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THE INDIAN LAW REPORTS, CALCUTTA SERIES, CONTAINING CASES DETERMINED BY THE HIGH COURT AT CALCUTTA AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM ALL OTHER COURTS IN BRITISH INDIA NOT SUBJECT TO ANY HIGH COURT.

CALCUTTA, Vol. XXIV—1897.

PRIVY COUNCIL.

The 13th November, 1895 and 20th May, 1896.

PRESENT:

LORDS HOBHOUSE, MACNAGHTEN AND MORRIS, AND SIR R. COUCH.

Hurri Bhusan Mukerji............Defendant

versus

Upendra Lal Mukerji and others............Plaintiffs.

[On appeal from the High Court at Calcutta.]

Limitation Act (XV of 1877), Schedule II, Articles 92, 93 and 118—Suit to set aside adoption—Concurrent findings upon an issue of fact—Privy Council, Practice of—Admission on appeal of evidence rejected by lower Court.

The merits of a claim depended upon the authenticity of an *anumati patro* (deed of permission to adopt) alleged to have been given to a widow by her husband, who died in 1832. She first adopted in 1884 a boy who soon after died. She then, in 1887, adopted the appellant, whose adoption the reversionary heirs of her husband brought this suit, in 1888, to have set aside.

Held that neither Article 92, nor Article 93, of Schedule II of the Limitation Act, XV of 1877, was applicable to bar the suit. There had been no "issue" of the instrument, the *anumati patro*, within the meaning of the former Article, the term "issue" having no application to such a document. There had not, within the meaning of Article 93, before this suit, been any attempt to enforce the instrument against the plaintiffs.

Article 118, as the suit had been brought within due time after the adoption, did not bar it.

The first Court found that the instrument was not genuine. The High Court, on appeal, upheld this finding, but had considered relevant, and had admitted in evidence documents rejected by the first Court when tendered by the appellant. This reception of evidence afforded no reason for making [2] the case an exception to the application of the rule, in the discretion of the Committee, against the disturbance of concurrent decisions upon a fact in issue below.

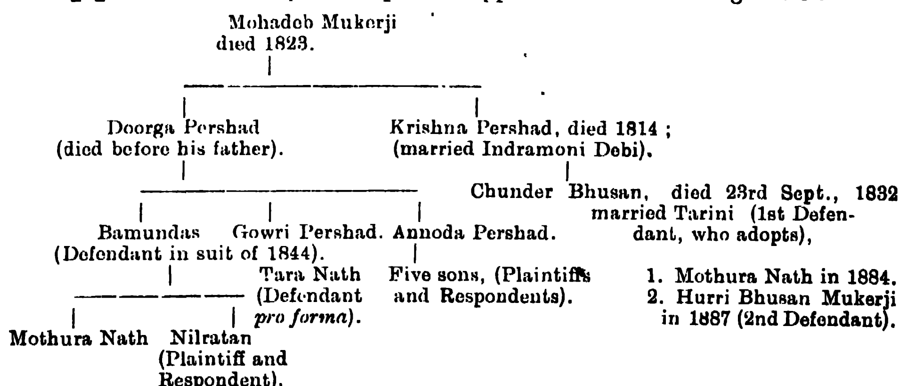
APPEAL from a decree (July 14th, 1891) of the High Court, affirming a decree (July 22nd, 1889) of the Subordinate Judge of Nuddea.

The suit out of which this appeal arose was brought on the 29th September 1888 by the reversionary heirs of a deceased Hindu proprietor, Chunder Bhusan Mukerji, who died on the 29th September 1832, leaving a widow, Tarini, the first defendant. The plaintiffs claimed to have her adoption of the second defendant, Hurri Bhusan Mukerji, set aside, on the ground that Chunder Bhusan had given no authority to the widow to adopt a son to him; and they alleged that an *anumati patro* represented by her to have been executed by him on the 23rd September 1832 was a fabricated document. The Courts below had concurred in finding that Chunder Bhusan Mukerji had not, in fact, executed it. And the principal questions on this appeal were, first, whether it should not be dealt with as an appeal in which the practice of not disturbing concurrent decisions on fact might be disregarded, because the High Court had accepted as relevant evidence certain documents which the first Court had rejected; secondly, whether the suit was, or was not, barred by time.

In 1832 Tarini, being then very young, was not living in her husband's house at Birnaghar, Ranaghat, and was not there when he died there; but was living with her father and his family, the Roys, at Santipore. Under the alleged *anumati patro* she adopted no son until 1884; but a son, adopted by her in that year, having died soon after, the adoption now in dispute was made by her in 1887.

The plaintiffs were the respondent, Upendra Lal Mukerji and his minor brothers, of whom he was the next friend on the record; and another plaintiff was Nilratan Mukerji, a cousin. The first defendant, Tarini, died pending this appeal, and the second defendant, Hurri Bhusan, the adopted son, was then represented by a guardian *ad litem*, Girendra Nath Mukerji.

[3] The relationship of the parties appears in the following table:—



After the death of Chunder Bhusan, his estate, previously managed by Bamundas, continued under the same management. Bamundas then alleged that his son, Mathura Nath, had been adopted by Chunder Bhusan in his lifetime, and that the latter had also left a Will, by which he appointed Indramoni to be guardian of this said adopted son, and Bamundas himself to be manager during the boy's minority. In 1844 this was disputed by Tarini. In that year, with the assistance of her brothers, she sued Bamundas to recover possession of the properties which had belonged to her husband, denying in her suit that any such adoption or Will had been made by Chunder Bhusan,

and she was successful up to the Privy Council: see *Bamun Doss Mookerjee* v. *Tarinee* (7 Moo. A., 169). In that suit Tarini alleged that her husband on the day of his death had given her a written power to adopt, *anumati patro*. It did not appear, however, to the High Court, as stated in their judgment in this suit, that any such power was produced at that time.

In this suit Tarini, by her written answer, alleged that the *anumati patro* was a genuine instrument, and also defended on the ground that the plaintiffs had not, at this distance of time since its execution, any right to obtain a declaration that it was false, or to have the adoption of Hurri Bhusan set aside as unauthorized. The first and second issues, the only issues material to this report, question both these propositions.

The Subordinate Judge held that Articles 91, 92 and 93 were inapplicable to the present suit.

The suit was not one to have it declared that an instrument "issued" was a forgery. The authority to adopt, now in question, [4] had never been "issued" before the present suit, nor had the defendant, in the Judge's opinion, ever attempted to enforce it against the plaintiffs in the sense of Article 93. The six years provided in Article 118 had not elapsed.

As to the second issue, the Subordinate Judge held that the burden of proof was on the plaintiffs according to a decision in the case of *Brojo Kishoree Dossee* v. *Sreenath Bose* (9 W. R., 463). He found (after excluding several documents, tendered by the defendants, as not admissible in evidence, which were afterwards admitted by the High Court without having the effect of altering the result at which both Courts arrived) that Chunder Bhusan, the husband of the first defendant, had not given to her any authority to adopt a son to him.

The High Court (PETHERAM, C.J., and BEVERLEY, J.) dismissed an appeal by the defendants. An application was made to them, while the appeal was pending, for the admission of certain documents which the Subordinate Judge had rejected. The first was a certified official copy of a petition purporting to have come from Indramoni, mother of Chunder Bhusan, informing the Magistrate of the District of her son's death, and stating that he had executed an *anumati patro*. The copy had been filed by Tarini in her suit of 1844. It was admitted as an assertion which was a relevant fact within sections 9 and 11 of the Indian Evidence Act, 1872. But the High Court did not accept as true the statement as to the execution of the *anumati patro*, or consider it proved that it was the statement of Indramoni.

The next document was a copy of statements said to have been made on an enquiry conducted by the Nazir of the Collector's Court in 1833, as to who were the heirs of Chunder Bhusan,—a document which had also been filed in the suit of 1844. To corroborate oral testimony this was admitted under section 157 of the Evidence Act; but no weight was attached to it. With the same result copies of two depositions of deceased persons, made in 1833, were admitted.

The High Court, having examined the evidence on the record, as well as that which they admitted themselves, concurred in the decision of the first Court that Chunder Bhusan had not executed [5] any *anumati patro* in favour of his wife. They also referred to an allegation made by Tarini that a verbal authority had been given to her by her husband some months before his death. In her written statement this had not been alleged, and no issue had been framed with regard to this point. Their finding was that neither a verbal, nor a written, authority to adopt had been given by Chunder Bhusan to his wife

With the question of limitation the High Court did not deal in their judgment, though it was raised by the memorandum of appeal.

Mr. M. *Crackanthorpe, Q.C.*, and Mr. *R. V. Doyne*, for the appellant, argued that the High Court's having disposed of the question, whether the power to adopt had been in fact given by the husband to his wife in 1832, on evidence, different, by reason of the documentary evidence admitted on the appeal, from that on which the judgment of the first Court had proceeded, should be thus regarded. It should render inapplicable the usual non-interference with the decision on fact of two Courts in concurrence ; of which rule, the application was entirely within the discretion of this Committee not taking effect where reasonable doubt existed as to the correctness of that decision. [LORD MACNAGHTEN referred to *Ram Lal* v. *Mehdi Husain* (I. L. R., 17 Cal., 882 ; L. R., 17 I.A., 76)]. There were certain points in the evidence to which reference was made, tending to show that the judgments below could not be sustained. On the evidence taken altogether the right of the widow to adopt under the *anumati patro* of 1832 should have been maintained. It was also contended that under Articles 91, 92 and 93 of Schedule II, Act XV of 1877, the suit to have the *anumati patro* declared to be false was barred by time.

Mr. *H. M. Bompas, Q.C.*, Mr. *J. D. Mayne*, and Mr. *J. H. A. Branson*, for the Respondents, were not called upon.

The **judgment** of their Lordships was delivered by

Lord Morris.—The plaintiffs in this suit, who are respondents in the appeal, make claim as reversionary heirs of Chunder Bhusan, who died in the year 1832. The defendants are his widow, who became his heir, and Hurri Bhusan Mukerji, whom the widow adopted in the year 1887. The substantial object of the suit is to dispute the adoption, on the ground that **[6]** no authority to adopt was given by Chunder Bhusan to his widow. The widow has died pending the appeal which is now prosecuted on behalf of Hurri Bhusan.

Soon after her husband's death the widow, or her friends, for she was then a girl of 13, asserted the existence of a written power to adopt, and she has at intervals renewed the assertion. But the instrument was never until the present suit produced in Court, though there had been previous hostility and litigation between the widow and the reversionary heirs. No action was taken on it till the year 1884 when the widow adopted a boy. That boy died, and the present appellant was adopted four years afterwards. On these facts and on the oral evidence the Subordinate Judge decided that the instrument relied on was not genuine, and that the widow had no authority to adopt. On appeal the High Court took the same view.

It appears that the Subordinate Judge rejected certain documents produced from the Courts of the Magistrate and the Collector, which the defendants tendered for the purpose of corroborating their oral evidence. The High Court admitted those documents. There was no dispute as to their construction ; the only question was how far they added to the weight of the defendant's evidence, and the High Court thought they added very little. It is now contended that because the High Court had before it materials which the Subordinate Judge had not, the case ought not to be treated as one in which there are concurrent decisions on facts. It would, however, be a strange thing if concurrent decisions were to have a less conclusive effect where the evidence in the first Appellate Court has been added to entirely in the interest of the appellant than they would have if his evidence had remained untouched. Their Lordships, indeed, have heard nothing inducing them to think that they would come to any different conclusion if the facts were all re-examined, but they are quite

clear that there is no ground for making the case an exception to the valuable rule against disturbance of concurrent decisions.

The remaining question is whether the suit has been brought in proper time. The material dates are the first adoption in 1884, [7] the second adoption in 1887, and the commencement of the suit in 1888.

The Subordinate Judge carefully discussed the plea of limitation and overruled it. The defendants appealed on this point among others, but it can hardly have been pressed, for the learned Judges of the High Court do not notice it in their judgment, and they say that the only question before them is whether the widow had power to adopt.

The Limitation Act of 1877 contains two Articles specifically relating to suits for attacking and supporting adoption, respectively. No. 118 enacts of a suit to obtain a declaration that an alleged adoption is invalid, that it shall be dismissed if brought after six years from the time when the alleged adoption becomes known to the plaintiff. This suit, therefore, even if it were affected by the adoption of 1884, would not be barred by Article 118.

It is, however, argued that the principle of the Limitation Act is not to enable suits to be brought within certain periods, but to forbid them being brought after periods, each of which starts from some defined event, and that more than one Article may apply to the same suit. So a plaintiff impugning an adoption may find himself impeded by other events, *e.g.*, a legal proceeding protected by a shorter term of prescription. And in this case it has been urged at the bar that there are two other Articles, *viz.*, 92 and 93, which compel the dismissal of the suit.

By Article 92 a suit to declare the forgery of an instrument issued or registered must be dismissed if brought after three years from the time when the issue or registration becomes known to the plaintiff. Assuming, in the defendant's favour, that this suit is one to declare forgery, is the instrument one of the kind indicated by the Article? It was not registered, but, as argued for the appellant, it was issued when the adoption of 1884 was effected with full publicity. Their Lordships think it sufficient to say on this point that in their opinion the word "issued" is intended to refer to the kinds of documents to which people commonly apply that term in business; and that it has no application to an instrument such as a power to adopt.

[8] By Article 93 a suit to declare the forgery of an instrument attempted to be enforced against the plaintiff must be dismissed if brought after three years from the date of the attempt. It is contended that the adoption of 1884 was such an attempt. It is, however, as the Subordinate Judge points out, very difficult to say that an adoption followed by nothing more is in any sense an enforcement of the power against other persons. Their Lordships are clear that it is not so within this Article. If it were, Article 118 would have no force in cases where the plaintiff impugns an adoption, on the ground that the power alleged for it is not genuine. They hold that this case is described by Article 118 alone, and therefore the suit is brought in good time.

They will humbly advise Her Majesty to dismiss the appeal and the appellant must pay the costs incurred in this appeal of the respondents who have appeared.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Barrow & Rogers.*

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*

C. B.

[24 Cal. 8]

PRIVY COUNCIL.

The 14th and 15th May, and 27th June, 1896.

PRESENT:

LORDS HOBHOUSE, MACNAGHTEN AND MORRIS, LORD JAMES OF HEREFORD AND SIR R. COUCH.

Grenon and others.... ....Plaintiffs

versus

Lachmi Narain Augurwala and others............Defendants.

[On appeal from the High Court at Calcutta.]

Contract—Sale of goods—Brokers' bought and sold notes—Special place of delivery "to be mentioned hereafter"—Disclosure of principal - Assessment of damages—Contract Act (IX of 1872), sections 49, 94, 231—Damages.

Bought and sold notes of Purneah indigo seed provided: "The seed to be delivered at any place in Bengal in March and April 1891." It was added, "the place of delivery to be mentioned hereafter." The buyer made mention of this on the 20th March 1891 in a letter to the broker for both parties. This letter, specifying Howrah Railway station as the place, was forwarded to the vendor, who replied that he would deliver at his own godowns at Sulkea. This the buyer declined. The vendor and the buyer each insisting that the place named by him was the proper one for delivery, the buyer refused to accept at the vendor's godowns, or at any place other than Howrah station. [9] The vendor remained for a certain time ready and willing to deliver at his godowns at Sulkea; and the buyer not accepting delivery at that place, the vendor declared the contract cancelled. The buyer then sued him for breach of the contract to deliver at the place mentioned by the buyer. On the question whether the vendor had discharged his liability by readiness and willingness to deliver at his own godowns at Sulkea,—

Held, that the choice of place given originally by the contract to the buyer, subject only to the express contract that it must be in Bengal, and to the implied one that it must be reasonable, had not been converted, by the words about "mention" thereafter, into a deferred question to be settled by a subsequent agreement. The buyer, according to the contract already subsisting, had the right to fix the place. There was a special promise in the contract as to the delivery, and to complete its terms nothing more was required than a mention by the buyer of a reasonable place within Bengal. This had been made by him. The contract therefore did not fall within section 94 of the Indian Contract Act (IX of 1872) dealing with cases where there has been no special promise as to delivery, and fixing the place of production as the place for delivery; but rather resembled what was contemplated in section 49*. And the buyer was entitled to damages on the contract.

Place for performance of engagement where no application to be made and no place fixed.

* [Sec. 49 :—When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.]

APPEAL from a decree (3rd March 1893) of the High Court, reversing a decree (8th August 1892) of the High Court in its original jurisdiction, and dismissing the suit with costs.

This suit was brought on the 27th May 1891 for Rs. 13,000 damages for a breach of contract entered into by the defendants, through Messrs. Robert Thomas & Co., brokers for both parties, with the plaintiff, Henry Nicholas Grenon, on the 27th October 1890, for the delivery, during March and April 1891, of 2,000 maunds of Purneah indigo seed at Rs. 8-8 a maund.

The principal question raised on this appeal related to the place of delivery; the plaintiffs having required delivery at the Howrah Railway station, and the defendants having declined to give delivery there, but having been ready and willing to deliver at their own godowns at Sulkea.

The facts on which that question turned, with the bought and sold notes and subsequent letters between the parties, are stated in their Lordships' judgment.

The plaint having stated a variation of the contract by the buyer agreeing with the seller to accept the whole amount of seed on the 30th April, averred that the buyer also intimated to the seller that he was willing, if by "their godowns" the sellers [10] meant their godowns at Pertabgunj, to take delivery in Purneah, provided that the Railway charges to Howrah should be deducted from the contract price. But if the defendants meant otherwise, then the plaintiff signified his adherence to his former notice, and must require delivery at the Howrah Station. By the defendants not delivering at the latter place, the plaintiff was put to loss, which he estimated at Rs. 13,000.

The defendants by their written answer alleged that Grenon as the principal was for the first time disclosed to them on the 21st March 1891, and that they had declined to recognize him as the principal, but had expressed their willingness to give delivery to Messrs. Thomas & Co., the broker, from their godowns at Sulkea. They further alleged that both the broker, and Grenon at one time, had agreed to the latter being the place.

The record did not show that any issues had been formally recorded as fixed by the Court, but the main questions raised at the first hearing were these: Whether the defendants did enter into a contract with the plaintiff for delivery of the seed, and whether they had not discharged themselves by being prepared on the 30th April to give delivery to the plaintiff at their Sulkea godowns.

It appearing at the hearing that Grenon had been buying the seed to supply a Calcutta firm of Sewdial Surjmull, the partners in the latter were joined as co-plaintiffs with him. The Judge in the original jurisdiction (HILL, J.) first disposed of an objection taken by the defendants in reference to section 231, Indian Contract Act, 1873, as follows :—

"The defendants place reliance on section 231, asserting the right to repudiate the undisclosed principal at any time before completion of the contract; and that as the time for fulfilment did not arrive till the 30th April, they contend that they had up to that date to repudiate him. It appears to me that to place such a construction on that section would lead to very grave inconvenience and perhaps injustice, and I do not think that I ought to place such a construction upon it. It is a question whether the second clause of that section must not be taken as relating to the circumstance to which the earlier clause relates, that is to say 'where a person making contract neither knows, nor has reason to suspect, that the person he is contracting with is an agent,' and it was argued that the defendants could not bring themselves within that, because in the contract itself Messrs. Thomas & Co. expressly contract on behalf of their principals, and it is further contended that it was not open

[11] to the defendants after the contract was concluded to repudiate the principal as soon as he was disclosed. The question is a somewhat difficult one, and one which I do not wish to decide unless it is necessary; but it seems to me that looking at the section and assuming that the defendants might have availed themselves of the provisions of the second clause that under the circumstances they deprived themselves of the right to do so long before the time arrived."*.

The next question upon which decision was given was whether or not Grenon had assented to taking delivery at the Sulkea godowns. The judgment, as to this question of fact, set forth some letters between the broker and Grenon, and the material part, for the purposes of this report, was as follows:—

"There appears to have been some vagueness as to the term 'Howrah,' as it appears to be large enough to include Sulkea, and it may be that Grenon conveyed to Thomas the impression, in mentioning Howrah, that he meant to include Sulkea. But had I to determine between the two, I confess that, although I should feel some difficulty, the tendency of my opinion, having regard to Grenon's persistence as to Howrah, would be in favour of the view that he had not given his assent to the alteration, and that Thomas was mistaken; and this is confirmed by what transpired afterwards. The following day Thomas & Co. wrote to Grenon enclosing a delivery order in his favour for the seed, and informing him that delivery was to be taken by him from the sellers' godowns, and asking for the cheque which Grenon had on the previous day expressed his willingness to pay before delivery. Simultaneously with that letter Thomas & Co. also wrote to the defendants asking them to give delivery to Grenon at their Sulkea godowns, and stating that Grenon had agreed to deposit his cheque with them for the amount of the seed; but immediately on receipt by Grenon on the 30th April of the letter to him, he writes back to Thomas & Co:—"

"Calcutta 30th April, 1891.

"DEAR SIRS,

"I beg to return herewith your delivery order on Messrs. Muckon Lall Gobindram for the 2,000 maunds Purneah indigo seed bought by me from [12] them under your contract No. 27, dated 27th October 1890, as it states that the seed is to be delivered to me from their Sulkea godowns. This is not in terms of the contract, nor is it according to my express request for delivery at the Howrah station, and I still insist upon taking delivery of the seed at the Howrah station and nowhere else, and if the seed is so ready for delivery I shall be glad to examine it and then hand you a cheque for the value of the same in order to my taking delivery, if the seed be all right."

After commenting on the improbability of Grenon's having, on the day before writing this, assented to delivery being made at the Sulkea godowns, and no allusion to the misunderstanding being made afterwards, the judgment set forth other correspondence including the broker's written request which concluded it, that the defendants would, under the terms of the contract of the 27th October 1890, give delivery at the Howrah station, and not at the Sulkea godown. And the Judge concluded in the following words:—

"The defendants decline to give delivery at Howrah, and delivery not having been taken from Sulkea they write the next day repudiating the contract.

* The Indian Contract Act, IX of 1872, section 231, enacts: "If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has as against the principal the same rights as he would have had as against the agent, if the agent had been principal.

"If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract."

"The conclusion at which I have arrived is that Gronon did not authorise Thomas & Co. to alter the place of delivery, and therefore, I think, that though they thought they were so authorised, they exceeded their authority by saying he had agreed to the alteration. I also think that the alteration not having been made with his authority he is not bound by it, and he is entitled to ask the defendants for completion of the contract at the place, namely, Howrah station, which he had selected for delivery. The goods were not so delivered, and the ordinary consequence must follow. The defendants must pay to the plaintiff the damages ordinarily assessable under such circumstances.

"The question then remains what are the damages for which the defendants are liable. The contract rate was Rs. 8-8 a maund, but I think the whole tendency of the evidence shews that as time went on Purneah seed became more and more difficult to obtain, and during the time up to May there was a steady rise for this commodity. Contracts have been put in for deliveries in May. There are two before me both of which were entered into in April, the one on the 4th and the other on the 30th. The first for delivery on or before the 10th May next, the second for delivery before the 15th May. These are for seed of the same quality and description as that in suit. The rate under the former is Rs. 13 per maund. That under the latter is 12-8, and there is evidence to shew that at the end of April rates were running from 12 to 13-8.

"Consequently, I think I shall not be far wrong if I hold that the rates [13] at the time this contract should have been completed ruled at Rs. 12 a maund for seed of this description."

"The plaintiff therefore is entitled to a decree on that basis."

From this judgment and decree the defendants appealed, almost entirely upon the contention that they were justified in offering delivery at Sulkea and not at Howrah station.

The plaintiffs filed a memorandum of cross-objections, on the ground that the first Court should have allowed damages at a higher rate.

The Appellate Court (PETHERAM, C.J., NORRIS, J., and O'KINEALY, J.) considered mainly one question, *viz.*, whether the plaintiff was entitled to insist on the seed being delivered at the Howrah station, which involved the question whether he was entitled to insist on its being delivered at any place in Bengal which he might select for its delivery.

As to this the Appellate Court inclined to the opinion that, were it not for the final words of the bought and sold notes, "the place of delivery to be mentioned hereafter." the construction contended for by the plaintiffs, and adopted by the first Court, would have been correct. But that the effect of the addition of those words was to show that the intention of the parties was that the place of delivery should be left for further agreement, and as no such further agreement was ever arrived at, "no contract had come into existence at all, but only an agreement as to price, to be carried out, if the other terms of the contract should eventually be arranged."

But the Appellate Court declined to rest its decision on that ground, as it had not been so contended by the appellants. And the judgment concluded in these words:—

"Assuming that the words do prove a contract it is a contract to sell 2,000 maunds of seed within March and April at a price, without any provision whatever as to delivery, and the question is what obligation to deliver does such a contract impose upon the seller? Sir *G. Evans*, for the buyer, argues that the case is within the provisions of section 49 of the Indian Contract Act read with the illustration* but this we do not think can be the case as,

* The Contract Act, IX of 1872, section 49, is as follows: "When a promise is to be performed without application by the promisee and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise and to perform at that place."

[14] if all the provisions as to delivery are taken out of this contract, there is no express agreement to deliver at all, and the case is one to which section 49 does not apply, but is the ordinary case of a sale of goods without any special promise as to delivery, such as is contemplated by section 94* and in such a case the seller is not under any obligation to send the goods to the buyer or to any place at which he may require them. Even then, if there was any binding contract at all, we think that the defendants were not bound to send the seed to Howrah station, and that by refusing to do so they have not broken their contract. The appeal will be decreed, and the suit dismissed with costs."

Mr. *A. Cohen*, Q. C., and Mr. *J. D. Mayne*, for the appellant, argued that the judgment of the Appellate High Court was erroneous, and should be reversed. The judgment of the first Court was correct as to the construction of the contract, and should be maintained; but should be amended by a larger amount of damages being awarded to the appellants. On the true construction of the contract, evidenced by the bought and sold notes, the plaintiff Grenon had the right to fix a reasonable place in Bengal for the delivery of the seed. The words, "the place of delivery to be mentioned hereafter," meant that the place was to be mentioned by Grenon, who, by his letter of the 20th March 1891 to the broker (which the latter forwarded to the vendors) had the right to mention the place, and he exercised his right by so doing, and the defendants were thereupon bound to deliver at the place fixed by him—the Howrah Railway station. The view was a mistaken one that the words relating to "mention hereafter" got rid of, out of the contract, the previous agreement that the seed should be delivered at some place in Bengal, meaning some reasonable place; and it was a mistake to assume that the reference to a deferred mention of the place left the contract without any express provision as to delivery. Nor was the judgment correct in assuming that the sale being of goods without any special promise for delivery, the place of delivery had been left open to be the subject of a future agreement between the parties, which never took place: and the judgment was incorrect that the case was within the con- [15] templation of section 94 of the Indian Contract Act. It could not be said that there was no special promise as to delivery, but the case seemed to fall under section 49.

Mr. *Lawson Walton*, Q.C., and Mr. *J. H. A. Branson*, for the respondents, contended that the appellants were not entitled, by the contract of the 27th October 1890, to require the respondents to deliver the seed at any place other than the one where they had been ready and willing so to do, *viz.*, at their own godowns at Sulkea. The respondents, on the other hand, were entitled to repudiate the contract at the time when they did so, and were then no longer bound by it. The contract between the parties was susceptible of any one of three views, each tending to support the defence that the respondents having been ready and willing to deliver at their own godowns at Sulkea on the 30th April 1891 were exonerated from liability. The first view was that the defendants undertaking to deliver anywhere, over so large an extent of country as Bengal, would be inconsistent with their not having had in prospect the entering into a subsequent arrangement to determine a place of delivery with better defined limits. From the second point of view, as the first clause meant delivery anywhere in Bengal, the second clause was required to give definite effect by the naming a place agreed upon. For a further agreement there was occasion, which would not be satisfied by a mere indication on the part of

* Section 94 is as follows: "In the absence of any special promise as to delivery, goods sold are to be delivered at the place at which they are at the time of the sale, and goods contracted to be sold are to be delivered at the place at which they are at the time of the contract for sale, or, if not then in existence, at the place at which they are produced."

the buyer at his choice alone. Without then the agreement, which never was arrived at, the contract remained incomplete. A third way of giving practical effect to the contract might have been to regard the action of the broker as within the authority given to him. It was submitted that the appellants were bound by the act of their agents in agreeing that the seed should be delivered at the respondents' Sulkea godowns,—the place which the agents at one time appointed for the delivery. The judgment of the High Court, on the dismissal of the suit, was supported by the Indian law.

Mr. *J. D. Mayne*, in reply, argued that section 42 of the Indian Contract Act supported the appellants' case.

On a subsequent day, June 27th, their Lordships' judgment was delivered by

Lord Hobhouse.—The action which gives rise to this appeal **[16]** is founded on a contract made through Thomas & Co. as brokers for both parties. It is in the usual form of bought and sold notes, dated 27th October 1890. The sold note addressed to the vendors, who are defendants, is as follows :—

"New Mart, Calcutta,
27th October 1890.

'Dear Sirs,

We have this day sold by your order and for your account, to our principals, 2,000 (two thousand) maunds of good fresh and clean new Purneah indigo seed to be of the growth of season 1890-91 at Rs. 8-8 (eight rupees eight annas) per maund.

The seed to be delivered at any place in Bengal in March and April 1891. and to be paid for by draft at 30 days date from date of delivery.

The seed to be packed in good strong bags and each bag to contain two maunds only."

The place of delivery to be mentioned hereafter.

Terms and conditions as above.

Brokerage 2½ per cent.

We are,
Dear Sirs,
Your obedient servants,
J. THOMAS & CO.,
Brokers.

To Babus Muckon Lall, Gobindram."

The bought note is in exact correspondence. There has been dispute whether the defendants ever recognized the plaintiff Grenon, who was sole plaintiff in the first instance, as the principal interested in the contract. That matter was decided against the defendants by Mr. Justice HILL, who presided at the trial, and it is not raised in this appeal.

The dispute which did arise and still exists between the parties relates to the place of delivery. Ultimately it came to a question between two places, the plaintiff insisting on delivery at the Howrah Railway station, and the defendants refusing to deliver except at their own godowns at Sulkea. After much discussion through the brokers, the defendants wrote to them on 1st May 1891 as follows —

"Dear Sirs,

Contract No. 27, dated 27th October 1890.

We waited all day yesterday to give delivery of the indigo seed sold to you from our Sulkea godowns, but as you failed to take delivery, we consider the contract at an end and cancelled."

[17] Upon that the action was brought. The defendants contended that in the course of the correspondence the plaintiff had bound himself to accept their godowns at Sulkea as the place of delivery. After a careful examination of the evidence, Mr. Justice HILL decided that point also against the defendants. They have renewed their contention here, but without persuading their

Lordships, who do not think it necessary to say anything more than that they entirely concur with Mr. Justice HILL on this point.

That leads to the question principally discussed at the Bar, how the contract is to be construed with reference to the place of delivery. The plaintiff contends that the place is to be some reasonable place mentioned by himself. The defendants contend, first, that the place was left over for future agreement; so that there is no concluded bargain until the parties have come to that agreement. Failing that argument they contend, secondly, that the seller can discharge his liability under the bargain by delivering, or offering to deliver, the goods at any reasonable place within the specified limits.

The former of these arguments was considered fully by the learned Chief Justice, who expressed an opinion in favour of its soundness, but did not decide the case on that ground, because the defendants' Counsel had not argued it. He held, indeed, that if the contract had contained only the first sentence relating to delivery, it would be very difficult to say that the seller had not contracted to deliver at any place in Bengal which the buyer might select. But he thought that the second sentence modified the meaning of the first; otherwise it would have no effect. The only way of making it effective is, the Chief Justice says, to construe it as meaning that the parties are to agree on the place. That conclusion has been ably supported here at the Bar.

Their Lordships agree that the first sentence relating to delivery gives the choice of place to the buyer, subject only to the expressed condition that it must be in Bengal, and to the implied one that it must be reasonable. But they cannot see how the choice which is given by the words "to be at any place" is taken away, or converted into a deferred agreement, by the statement that the place is "to be mentioned hereafter." That is a very unsuitable expression by which to reserve a point for [18] subsequent agreement. It would be quite simple to say "to be agreed on hereafter," if that were meant. But it is only "to be mentioned," and the obvious meaning of that term is that the place is to be mentioned by the party who, according to the former part of the agreement, had the right of mentioning it.

It is true that with such a meaning the sentence in question adds nothing of value to the document; it merely takes notice that some place of delivery is to be mentioned more definite than the very wide area of Bengal. The addition is natural enough, and though it may be legally superfluous, such superfluities are not unknown in agreements. The principle of giving a meaning to all expressions is a sound one, but it does not justify the importation of a meaning which the expression does not of itself suggest, for which another expression equally short and simple would more readily be used, and which materially affects the rights of the parties.

The learned Chief Justice considers that the contract should be read as if all the provisions for delivery were taken out of it. Then, he says, it would fall within section 94 of the Indian Contract Act, which deals with contracts where there is no special promise as to delivery; and which in the circumstances of this case would prescribe that the seed should be delivered where it is produced. But under any construction of the final sentence it contains a special promise as to delivery, and a delivery bounded by area, though it is true that the area is so large as to require further delimitation. Moreover, the contract is not to deliver at some place to be chosen or assented to by the seller, but at any place, without restriction, except the area of Bengal. It requires nothing more for completion than a mention of the place, and so far from falling within section 94, seems rather to resemble the contracts contemplated in section 49, where the promisee has not to make any application for performance, but no

place is fixed. In those cases not only has the promisee the right of naming the place, but there is thrown on the promisor the duty of applying to the promisee to appoint a reasonable place.

Mr. Justice HILL did not enter into any discussion of arguments [19] such as these. He simply stated his opinion that the plaintiff was entitled by the terms of the contract to ask the defendants for its performance at the place selected by him, *viz.*, Howrah station. For the reasons above assigned, their Lordships have to express their agreement with him, and their dissent from the opposite view of the High Court.

There is a further question as to the amount of damages. That depends upon the price of indigo seed at the time when the contract should have been performed. Mr. Justice HILL estimated the price at Rs. 12 per maund. His estimate rests partly on oral evidence, and partly upon two contracts made by Thomas & Co. for the sale of indigo seed; one on 4th April and the other on 30th April 1891. He says that the rate under the earlier contract is Rs. 13 per maund, which is the case; and that the rate under the latter is Rs. 12-8. As regards this latter contract, the learned Judge seems to have been misled by the circumstance that the same document contains a contract for the sale of Shirkarbhoom seed at Rs. 12-8. The price of the Purneah seed is Rs. 15.

The learned Judge says that there is evidence to show that at the end of April rates were running from Rs. 12 to Rs. 13-8. In fact, the evidence shows that the Calcutta rates were higher; the lower rates mentioned by the learned Judge appear to be those at Pertabgunge, the principal mart in Purneah; and something substantial (the plaintiff puts it as high as Rs. 2, but at least 8 annas) has to be added for freight to Howrah, and other expenses. The only evidence to the contrary is that of Balaram, one of the defendant's firm, who says that at the end of April they sold this seed in Calcutta at Rs. 6, and before that at Rs. 5-8. If this were true, it is incredible that the defendants should not gladly have taken the seed to Howrah for the contract price of Rs. 8-8.

Their Lordships do not go very minutely into this question because the plaintiffs' Counsel do not ask for an enhancement of damages on a higher basis than Rs. 13 per maund, and they have fully proved their case for as much as that.

By Mr. Justice HILL'S decree additional plaintiffs, now represented by the appellants Juggun Nath and Ramjee Dass, were [20] placed on the record, and the defendants were ordered to pay to the plaintiffs Rs. 7,000 with interest and costs of suit. The High Court decree simply dismissed the suit with costs in both Courts. The proper course now will be to discharge the decree of the High Court; to order the defendants to pay the costs of appeal in that Court; to vary the decree of the first Court by substituting the sum of Rs. 9,000 for Rs. 7,000; and in other respects to affirm that decree. Their Lordships will humbly advise Her Majesty in accordance with this opinion. The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellants: Messrs. *Wrentmore & Swinhoe.*

Solicitor for the Respondents: Mr. *J. F. Watkins.*

C. B.

NOTES.

[The rule as regards the measure of damages was applied in (1914) 20 C. L. J., 138.]

[24 Cal. 20]

APPELLATE CIVIL.

The 16th June, 1896.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Satyesh Chunder Sircar and another, minor, by his mother Matangini Debi............Defendants

versus

Dhunpul Singh............Plaintiff.*

Lease—Subsequent written agreement to abate rent—Variation of lease—Transfer of Property Act (IV of 1882), section 107—Evidence Act (I of 1872), section 92—Registration Act (III of 1877), sections 17 and 18.

In the year 1879 the plaintiff granted a lease of certain lands to the father of the defendants. In May 1889 he agreed in writing to allow the defendants an abatement of rent to the extent of Rs. 100 per annum. This agreement was not registered, but was stated in the plaint in a previous suit brought by the plaintiff. He subsequently brought a suit against the defendants for the recovery of the entire amount of the original rent.

Held, that the defendants could rely on the agreement, and that section 92 of the Evidence Act (I of 1872) did not apply to it.

Held, also, that the agreement did not operate as a lease, but was merely a variation of the lease, and that, therefore, registration was not necessary.

Held, therefore, varying the order of the District Judge, that the decree for the entire amount of the original rent must be set aside, and a decree made for the amount of rent due at the reduced rate.

[21] THE plaintiff sued the defendants for rent due under a *putni* lease executed in the year 1879, at the rate of Rs. 1,501 per annum. The defendants pleaded that in May 1889 the plaintiff had agreed in writing to reduce their rent to Rs. 1,401 per annum, and that he had himself referred to this agreement in his plaint in a previous suit. The plaintiff's case, as to this agreement, was that the defendants procured it from him by fraud and misrepresentation, and that it was in operative by reason of the fact that it was never registered. The lower Court found against the plaintiff on the question of fraud, but held that the agreement required registration in order to become operative; and the District Judge therefore made a decree in favour of the plaintiff for the whole amount claimed by him.

The defendants appealed.

Dr. *Rash Behari Ghose* and Babu *Karuna Sindhu Mukerji* for the appellants.—The defendants are entitled to rely on the written agreement by the plaintiff to accept a reduced rent. It does not constitute a new lease; it is merely a release, by the landlord, of part of the rent payable under the lease.

* Appeal from Original Decree No. 344 of 1894, against the decree of J. Whitmore, Esq., District Judge of Beerbhoom, dated the 18th of August 1894.

At the time the lease was granted, namely in 1879, no lease was required to be in writing; although, if a lease was written, it had to be registered. The lower Court should not have held registration of this agreement to be essential, but should have allowed the defendants to rely on the plaintiff's admission of the agreement without producing it, as was done by the High Court of Madras; *Chedambaram Chetty* v. *Karunalyavalangapuly Taver* (3 Mad., H. C., 342). The agreement having been admitted by the plaintiff in his former plaint, effect should be given to it; *Dinonath Mookerjee* v. *Debnath Mullick* (14 W. R., 429); and that without requiring the defendants to produce it, for the agreement is properly admissible in evidence; *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (I. L. R., 5 Bom., 143). Again, section 92 of the Evidence Act does not affect the case. We are not seeking to vary the terms of a written agreement by an oral agreement, and that is all that section 92 deals with; but we are relying on the plaintiff's own statement. He admits all that we have to prove; and therefore the agreement is admissible under section 65 of the Evidence Act. Since this agreement contained **[22]** a portion only of the terms upon which the new lease or settlement was to be granted, it was neither a lease nor an agreement for a lease within the meaning of the Registration Act, and consequently was admissible in evidence without having been registered, *Luchmissur Singh* v. *Dakho* (I. L. R., 7 Cal., 708). [GHOSE, J.—Section 92 of the Evidence Act alone is no answer to your case. But how if it is read with section 107 of the Transfer of Property Act?] Still it does not affect the case. The agreement to reduce the rent does not amount to the creation of a new lease, nor to a surrender, by operation of law, of the old one. It is simply a release of portion of the rent; and rent is not land or an interest in land.

Babu *Srinath Dass* (with him Babu *Saroda Churn Mitter* and Babu *Pramathanath Sen*) for the respondent.—It is true the plaintiff agreed to reduce the rent; but he is not bound for all time; he is at liberty to change his mind. The question is, whether he had by any act of his legally bound himself to this reduction. His case is that, if the agreement is binding, it creates a new lease, which, being made after the Transfer of Property Act came into force, must be registered. He sues on the old contract, and must do so: he cannot sue on the new agreement, because it is not registered. The original contract has not been rescinded: all that the plaintiff has done is to accept a lower rent for a time as a favour to the defendants.

Dr. *Rash Behari Ghose* in reply.

The **judgment** of the Court (**Ghose** and **Gordon, JJ.**) was as follows. -

This appeal arises out of a suit for rent. It appears that the defendants father obtained a *putni* lease from the plaintiff, on the 26th Assin 1286 at a *jama* of Rs. 1,501. The plaintiff, however, states in his plaint that subsequently the defendants, upon a false representation that the gross rental of the property had decreased, obtained a letter from him, the plaintiff, reducing the *jâma* by Rs. 100 a year, on the 18th Jeyt 1296, corresponding to the 31st May 1889; but that they did not execute a fresh *kabuliyat* agreeing to pay the reduced *jama*. The plaintiff adds that the said letter, granting an abatement of the *jama*, was obtained by fraud and **[23]** without any consideration; and that, being an unregistered document, it is inoperative according to law. He accordingly claims rent from 1297 to 1300, at the full rate, namely Rs. 1,501, *plus* cesses, etc.

The defence of the defendants is that the abatement of rent by Rs. 100 a year was not obtained by any misrepresentation of facts; but that there were good grounds for such abatement being allowed, and that the letter of the 18th Jeyt 1296 did not in law require registration.

The Court below has held that the letter in question is evidence of a substituted contract, and that it required registration; and that, because it was not registered, it is not operative in law. The District Judge has accordingly given the plaintiff a decree at the full rate of Rs. 1,501 a year from a certain point of time mentioned in his judgment, the time when he has held the defendants had notice that the plaintiff meant to adhere to the original rate of rent as contained in the *putni pottah* of 1286.

Against this decree the defendants have appealed to this Court.

It appears to us that if the fact of the abatement was a matter in issue between the parties, and the success of the case set up by the defendants depended upon the production and proof of the letter of the 18th Jeyt 1296, then no doubt the question whether it required registration would arise; but it seems to be clear that there was no such issue between the parties in the Court below. That an abatement was actually made in the *jama*, and the letter in question given, the plaintiff admits in the plaint; and we find upon a reference to his plaint in a previous suit between the parties, bearing date the 13th September 1890, that he admitted there also in distinct terms that he had granted an abatement of rent to the defendants, to the extent of Rs. 100 a year, from the year 1296, and that from that year the defendants were bound to pay to the plaintiff rent at the rate of Rs. 1,401 a year. Indeed, the fact of the abatement having been allowed to the defendants was conceded on all hands; and it was not therefore essential for the success of the defendants' case that they should have produced the letter granting the abatement and to have proved the same. No doubt, if this letter was all the evidence in support of the position, that abatement to the extent of Rs. 100 **[24]** a year had been allowed by the plaintiff, then no doubt the defendants could not succeed in their defence unless they produced and proved the letter itself, and then no doubt also the question of registration would be important. But that is not the case here.

The plaintiff, as has already been mentioned, sought to avoid the effect of the abatement that he had allowed by alleging that it had been obtained by the defendants by means of fraud and upon misrepresentation of facts, and that it was without any consideration. Both these points were found against the plaintiff by the Court below; and no contention has been raised before us on that score by the learned vakil for the respondent; and we think, we may therefore take it that there was no misrepresentation at all on the part of the defendants when they obtained the abatement of rent, and that there was good and valid consideration for such abatement. The learned vakil for the respondent has, however, referred us to section 92 of the Evidence Act, and to section 107* of the Transfer of Property Act, and has contended that the original lease of the year 1286 could not be varied by any oral agreement, and that the agreement on the part of the plaintiff to allow an abatement of rent must be regarded as a lease within the meaning of section 105 of the Transfer of Property Act, and as such, requiring to be reduced to writing and to be registered.

With regard to the contention based upon section 92 of the Evidence Act, all that we need say is, that the defendants do not in this case seek to prove any oral agreement between the parties. The agreement that had been come to is admitted by the plaintiff himself, and, therefore, it seems to be obvious that section 92 of the Evidence Act does not operate as a bar to the plea raised by the defendants.

*[Sec. 107 :—A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

Leases how made.

All other leases of immoveable property may be made either by an instrument or by oral agreement.]

Then as regards the contention based upon section 107 of the Transfer of Property Act, it seems to us that it has no application to the present case; for the agreement allowing the abatement does not operate as a lease. No doubt it purports to vary to some extent one of the terms of the lease; but that is all. It seems to us, therefore, that it was not absolutely necessary that the agreement should have been reduced to writing or registered.

[25] The view that we adopt in this case finds support from the several cases referred to us in the course of the argument, namely, the cases of *Burjorji Kursetji Panthaki* v. *Muncherji Kuverji* (I.L.R., 5 Bom., 143), *Chedambaram Chetty* v. *Karunalyavalandapuly Taver* (3 Mad., H. C., 342), *Dinonath Mookerjee* v. *Debnath Mullick* (14 W. R., 429), and *Luchmissur Singh* v. *Dakho* (I. L. R., 7 Cal., 708). In the last mentioned case it was held that a *dowl* containing only a portion of the terms upon which a new lease or settlement was to be granted was not a lease or an agreement for a lease within the meaning of the Registration Act.

Certain other points have been discussed before us by the learned vakil for the appellant; but we do not think it necessary to express any opinion upon them.

The result is, that the decree of the Court below, so far as it holds that the plaintiff is entitled to recover rent at the rate of Rs. 1,501 a year, as mentioned in the original *putni* lease of the year 1286, should be set aside. The decree will be at the reduced rate.

Under the circumstances of the case, we direct that each party do bear his own costs.

H. W. *Appeal allowed.*

NOTES.

[A '*dowl*' evidencing commutation of rent from kind into cash, was held to be not compulsorily registrable. "To a document of this description the principle laid down by this Court in (1896) 24 Cal., 20 and by the learned Judges of the Madras High Court in (1898) 22 Mad., 217 applies. That principle is that a document given by the owner of land to his tenant, or by the tenant to his landlord, varying the terms of the tenancy with reference to the amount of rent to be paid is not an instrument relating to an interest in immoveable property and does not require registration. Substantially the same view was taken by this Court in (1880) 5 Cal., 864."—per MOOKERJEE, J., in (1909) 11 C.L.J., 20.

An unregistered contemporaneous agreement to abate rent was held not admissible in evidence:—(1901) 6 C.W.N., 60: 12 C.L.J., 439.

In (1909) 10 C.L.J., 570 the decision in 24 Cal., 20, was distinguished as having proceeded on an admission.

In (1900) 24 Bom., 609 a receipt setting forth the settlement of mortgage accounts was not required to be registered.]

[24 Cal. 25]

The 2nd July, 1896.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Dakeshur Pershad Narain Singh............Defendant

versus

Rewat Mehton and others............Plaintiffs.*

Guardian—Guardian Ad litem—*Guardians and Wards Act (VIII of 1890), section 53— Civil Procedure Code, section 443, as amended by section 53 of Act VIII of 1890.*

Section 53 of Act VIII of 1890, amending the Code of Civil Procedure, expressly requires

* Appeal from Original Decree No. 51 of 1895, against the decree of Babu Upendra Chundra Mullick, Subordinate Judge of Patna, dated the 20th of November 1894.

the appointment of a guardian *ad litem*, whether or not a guardian is appointed under Act VIII of 1890.

In a suit against a minor, the summons was attempted to be served on his guardian appointed under Act VIII of 1890, but no guardian *ad litem* was [26] appointed in the suit. The suit was decreed *ex parte*, no one having appeared for the minor. *Held*, that the decree must be set aside and the case sent back in order that the minor might be represented in accordance with law and the case retried.

THE plaintiffs in this suit alleged in their plaint that during their minority a suit was brought against them by the father and uncle of the defendant Dakeshur Pershad, in which they were not legally represented; that the suit was compromised by their co-sharers in collusion with the plaintiffs in that suit, and a decree passed on the basis of such compromise; that the defendant had taken out execution of the decree and the plaintiffs' joint ancestral property was about to be sold in execution. The prayer was for a declaration that the plaintiffs' rights were not affected by the decree.

The defendant (No. 1), Dakeshur Pershad, was a minor under the guardianship of his mother Deomurat Koer, who was appointed guardian under the Guardians and Wards Act (VIII of 1890). The defendants 2 and 3 were the plaintiffs' co-sharers, who were charged with having brought about the collusive compromise mentioned above.

Summonses and notices were issued to the defendants and an order was recorded in the order sheet as follows :—

7-11-94. "House service of summons was effected on the defendant No. 1, on the 4th October last, and on the defendants 2 and 3 on the 12th October last."

"The defendants on legal service of summonses have not appeared; the case is decreed *ex parte*. There is no need of framing issues. Plaintiffs shall adduce evidence to-morrow."

In his judgment the Subordinate Judge said: –

"The service of summons on the defendants is proved, but they have not entered appearance, the case therefore proceeds *ex parte* against them.

"The testimony of witnesses examined on behalf of the plaintiffs coupled with documentary evidence proves plaintiffs' case and claim. It has been shown that Dodraj and Nirpal (defendants 2 and 3) had no power to alienate the joint family property, and that the compromise filed in the previous suit was purely personal.

"Plaintiffs' suit is accordingly decreed *ex parte* with costs and interest at 6 per cent. per annum."

The defendant No. 1 through his guardian Deomurat Koer preferred an appeal to the High Court.

[27] *M. Mahomed Yusuf*, Babu *Umakali Mukerjee*, Babu *Tarit Mohun Das* and *M. Mahomed Habibullah* for the Appellant.

Mr. *C. Gregory*, for the Respondents.

The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ.**) was as follows :—

It is difficult to conceive of a case where the formalities of the law have been more neglected than in the present instance.

The suit was brought against a minor. No guardian *ad litem* was appointed of that minor, yet the case was allowed to proceed to decree. No attempt was made to serve the minor with a summons, but some attempt apparently was made to effect service of notice upon the lady who had been appointed guardian by the Court under Act VIII of 1890. Section 53 of that Act, amending the Civil Procedure Code, expressly requires the appointment of a guardian *ad litem*, whether or not a guardian is appointed under Act VIII of 1890, although that section gives precedence to the appointment of a guardian appointed under the provisions of that Act.

It is perfectly obvious that the decree appealed against is bad and must be set aside, and the case must go back to the lower Court in order that the minor may be represented in accordance with the law, and then the case must be retried. Until the minor is represented in accordance with law no proceedings had can be binding upon him.

S. C. C. *Appeal allowed.*

[24 Cal. 27]

The 24th July, 1896.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Mahanund Chuckerbutty and another............Defendants Nos. 2 & 3

versus

Banimadhub Chatterjee and others (Plaintiffs and others)............Defendants.*

Bengal Cess Act (Bengal Act IX of 1880), section 47—Decree for Arrears of Cess—Sale in execution of decree, Effect of.

Although the procedure for the realization of cesses may be the same as the procedure laid down for the realization of rent due upon the tenure, yet it does not necessarily follow that the effect of a sale for cesses should [28] be the same as that of a sale for arrears of rent for which the tenure itself is liable to be sold. *Umacharn Bag* v. *Ajadannissa Bibee* (I. L. R., 12 Cal., 430) followed.

Notwithstanding, therefore, that section 47 of the Cess Act, 1880, provides that "every holder of an estate or tenure to whom any sum may be payable under the provisions of this Act may recover the same with interest at the rate of twelve and a half per centum per annum in the same manner and under the same penalties as if the same were arrears of rent due to him," the effect of a sale by the Collector in execution of a decree for cesses against some of the owners of a tenure is not to convey to the purchaser the whole tenure, but only the right, title and interest of the particular persons against whom the decree had been obtained.

THE road cess and public works cess payable for the share of the plaintiffs in a certain *mouza* having fallen into arrear the defendant No. 1 brought separate suits against them for their respective shares of the cesses, and obtained decrees. He then instituted against some of the other defendants a suit for recovery of the cesses due for the entire *mouza*, and in execution of this decree he caused the entire *mouza* to be put up for sale, and it was purchased by the defendants Nos. 2 and 3, the appellants. The plaintiffs then brought a suit for a declaration that the sale did not affect their shares of the *mouza*. The Subordinate Judge decreed the suit. The defendants 2 and 3 appealed.

Dr. *Rash Behari Ghose* and Babu *Digamber Chatterjee* for the Appellants.

Babu *Dwarkanath Chuckerbutty* for some of the Respondents; Babu *Hem Chunder Banerji* and Babu *Ram Churn Mitter* for others.

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* Appeal from Original Decree No. 270 of 1894 against the decree of Babu Debendra Lal Shome, Subordinate Judge of Manbhoom, dated the 27th of July 1894.

The **judgment** of the Court (**Ghose** and **Gordon, JJ.**) was as follows:—

We think that the Court below in this case has arrived at a proper conclusion.

The whole question discussed before us by the learned vakil for the appellants is as to the effect of the sale held by the Collector in execution of a decree under Act X of 1859 for cesses against certain of the owners of the tenure in respect of which the cesses were due, that is to say, whether it was a sale of the **[29]** tenure itself, or simply the right, title and interest of the persons against whom the said decree had been obtained.

The contention of the appellant depends entirely upon the construction to be put upon section 47 of Bengal Act IX of 1880. That section runs thus: "Every holder of an estate or tenure to whom any sum may be payable under the provisions of this Act may recover the same with interest at the rate of twelve and half *per centum per annum* in the same manner and under the same penalties as if the same were arrears of rent due to him."

It has been contended that when the Legislature says that the cess may be recovered in the same manner and under the same penalties as if the same were arrears of rent due to the landlord, it means that the same incidents which attach to, and follow upon, a sale for arrears of rent for which the tenure itself is liable to be sold, equally attach to a sale for cesses, and that, therefore, the sale at which the defendants-appellants purchased the property conveyed to them the whole tenure, and not simply the right, title and interest of the particular individuals against whom the decree for cesses had been obtained.

We are, however, unable to accept this argument as correct. We think that, although the procedure for the realization of cesses may be the same as the procedure laid down for the realization of rent due upon the tenure, yet it does not necessarily follow that the effect of a sale for cesses should be the same as that of a sale for arrears of rent for which the tenure itself is liable to be sold under section 105 of Act X of 1859. We observe that this is the view that was substantially adopted by a Division Bench of this Court in the case of *Umachurn Bag* v. *Ajadannissa Bibee* (I. L. R., 12 Cal., 430) where the learned Judges had, amongst other matters, to construe the meaning of section 25, Act X of 1871, the language of which (so far as the question we are now dealing with is concerned) is substantially the same as that of section 47 of Bengal Act IX of 1880.

We think that what the defendants-appellants have purchased in this case is, not the tenure itself, but simply the right, title and interest of the particular individuals against whom the decree for cesses had been obtained.

[30] It has been found by the Court below that the plaintiffs are entitled to a 9-anna share of the tenure, and no attempt has been made before us to question the finding of the lower Court in that respect.

It follows, therefore, that the decree of the lower Court should be affirmed and this appeal dismissed with costs. The Maharajah is entitled to separate costs.

H. W. *Appeal dismissed.*

NOTES.

[As regards the personal character of such debts, see also (1909) 36 Cal., 753 at 757.]

[24 Cal. 30]

The 6th August, 1896.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE RAMPINI.

Esoof Hasshim Dooply and another..............Plaintiffs

versus

Fatima Bibi *alias* Mah Poh and others...........Defendants.*

Appeal—Lower Burmah Courts Act (XI of 1889), section 40—Burmah Courts Act (XVII of 1875), section 49—Probate and Administration Act (V of 1881), sections 3 and 86—Code of Civil Procedure (Act XIV of 1882), sections 595 and 614—Final decree passed by the Recorder of Rangoon in the exercise of Original Civil Jurisdiction where the value of the subject-matter of the suit is above ten thousand rupees.

A decree passed by the Recorder of Rangoon, in a suit for grant of probate of a will, is a final decree passed by him in the exercise of Original Civil Jurisdiction.

No appeal lies to the High Court from a final decree passed by the Recorder of Rangoon in the exercise of Original Civil Jurisdiction, where the value of the subject-matter of the suit is above ten thousand rupees, but an appeal lies to Her Majesty in Council.

ONE Esoof Hasshim Dooply and another sought to propound the will of one Mahomed Ibrahim Dooply, who died on the 17th November 1894. The alleged will was dated the 10th October 1894. Caveats were entered on behalf of the widow and five daughters of the testator. The caveators objected to the grant of the probate of the will, on the ground that the testator at the time of its execution was of such feeble mind that he was incapable of understanding the nature of the act. The value of the estate was above six lakhs of rupees. The learned Recorder of Rangoon refused to grant probate and dismissed the suit, holding that the testator was not in full possession of his senses when he executed the will.

[31] Against this judgment the petitioners appealed to the High Court.

Mr. *Pugh* and Mr. *Evans Pugh* (Mr. *Simmons* with them) for the Appellants.

Mr. *Jackson* (Mr. *G. B. Macnair* with him) for the Respondents.

Mr. *Jackson*, for the respondents, took a preliminary objection to the hearing of the appeal. He contended that the decree passed by the Recorder of Rangoon, in this case, was a final decree; it was passed by him in the exercise of Original Civil Jurisdiction; see *Navivaboo* v. *Turner* [I. L. R., 13 Bom., 520 (526): L. R., 16 I.A., 156 (162)]; and as the value of the subject-matter of the suit was above ten thousand rupees, no appeal would lie to the High Court, but to Her Majesty in Council. See section 83 of the Probate and Administration Act, and sections 595 and 614 of the Code of Civil Procedure.

Mr. *Pugh* for the appellants.—Section 86 of the Probate and Administration Act provides that any order made by a District Judge shall be subject to appeal to the High Court, under the rules contained in the Code of Civil

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* Appeal from Original Decree No. 194 of 1895, against the decree of W. F. Agnew, Esq., Recorder of Rangoon, dated the 5th of April 1895.

Procedure. A District Judge, as defined in section 3 of the same Act, is a Judge of a principal Civil Court of Original Jurisdiction. The Recorder of Rangoon is a District Judge, so far as appeals to the High Court are concerned. Testamentary Jurisdiction does not come under Original Civil jurisdiction. If it does, section 40 of the Lower Burmah Courts Act provides for such cases. Section 595 of the Code of Civil Procedure does not govern the present case, as the decree was not passed on appeal by the Recorder of Rangoon. For the purpose of sections 595 and 612 of the Code of Civil Procedure the Recorder's Court is a High Court. The decree passed by the Recorder is not final, as there is an appeal given by the Probate and Administration Act. See the case *In the matter of Mononhur Mookerjee* (I. L. R., 5 Cal., 756). The Court of the Recorder of Rangoon is not a High Court except for the purpose of deciding cases to be sent up to the Privy Council. While the Burmah Courts Act (XVII of 1875) was in force, the Probate and Administration Act (V of 1881) was passed, which gave an appeal to the High Court, and the **[32]** Lower Burmah Courts Act (XI of 1889) did not interfere with that.

Mr. *Evans Pugh* followed.

The **judgment** of the High Court (**Petheram, C.J.**, and **Rampini, J.**) was as follows:—

This is an appeal from a judgment of the Recorder of Rangoon by which he refused probate of an alleged will of a person named Mahomed Ibrahimji Dooply, whose estate is valued at more than six lakhs of rupees, and the first question we have to consider is whether the appeal lies to this Court or to Her Majesty in Council.

The Probate and Administration Act came into operation on the 21st of January 1881. By section 86* of that Act every order made by a District Judge under the powers of the Act is subject to appeal to the High Court, and the definition of a District Judge in section 3 is wide enough to include the Recorder of Rangoon.

The Civil Procedure Code came into operation on the 17th of March 1884. Section 614 of that Code enacts that the expression "High Court" in section 595 shall include the Recorder of Rangoon, with the result that section 595 will read: "An appeal shall lie to Her Majesty in Council from any final decree passed by the Recorder of Rangoon in the exercise of Original Civil Jurisdiction." The Lower Burmah Courts Act came into operation on the 30th of May 1889. Section 40 of that Act provides that, save as otherwise provided by any enactment for the time being in force, an appeal shall lie to the High Court from a decree or order of the Recorder in a suit or civil proceeding of which the value of the subject-matter is less than rupees 10,000.

The case made here on behalf of the appellant is that the Recorder disposed of the matter as a District Judge, and that an appeal to this Court is expressly given in all cases against such a decision by the Probate and Administration Act, whatever may be the value of the subject-matter, and is not taken away by the subsequent legislation.

Whatever may have been the law on the subject between January 1881 and March 1882, the tribunal to which appeals lay from final decrees passed by the Recorder of Rangoon in the exercise of Original Civil Jurisdiction was, between March 1882 and **[33]** May 1889, regulated by section 595 of the Civil Procedure Code and Act XVII of 1875, section 49.

* [Sec. 86:—Every order made by a District Judge or District Delegate by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals.]

Appeals from orders of District Judge.

If the provisions of the Code are inconsistent with those of the Probate and Administration Act, those of the Code must prevail, as it is the later enactment. That being so, the only question is whether the decree of the Recorder is a final decree passed by him in the exercise of Original Civil Jurisdiction. We think it is. No doubt in some cases, as in the Burmah Courts Act, 1889, Civil Jurisdiction is sub-divided, but where this is not done, we are clearly of opinion that the words Original Civil Jurisdiction are wide enough to include all matters which are not criminal, and therefore to include those which relate to wills. The decision must, we think, be final within the meaning of section 595, though it is appealable, as the section is dealing with original decrees of High Courts, which are always appealable.

Section 40 of the Lower Burmah Courts Act, 1889, does not really touch the present question. That section only deals with matters in which the subject-matter is below the value of Rs. 10,000, which is certainly not the case here.

The result is that in our opinion the case is governed by sections 595 and 614 of the Civil Procedure Code, and that no appeal lies to this Court.

This is, of course, enough to dispose of the appeal, but as the case has been argued before us by Mr. *Pugh* on the merits, and as it may go further, we think it right to say that in our opinion the Recorder was right to refuse probate of this will and to express very shortly our reasons for that opinion.

[After considering the evidence their Lordships concluded as follows.]

Under these circumstances, bearing in mind that we are sitting here as a Court of First Appeal, and that our decision might be appealed against, we think that we should say that in our opinion the appeal cannot be sustained even on the evidence, but we do not dismiss the appeal on this ground, but we dismiss it inasmuch as we think that we have no jurisdiction to hear it. The appeal is accordingly dismissed with costs.

S. C. G. *Appeal dismissed.*

NOTES.

[See also (1904) 8 C.W.N., 748; (1913) 35 All., 448.]

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[34] *The 6th July, 1896.*

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Bhola Porshad...... .....Defendant No. 2

versus

Ram Lall and others............Plaintiffs.*

Parties—Adding parties as plaintiffs—Civil Procedure Code (1882) section 32—Suit by Benamidar.

A mortgage bond was executed ostensibly in favour of *R*, but *J* was the real mortgagee. A suit was brought by *R*, the *benamidar*, to enforce the bond; *J*, the real mortgagee, made

*** Appeal from Original Decree No. 313 of 1894, against the decree of Babu Amrita Lall Chatterjee, Subordinate Judge of Tirhoot, dated the 26th of March 1894.**

over the debt on a date previous to the suit, but executed the formal deed of assignment on a date subsequent thereto. The assignees were then added as plaintiffs to the suit.

Held, distinguishing the case of *Chunder Coomar Roy* v. *Gocool Chunder Bhuttacharjee* (I. L. R., 6 Cal., 370), that a *benamidar* may sue, and that the assignees were rightly added as plaintiffs under section 32 of the Civil Procedure Code.

Held, also, that section 32 is wide enough to meet every case of defect of parties; and, further, that the power to add parties must be exercised with reference to the interests which those parties have at the time when the addition is being considered.

THE facts and arguments in this case sufficiently appear from the judgment of the High Court.

Mr. *W. C. Bonnerjee*, Babu *Hem Chunder Banerjee*, Babu *Umakali Mukerjee*, and Babu *Baldeo Narain Singh* for the Appellant.

Dr. *Rash Behari Ghose*, M. *Mahomed Yusuf* and M. *Mahomed Habibullah* for the Respondents.

The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ.**) was as follows :—

The facts which it is necessary to detail for the purposes of our judgment are as follows :—

On the 19th of July 1889 the first defendant executed a mortgage of certain property in favour of one Ram Lall, and in the mortgage bond promised to pay the amount secured thereby by the end of Sraban 1297 (July 1890). The consideration for the mortgage consisted of a decree which had been made in favour of one Dooli Chand, and two bonds which had been given to one **[36]** Jaitroop. As a matter of fact the money covered by the decree belonged to Jaitroop, and in the matter of the mortgage, Ram Lall was the *benamidar* of Jaitroop.

On the 6th of September 1891, Jaitroop made over this debt to the firm of Hardeo Dass, Janki Dass, the members of which firm are Behari Lal and Nait Ram. The assignment then made was not in writing, but a record of it was made in the books of the firm of Hardeo Dass, Janki Dass, and a release was given to Jaitroop for the debt which was owing by him, and was to that extent satisfied by this assignment.

On the 21st of January 1893, this suit was brought by Ram Lall at the instigation of the gomasta of the firm of Hardeo Dass, Janki Dass. The suit was brought for the purpose of recovering the sum due on the mortgage. Besides the mortgagor, Bhola Pershad, the appellant before us, was made a party defendant. He was described in the suit as a second mortgagee, but as it turns out, his mortgage was prior in date to the mortgage sued upon. He has also bought the first defendant's equity of redemption, but subsequently to the mortgage in suit.

On the 6th of March 1893, the first defendant filed a written statement, charging amongst other things that the plaintiff Ram Lall was a fictitious person, and that the persons really interested in the mortgage were Jaitroop and Dooli Chand, but on the 27th of March 1893 he filed a petition admitting the plaintiffs' claim. In a written statement filed on the 13th of April 1893, a contention similar to that in the written statement of the 6th March was, amongst others, raised by the defendant Bhola Pershad.

On the 30th of July 1893, a formal deed of sale of the mortgagee's right was executed by Jaitroop in favour of Behari Lal and Nait Ram, who by an order of the 21st August 1893 were added as plaintiffs to this suit. This order was made *ex parte*, but a fresh summons was issued.

On the 10th of September 1893 a further written statement was filed by Bhola Pershad, protesting against the order of the 21st of August 1893.

This objection was pressed at the hearing, but has been disallowed by the learned Subordinate Judge, who has given the added plaintiffs a decree on the mortgage, conditionally on their [36] paying the amount due under the first mortgage. They deposited this sum in Court.

The only question argued before us in the appeal is, whether the order of the 21st of August 1893 could and ought to have been made. The two sections of the Civil Procedure Code, which have been referred to, are sections 27 and 32.

We need only consider section 32, which empowers the Court to add the name of any person whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The case of *Chunder Coomar Roy* v. *Gocool Chunder Buttacharjee* (I. L. R., 6 Cal., 370) holds that section 32 applies only to a suit "which is to some extent properly instituted, though partially defective; in other words, there is no jurisdiction at the hearing to add a plaintiff, unless the original plaintiff had some title to sue."

Taking that case to be good law, we are of opinion that the circumstances of the present case are not governed by the principle there laid down. In that case the son had no right to sue at all. We are unable to say that a *benamdar* cannot under any circumstances sue. It is true that his name only is used in the transaction, but his name also is frequently used in suits, and unless an objection be taken a decree can be made in his favour. There is authority to show that the real owner is bound by a suit by the *benamdar*. It is, therefore, impossible for us to hold that a suit by the *benamdar* can, to no extent, be properly instituted, although it may be partially defective.

The real question is whether the added plaintiffs could, under any circumstances, be introduced into the suit, as the assignment to them was subsequent to the institution of the suit. It is not necessary for us to decide whether an assignment of the interests of the mortgagee could be otherwise than in writing. At the time when they were added, Jaitroop could not have been added as he had ceased to have any interest. When it was found necessary to add the real owners, the added plaintiffs as being the then real owners were added. [37] The power to add parties must be exercised with reference to the interests which those parties have at the time when the addition is being considered. Mr. *Bonnerjee* contended that the Court could not add a plaintiff unless he had a right at the time of suit, or had derived a right from an original plaintiff. Even if this be a correct limitation to the powers of the section, we think that a conveyance from the real owner, whose *benamdar* is the plaintiff, must, for the purposes of this proposition, be treated as a conveyance from the plaintiff. We are by no means saying that the section is so limited, as we are of opinion that it is wide enough to meet every case of defect of parties.

Another question has been raised under section 131* of the Transfer of Property Act, but it was not referred to in the lower Court or in the grounds of appeal to us. If it had been pleaded, it might have been the subject of an issue of fact.

*[Sec. 131:—No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer; and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of, a transfer, with the debt or property shall be valid as against such transfer.]

Transfer of debts.

In our opinion the appeal fails and must be dismissed with costs.

S. C. C. *Appeal dismissed.*

NOTES.

[In *Jagat Tara* v. *Narmada* (1914) 24 I. C., 801 (Cal.), MULLICK, J., said, "Although there are decisions in other High Courts to support this view, (that a *benamidar* in a suit for possession of immoveable property is entitled to sue), I think that so far as this Court is concerned it is a settled law that no such suit can be maintained. It is sufficient to cite the latest case upon the subject, *Mohendra Nath Mookerjee* v. *Kali Prashad Johuri* (1902) 30 Cal., 265. *Bhola Pershad* v. *Kali Prashad* (1896) 24 Cal., 34 and *Sachitananda Mohapatra* v. *Balaram Gosain* 24 Cal., 644 are authorities for the proposition that a *benamidar* mortgagee can sue; but on the other hand the contrary view has been taken in *Munshi Basiruddin Ahmed* v. *Mahomed Jalish Patwari* 12 C.W.N., 409 and in any event the distinction between suits based on mortgage and those based on sales has been clearly recognised in this Court. I hold that the plaintiff if she is a *benamidar* is not entitled to maintain the suit". (1899) 21 All., 380 was the case of a mortgagee. See also (1897) 22 Bom., 672.]

[24 Cal. 37]

The 24th July, 1896.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE HILL.

Alim..........Defendant

versus

Satis Chandra Chaturdhurin............Plaintiff.*

Bengal Tenancy Act (VIII of 1885), section 67 and section 178—Payment of Interest—Rate of interest specified in kabuliyat—Sale, for arrears of rent, of right of defaulting tenant who has held over—Purchaser of tenure, Rights of.

In execution of a decree for arrears of rent against a tenant whose term under a *kabuliyat* had expired but who had held over, the plaintiff put up the tenure for sale, and the defendant purchased it. The plaintiff afterwards sued the defendant for interest at the rate and according to the instalments specified in the *kabuliyat.*

Held, reversing the decision of the Subordinate Judge, that the defendant was liable only for interest at the rate specified in section 67 of the Bengal Tenancy Act.

[38] *Ishan Chunder Chowdhry* v. *Chunder Kant Roy* (13 C.L.R., 55) distinguished.

ANU SARKAR held certain lands under a *kabuliyat* for a period of seven years from 1285 to 1291 (B.S.) (1878 to 1884). After the term expired, he held over without any further agreement. In Phalgun 1296 the plaintiff obtained a decree against him for arrears of rent; and in execution of that decree he put up the holding for sale, and it was purchased by the defendant. The plaintiff subsequently brought a suit against the defendant to recover arrears of rent for the years 1296 to 1299 (1889 to 1892) with interest at the rate of one anna in the rupee per mensem, as specified in the *kabuliyat.* The amount of interest so claimed exceeded the principal. The defendant pleaded that under the Tenancy Act no higher rate of interest than 12 per cent. per annum could be claimed. The Munsif made a decree in favour of the plaintiff for the rent due, with interest at 12 per cent. per annum.

The plaintiff appealed to the Subordinate Judge, who decreed the plaintiff's claim in full, with costs and interest at 6 per cent. per annum until realisation. The defendant appealed.

* Appeal from Appellate Decree No. 12 of 1895, against the decree of Babu Biprodas Chatterjee, Subordinate Judge of Mymensingh, dated the 7th of September 1894, reversing the decree of Babu Phani Bhushan Mukerjee, Munsif of Iswargunge, dated the 1st of December 1893.

Babu *Grish Chunder Chowdhry*, for the Appellant.

Dr. *Rash Behari Ghose*, and Babu *Jogesh Chunder Roy*, for the Respondent.

The **judgment** of the Court (**Macpherson** and **Hill, JJ.**) was as follows :—

This is a suit for arrears of rent for the years 1296 to 1299 according to certain specified instalments, and interest at the rate of 1 anna per rupee per mensem. The interest claimed is much in excess of the principal. It seems that the holding for which the rent is claimed formerly belonged to one Anu Sarkar, who held it under a registered *kabuliyat* for a term of 7 years, extending from 1285 to 1291. • After the lease expired he held over without any further agreement. In February 1889 (Phalgun 1296) the plaintiff obtained a decree for arrears of rent against Anu Sarkar, and in execution of the decree the holding was sold and purchased by the defendant. The plaintiff in the present suit claimed interest at the rate and according to the **[39]** instalments specified in the *kabuliyat*. The defendant said the rent was payable in the instalments specified in section 53 of the Tenancy Act, and that the plaintiff could not recover a higher rate of interest than was allowed by section 67 of the same Act. The first Court decided both points in favour of the defendant. The Appellate Court reversed that decision and decided them in favour of the plaintiff. The only question raised in this appeal is as to the rate of interest. The holding when sold was either an occupancy or non-occupancy holding; it does not appear, and for the purpose of the case it does not matter, which it was. Section 67 of the Tenancy Act provides that "an arrear of rent shall bear simple interest at the rate of 12 per centum per annum from the expiration of that quarter of the agricultural year in which the instalment falls due to the institution of the suit." Section 178 provides that nothing in any contract made between a landlord and a tenant after the passing of the Act shall " affect the provisions of section 67 relating to interest payable on arrears of rent." Neither landlord nor tenant could, therefore, after the passing of the Act in March 1885, contract himself out of the provisions of section 67.

We will assume, in the absence of anything to denote the contrary, that the original holder while holding over held under all the terms of the *kabuliyat* which he had given. When, however, the landlord put up the holding to sale for its arrears, he must be taken to have put it up subject to all the ordinary incidents of such a holding. It was not an ordinary incident that interest on arrears should be payable at the very high rate claimed. On the contrary there was no such incident, and if the landlord had put up the holding subject to an express condition that the higher rate should be paid, the condition would not bind the purchaser in so far as it purported to create a new contract between himself and the landlord. If there was no such condition attached to the sale, the purchaser must be taken to have purchased subject to all the ordinary incidents of the holding. If there was such a condition, and it was for the respondent to show it, which he has not done, the condition was, we consider, contrary to the provisions of the Act and not binding on the purchaser. An agreement by a tenant of a holding **[40]** for a term, to pay interest at a certain rate, may, if made before the passing of the Act, bind him so long as he continues to hold, but it does not attach to the land, when the term has expired, and the holding by the act of the landlord passes into other hands; and if the landlord, after the expiry of the term, puts up the holding to sale under the Act, he puts it up subject to the express provisions of the Act in connection with it.

The case of *Ishan Chunder Chowdhry* v. *Chunder Kant Roy* (13 C.L.R., 55) is, we think, quite distinguishable. That was a case of a *putni* tenure, which

is a permanent and a well-known description of tenure, and the purchaser was held to be bound by the terms of the *putni* agreement so far at all events as they were consistent with the nature of a *putni* tenure.

The defendant is only liable to pay interest at the rate specified in section 67 of the Tenancy Act. The decision of the Subordinate Judge is set aside, and the case must be sent back to him in order that he may determine what that interest is according to the instalments stated in the plaint, and make a decree accordingly.

The appellant will get his costs of this appeal.

H. W. *Appeal allowed.*

NOTES.

[In (1904) 32 Cal., 258, *A* purchased at an auction sale in execution of a rent-decree, a tenure covered by a *kabuliat* which stipulated for interest at a specified rate. It was held by the Full Bench that the tenure being subsisting, *A* bought the tenure subject to the terms and conditions of the lease, and was liable for interest at the rate mentioned in the *kabuliat* and not at the rate mentioned in sec. 67 of the Bengal Tenancy Act 1885. RAMPINI, J. distinguished his decision in (1899) 26 Cal., 315. See also (1902) 30 Cal., 213; (1902) 6 C.W.N., 877; (1900) 28 Cal., 227; (1898) 2 C.W.N., 525.]

[24 Cal. 40]

The 28th July, 1896.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Bheka Singh............Plaintiff

versus

Nakchhed Singh and another............Defendants.*

Bengal Tenancy Act (VIII of 1885), Schedule III, Article 3—Limitation—Suit by occupancy-raiyat for possession.

Article 3 of Schedule III of the Bengal Tenancy Act (VIII of 1885), prescribing a limitation of two years, is not restricted to suits against the landlord alone; it applies to a suit brought against a tenant with whom the land was settled by the landlord.

Ramjanee Bibee v. *Amoo Beparee* (I. L. R., 15 Cal., 317) and *Chunder Kishore Dey* v. *Rajkishore Mozumdur* (I.L.R., 15 Cal., 450) distinguished.

[41] THIS suit was brought on the allegation that the land claimed was a part of the plaintiff's ancestral *kasht* in a village in the district of Monghyr; that in 1885 the land was included in Jazira Dumra in the district of Patna, under orders of the Revenue authorities; that after the death of the plaintiff's father, the officers of Government refused to register his name as tenant, set up defendants Nos. 2 and 3 as tenants on the land, and caused the crops to be attached in 1297 and 1298 *Fasli* (1889 and 1890); that the plaintiff sent a notice to the Collector of Patna asking for registration of his name but to no purpose, and that the term fixed in the notice expired on the 3rd December 1890. The plaintiff accordingly brought this suit on the 29th January 1892 praying for recovery of possession and mesne profits upon declaration of his occupancy right. The Secretary of State for India was made defendant No. 1 in the suit; but it was stated on his behalf that he had no objection to the registration of plaintiff's name and to the Court's awarding possession to the plaintiff if the Court considered it proper to do so. The other defendants contested the claim and raised the plea of limitation.

* Appeal from Appellate Decree No. 822 of 1895, against the decree of Moulvie K. S. Fukhruddin Hossain, Subordinate Judge of Patna, dated the 6th of March 1895, affirming the decree of Babu Bhawa Charan Mukerjee, Munsif of that district, dated the 17th of February 1893.

The first Court found that the plaintiff had a right of occupancy, but that he was dispossessed by the acts of the servants of defendant No. 1 more than two years before the institution of this suit; and held that the suit was barred under Article 3 of Schedule III of the Bengal Tenancy Act.

The plaintiff preferred an appeal, but the appeal was dismissed on the ground that the Secretary of State, who was defendant in the first Court, was not made respondent in the appeal.

On a second appeal, the High Court (TREVELYAN and AMEER ALI, JJ.) observed: "In the first Court the Secretary of State disclaimed all interest in the subject-matter of the suit and stated that it was perfectly indifferent to him whether the plaintiff or the other defendant in the case established their title to the land. That being so, there was no decree against him, and the appellant was right, we think, in not making him party to the appeal in the Court below. As he is not a necessary party to the appeal the learned Judge ought to have tried the appeal. We therefore direct that the case go back, so that all matters in question in the appeal may be tried by the learned Judge."

[42] After remand, the Subordinate Judge of Patna tried the appeal and held that the suit was barred by limitation as the plaintiff failed to bring it within two years from the date of his dispossession.

The plaintiff appealed to the High Court.

Babu *Dwarka Nath Chakravarti* for the Appellant.

Babu *Karuna Sindhu Mukerjee* for the Respondents.

The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ.**) was as follows:—

This is an appeal from a decision on remand.

The suit was brought by the plaintiff, claiming to be an occupancy-raiyat, against the Secretary of State, who was his landlord, and also against a person who had been settled on the land by one of the officers of the Secretary of State. The Secretary of State put in an answer disclaiming any preference for the plaintiff or the defendant as his tenant.

The case came before the Munsif who found that the plaintiff had an occupancy-right, but he dismissed the suit on the ground that it was barred by limitation under Article 3, Schedule III, Part I of the Bengal Tenancy Act. The plaintiff appealed, not making the Secretary of State a party to the appeal; as far as the decision against the Secretary of State as to the suit being barred by limitation is concerned, it was final, not having been excepted to by the appellant. The learned Subordinate Judge dismissed the appeal on the ground that the Secretary of State was not made a party to the appeal before him. A second appeal was preferred, and a Division Bench of this Court held that under the circumstances the Secretary of State was not a necessary party to the appeal, and therefore set aside the decree of the Subordinate Judge and directed him to try all questions on appeal. This has been done, and the Subordinate Judge has found that the suit, as it now stands as against the second defendant who was put in possession by the Secretary of State, is barred by limitation.

It is contended before us that Article 3 only applies to a suit against the landlord. In the first place this suit was brought against the landlord, and the High Court did not hold that the [43] landlord was not a necessary party to the suit. The suit was dismissed as against him on the ground that it was barred by limitation. But even if we could treat the suit at this stage of the case as not being a suit against the landlord, we are not prepared to say that

the broad proposition contended for is correct. It is perfectly true that it has been held that this article is limited to suits where the ouster complained of has been caused by the landlord or by somebody acting in concert with him or at his instance. We are not aware of any decision (there is none reported) which limits the article against the landlord alone, and holds that it does not apply to a suit against a person holding under the landlord. The omission to add the landlord as a party defendant would not in our opinion extend the period of limitation from two to twelve years. It is the circumstance of the ouster, and the fact that a particular person has ousted the plaintiff, which give rise to the necessity of his proving his occupancy right as against that person and therefore make it necessary for him to sue to recover possession of the land claiming it to be held by him as an occupancy-raiyat.

As far as we are aware, the effect of all the decisions and certainly of those cited to us to-day is not to restrict the article to suits against the landlord alone. The two cases referred to -*Ramjanee Bibee* v. *Amqo Beparee* (I. L. R., 15 Cal., 317) and *Chunder Kishore Dey* v. *Rajkishore Mozumdar* (I. L. R., 15 Cal., 450) were cases brought against persons who were trespassers not claiming under the landlord. Here we have a case brought against a tenant with whom the land was settled by the landlord.

In our opinion, the judgment of the Subordinate Judge is right, and the appeal must be dismissed with costs.

S. C. C. *Appeal dismissed.*

NOTES.

[See also (1899) 4 C.W.N., 326; (1908) 13 C.W.N., 108.]

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[44] ORIGINAL CIVIL.

The 28th July, 1896.
PRESENT:
MR. JUSTICE SALE.

G. W. A. Lloyd
versus
A. B L. Webb and another.

Will—Construction of Will—Vested Interest—Conditions Repugnant—Condition restricting Immediate Enjoyment—Commission allowed to Trustees, Calculation of.

Where a testator who died in 1896 bequeathed the whole of his property, with the exception of an annuity to his wife of £ 250 per annum and some other specific legacies, to his only son, who had attained majority at the date of his father's death, but subject to the restriction that he should not be allowed to enjoy it until the end of the year 1900; and appointed two trustees to carry out his wishes:

Held, that the son took an immediate vested interest in the estate of the testator.

Held, also, that the condition restricting his immediate enjoyment was a condition repugnant and was invalid.

Gosling v. *Gosling* (Joh. 265), *Weatherall* v. *Thornburgh* (L. R., 8 Ch. Div., 261) followed.

Where commission is allowed to trustees annually, such commission should be calculated on the income of the estate, and not on the corpus.

THIS was a suit for the construction of the will and for the administration of the estate of William Lloyd, who died on 15th January 1896, in the district of Darjeeling, leaving a son, the plaintiff, and a widow, who resided in England. Probate of the will was obtained by the executors, the defendants, on 10th of February 1896. By the will they were also appointed trustees for carrying out the wishes of the testator, and one of the defendants, A. B. L. Webb, was at the time of the death of the testator the manager of the banking business carried on by him during his lifetime. The plaintiff at the date of the will had attained full age, but had not adopted any profession, although before the death of his father he had succeeded in obtaining a commission in the Militia.

The questions raised on the construction of the will were as to the effect to be given to the following provisions contained in the will relating to the plaintiff:—

" I leave all my estate, whether private or appertaining to Lloyds Bank, [46] in trust for the benefit of my only child, George William Aylmer Lloyd, and hereby appoint Alexander Baness Lumley Webb and his brother Edwin John Webb trustees for carrying out my wishes.

" And my son is to be allowed only such small sum pecuniary as may force him to earn his own bread. At the end of the year 1900 the trust shall cease.

" At the end of 1900 years my son is to be allowed to enjoy the estate."

Under the will, apart from the provisions dealing with the son's interest in the estate, the widow of the testator was entitled to an annuity for her life. There were also other legacies which it is not necessary to discuss for the purposes of this case.

A further question was raised as to the intention of the testator when he directed that the remuneration of the trustees should be fixed at a commission of three per cent. The will provided that " three per cent. commission be allowed among the trustees annually." As trustees the defendants would have to conduct the business of the Bank, and if the amount fixed by the will was to be paid out of the income of the estate only, the remuneration would be wholly inadequate as a Bank manager's salary, and would amount to considerably less than what the defendant A. B. L. Webb had drawn hitherto as the manager of the Bank.

Mr. *Jackson* (Mr. *Bonnerjee* with him) for the Plaintiff.—I submit that the terms of the will are clear. From the 1st clause there can be no doubt that there was an absolute gift to the son ; subject, however, to the gift to the widow of £250 per annum for her life. No portion of the property therefore is given away, and the next condition is void. *Harbin* v. *Masterman* [L. R. Ch. Div. (1894) Vol. 2, 184], *Gosling* v. *Gosling* (Joh. 265), *Gosavi Shivgar Dayagar* v. *Rivett-Carnac* (I. L. R., 13 Bom., 463). The authorities are clear. This is an absolute gift, and the conditions restraining it are void. The moment the legacies are satisfied the plaintiff is entitled to immediate possession. As regards the trustees they are to be allowed commission at the rate of 3 per cent. The question is whether the three per cent. is to be paid out of the corpus or the income. Lewin on Trusts, p. 708. Under the Administrator-General's Act all attempts to charge commis-[46]sion have been done away with. It is submitted that the commission must come out of the income.

Mr. *Bonnerjee* on the same side.—There can be no doubt that the plaintiff takes a vested interest in fee in the entire portion of the estate. The clause

as to the pecuniary assistance to the son is inconsistent with the gift. It would come out of his own estate. The clause that "at the end of the year 1900 my son is to enjoy the estate" is void, as being repugnant to the gift. White and Tudor's Leading Cases, p. 258, *Bradley* v. *Peixoto* (3 Ves. 324). Suppose there was an intestacy. The widow would get ⅓ and the son ⅔. But if there is a gift of the corpus, the condition repugnant must go. The defendants cannot contend that the intestacy relates to the income and not to the corpus. If they say that it relates to the corpus as well, that is clearly confuted by the 1st clause of the will. The testator did not wish to deprive his son of the property in any way, but was clearly not satisfied with him. Under the circumstances the attempt to postpone the enjoyment of the property in any way cannot be upheld. *Gosling* v. *Gosling* (Joh. 265) extends the principle of *Sanders* v. *Vautier* (Cr. & P. 240), *Gopal Lall Seal* v. *Administrator-General of Bengal*. The commission is clearly to be paid out of the rents and profits and not out of the corpus. The words "annually" shew that it must be on the income.

The *Advocate-General* (Sir *Charles Paul*).—This case is not governed by the English Law, but by the Succession Act. *DeSouza* v. *Secretary of State* (12 B. L. R., 423), *Norendra Nath Sircar* v. *Kamal Basini Dasi* (I. L. R., 23 Cal., 563: L. R., 23 I. A., 18). In the latter case the Privy Council say you must construe the Code by itself. There is no gift here *ab initio*. The legal estate goes to the trustees. There is a limitation in trust, but no more. The testator intended the wife to have £250 per annum, and the son something to live on until the year 1900. There is nothing in the Indian law preventing a person from making a will of this sort. There is a great deal which says you can do it. Succession Act, s. 107, Illustration (*j*) is a similar gift. Again, if the son died before 1900, the estate would go to the **[47]** wife. The Court cannot set aside the intentions of the testator. *In re Brooke's Will* (34 L. J. Ch., 616). The testator nowhere says that he gives the estate to the son absolutely. Is there anything in the Indian law to prevent the testator from keeping his son out of his estate for six years. I submit there is nothing. As regards conditions repugnant, the Indian law is contained in sections 118, 119 and 120 of the Succession Act. There are no repugnancies such as those stated in *Gosling* v. *Gosling* (Joh., 265). That is not a case similar to this one. In *Gosavi Shivgar Dayagar* v. *Rivett-Carnac* (I. L. R., 13 Bom., 463), the Succession Act was not referred to. In this will there is nothing to show that the testator gave absolutely in the first instance. The income would accumulate. There has been no disposition of it. As regards the commission of three per cent., Mr. Webb has been the manager of the Bank for years. Are he and his brother only to get Rs. 150 per mensem between them? Legally he cannot now charge a salary as manager of the Bank, being the trustee. The words "annually" cannot mean upon the income only. If not then it must be out of the corpus. [SALE, J.—The *trustees* might say: "if we are only entitled to get three per cent. as commission out of the income we are entitled to be appointed managers separately.] Yes, but that was not the intention.

Mr. *Bonnerjee* in reply.—The property must vest beneficially in some one at the death of the testator. [SALE, J.—Could not the testator give the property to the son after six years?] No, then there would be an intestacy: against that the Court would struggle. Section 70 of the Succession Act. You cannot tie up the property with no one to enjoy it.

Sale, J.—This is a suit for the construction of the will and for the administration of the estate of William Lloyd, who died in the Darjeeling district on

the 15th of January 1896, leaving the plaintiff, his son, an only child, and a widow who resides in England. The will is dated the 16th of September 1890, and the defendants, who are appointed the trustees for carrying out the wishes of the testator expressed in the will, obtained probate as executors according to the tenor, on the 10th of February 1896. It appears that the testator had for many years carried [48] on, and was carrying on at the date of his death, a banking business in Darjeeling, of which the defendant Alexander Baness Lumley Webb was the manager, and that the business is still being carried on by the defendants as the trustees appointed by the will. It also appears that at the date of the will the plaintiff had attained full age but had not adopted a profession, though it is said that before the death of his father he succeeded in obtaining a commission in the Militia.

The main question raised on the construction of the will of the testator is as to the effect to be given to the provisions contained in the will relating to the plaintiff.

Subject to the payment of an annuity to the widow, about which no question arises, the will, which is an inartificial and ill-expressed document, contains the following directions:

"I leave all my estate, whether private or appertaining to Lloyds Bank, in trust for the benefit of my only child, George William Aylmer Lloyd, and hereby appoint Alexander Baness Lumley Webb and his brother Edwin John Webb trustees for carrying out my wishes."

A subsequent clause provides as follows —

"And my son is to be allowed only such small sum pecuniary as may force him to earn his own bread. At the end of the year 1900 the trust shall cease."

Then follows the provision:

"At the end of 1900 years my son is to be allowed to enjoy the estate."

The first question is, what is the nature of the gift to the son, is it an absolute gift of the whole estate with immediate vesting, or is it a postponed gift contingent upon the son surviving to the end of the year 1900, when the *trust* is to cease.

It is to be observed that there is no gift over in the will nor is there any separate or express devise of the surplus income of the estate for the period intervening between the death of the testator and the cessation of the trust after providing for the widow's annuity, the son's subsistence allowance, and the trustees' remuneration.

It is said that though the testator leaves his estate in trust for the benefit of his son, the benefit which it was intended that the son should take is explained by the subsequent provisions of the will and is limited and controlled thereby. But the object of the *trust*, so far as it is defined by the subsequent directions of [49] the will, is not to create a benefit in favour of the son, but to cut that benefit down and to restrict it to a subsistence allowance until the year 1900, when the trust is to determine. It seems to me, therefore, the *benefit* given by the earlier clause of the will cannot be confined to the *benefit* to be enjoyed by the son under the terms and during the pendency of the trust.

The gift is in express terms of the whole of the estate to trustees for the benefit of the son. The testator, however, desires that his estate is not to come into the possession or enjoyment of the son for a given period so as to afford the son an opportunity of learning to earn his own livelihood. Similar provisions with a similar object have been held to constitute an immediate and absolute gift.

In *Hanson* v. *Graham* (6 Ves. 239) the subject of immediate gifts with postponed enjoyment and gifts postponed to or contingent on the donee attaining a certain age was much discussed, and at p. 248 of the report Sir W. GRANT, M. R., observes as follows as regards the decision in the case of *Love* v. *L'Estrange* (3 Bro., 337). "It was not a simple unqualified gift, but there were many circumstances to shew that Walter Nash was meant to have the benefit absolutely, and that the enjoyment was only postponed; the testator giving it to trustees in the meantime; and applying a reason for withholding the enjoyment from this minor; that he wished him to follow his trade as a journeyman; with which object he naturally thought that fortune would interfere, and therefore he postpones the enjoyment of it until the age of twenty-four. But he gives it to trustees entirely and absolutely for the benefit of Walter Nash; to improve it for his benefit, to transfer the whole to him when he arrives at that age, and to make him a certain allowance in the meantime. That is very different from a simple bequest to him, when twenty-four, for if that had been a legacy it would have been separated from the residue immediately upon the testator's death, and must have been paid over to the trustees immediately, and they would have managed it until the legatee had attained the age of twenty-four."

In *Saunders* v. *Vautier* (Cr. & P., 240) where a testator bequeathed certain [50] stock to trustees upon trust to accumulate the dividends until the intended donee should attain 25 and then to transfer the principal together with the accumulation to the donee absolutely, it was held that the donee, though a minor at the testator's death, took an immediate vested interest in the legacy, and at p. 248 of the report Lord COTTENHAM referring to the cases of *Love* v. *L'Estrange* (3 Bro., 337) and *Hanson* v. *Graham* (6 Ves. 239) makes the following observations:—

"That case has many points of resemblance to the present, and although Lord ROSSLYN seems in *Monkhouse* v. *Holme* (1 Bro., C. C., 298) to question the principle of the decision, Sir W. GRANT in *Hanson* v. *Graham* justifies it upon grounds most of which apply to this case, particularly that the fund was given to trustees till the legatee should attain a certain age, and that it should then be transferred to him; from which and other circumstances he thought it was to be inferred that the fund was intended wholly for the benefit of the legatee, although the testator intended that the enjoyment of it should be postponed till his age of twenty-four. Such, I think, was clearly the intention of the gift in this case."

It appears to me that these observations of Sir W. GRANT and Lord COTTENHAM are applicable to the circumstances of the gift in question in this suit, and that in accordance therewith I must hold that the plaintiff under the will of the testator took an immediate vested interest in the estate of the testator.

The next question is whether the gift is an absolute gift of the entire estate, or whether the gift is qualified or restricted in any way by the subsequent directions to the trustees, and in particular by the direction that the son is not to be allowed to enjoy the estate till the end of the year 1900.

The plaintiff contends that there is an absolute gift of the estate to him, and that the subsequent restrictions are repugnant to the previous absolute gift and should be disregarded.

The rule under which the Courts will set aside or disregard conditions or restrictions as repugnant to a previous gift is well [51] recognized in England, and it is thus stated by LINDLEY, L.J., in the case of *Harbin* v. *Masterman* [L. R., Ch. Div. (1894), Vol. 2, 184 (196)]. "Now notwithstanding

the general principle that a donee or legatee can only take what is given him on the terms on which it is given, yet by our law there is a remarkable exception to this general principle. Conditions which are repugnant to the estate to which they are annexed are absolutely void, and may consequently be disregarded. This doctrine, I apprehend, underlies the rule laid down in *Saunders* v. *Vautier* (Cr. & P., 240) and enunciated with great clearness by Vice-Chancellor WOOD in *Gosling* v. *Gosling*, Joh., 265 (272). Vice-Chancellor WOOD says this: 'The principle of this Court has always been to recognise the right of all persons who attain the age of 21 to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age:—unless during the interval the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment,—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold, that, as to the previous rents and profits there has been an intestacy—the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years.' "

And in *Weatherall* v. *Thornburgh* [L. R., 8 Ch. Div., 261 (269)], Lord Justice JAMES refers to the same rule in these words:

"The Court acted on the established principle that where there is an absolute gift to an adult male any direction to restrain his enjoyment of it is absolutely idle, unless there is a defeasance. In such a case a direction to accumulate the income is only a mode of **[52]** preventing the person entitled from enjoying the property, which can have no effect."

Now can it be said in this case that as to the intermediate interest or as to the surplus income of the estate prior to the end of the year 1900, there is either an intestacy or a defeasance. In my opinion it cannot. The testator intended, I think, to make a present gift of the entire estate to his son, and he intended that his son should have the ultimate enjoyment of the whole estate in the hands of the trustees after payment of the legacies. It was only the *present enjoyment* of the estate of which the testator desired to deprive the plaintiff, and this attempted restriction is in my opinion invalid and must be disregarded.

It is true that the rule as to repugnant conditions has not been introduced into this country by the Succession Act, or by other statutory enactment, but on the other hand it has been applied by PHEAR, J., in the case of *Mokoondo Lall Shaw* v. *Gonesh Chunder Shaw* (I. L. R., 1 Cal., 104), and also by the Bombay Court in the case of *Gosavi Shivgar Dayager* v. *Rivett-Carnac* (I. L. R., 13 Bom., 463) and by the Privy Council in the case of *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (I. L. R., 5 Cal., 438): see page 444 of the report.

A question has also been raised as to the trustees' remuneration. The will provides that "three per cent. commission be allowed among the trustees annually." Is the commission to be calculated on the corpus or income of the estate?

The testator contemplated the trust continuing till the year 1900, and even longer should the son die before that time and the wife survive. The remuneration given to the trustees is for the management of the general estate, and the direction that the commission is to be allowed *annually* appears to

indicate that it was to be calculated on the income of the estate. It is said, however, that if calculated in this way, the remuneration would be wholly inadequate as a Bank manager's salary—and that the testator could not have intended to reduce so largely the salary of the defendant Alexander Baness Lumley Webb, who has for many years acted as the manager of the Bank.

[53] But in my opinion the remuneration provided by the will for the trustees, was intended to be wholly apart from the salary which the defendant Alexander Baness Lumley Webb would be entitled to so long as he continued to be the manager of the Bank. The remuneration provided by the will is intended for the discharge by the trustees of the duty of general management of the estate and not for performing the special duties of a manager of the Bank. The remuneration for the latter duties must be specially provided for in due course of the administration of the estate.

There must be a decree for administration of the estate with a declaration of the right of the plaintiff to immediate possession of the estate, subject to the payment of the debts and legacies, or provision being made therefor, in due course of administration.

Costs of all parties to be taxed on scale 2 as between attorney and client and to come out of the estate.

Attorneys for the Plaintiff: Messrs. *Morgan & Co.*

Attorneys for the Defendants : Messrs. *Dignam & Co.*

C. E. G.

NOTES.

[This case was distinguished in (1905) 9 C.W.N., 526 : 1 C.L.J., 605 on the ground that there, for the intermediate period *specific trusts* were created and for that reason the restraint was held to be not bad in law.]

[24 Cal. 53]

CRIMINAL REFERENCE.

The 24th August, 1896.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE BANERJEE.

Mukti Bewa............Complainant

versus

Jhotu Santra............Accused.*

Compensation—Compensation to accused in Criminal Case—Criminal Procedure Code (Act X of 1882), section 560—Separate charges—Complete discharge or acquittal.

The accused was charged under section 352 and section 379 of the Penal Code but convicted under section 352, being discharged under section 379. The Magistrate ordered the complainant to pay compensation for bringing a frivolous and vexatious charge under

* Criminal Reference No. 202 of 1896, made by W. R. Bright, Esq., District Magistrate of Midnapur, dated the 28th of July 1896.

section 560 of the Criminal Procedure Code. The order for paying compensation was set aside on the ground that section 560 could only operate when there was a complete discharge or acquittal.

THIS was a reference to the High Court by the District Judge of Midnapur. The facts of the case and the grounds of reference appear from the following letter of reference :—

[54] "In this case Mukti Bewa complained against Jhotu Santra and others charging them with beating her and taking away her husuli. The case was referred to the police for enquiry, as I thought the charge of theft might be an exaggeration. The police sent the case up for trial under sections 379 and 147.

"The accused was convicted under section 352 and fined Rs. 2, but he was discharged, under section 253, of the accusation under section 379 and the complainant was fined Rs. 25 for bringing a false and vexatious charge. As the order appears to me to be of very doubtful legality, I think it necessary to refer the case to the Hon'ble Court. Section 560 of the Criminal Procedure Code, which takes the place of section 250 of the former Code, is intended as a means for summarily punishing persons who have brought false complaints without the necessity of recourse being had to section 211. By parity of reasoning it would seem that if a prosecution could not be instituted for bringing a false complaint under section 211, no order for compensation could be given under section 560.

"In cases similar to the one now under reference, a prosecution under section 211 would not be undertaken, as the case, at any rate, was partly true. Section 560 lays down that, if the Magistrate is satisfied that the accusation was frivolous and vexatious, he can grant compensation. Now, in this case the accusation was at any rate partly true. The complainant was at any rate beaten ; it cannot be said that the complaint was frivolous or vexatious unless the offences with which the accused was charged can be treated as different accusations and judged separately. In that case I should think that the Legislature would have certainly provided some clause like this : Where the accused is charged with one or more separate offences and the Court considers that any one of these is frivolous and vexatious he can grant compensation. It appears to me that the present procedure is a dangerous one. In the present case the complainant had suffered a wrong, at the utmost she had exaggerated the wrong really suffered, and the result is that she has had to pay Rs. 25 and has suffered her wrong too. Although such an order as the one under reference may have the effect of checking the common habit of embellishing assaults with charges of theft, at the same time it will undoubtedly act as a deterrent to the filing of complaints at all. A further point is this: section 560 was enacted in order to cover warrant cases and cases of accusations instituted otherwise than upon complaint, but so far as I know no other change was intended. Under section 250 the compensation now given could, I think, certainly not have been given, as the complaint was certainly not frivolous or vexatious, for at bottom, it was true.

"I would urge that as far as cases instituted upon complaint are concerned, section 560 has made no change except that in warrant as well as summons cases compensation can be given. The Deputy Magistrate has furnished an explanation. He has quoted three cases from the notes to his Criminal Procedure Code. The third case, Lala Baneshwar Sahai, Calcutta High Court, August 20, 1877, is unreported.

[55] "The first case, *Modhoosoodan Ghose* v. *Jayram Hazrah* (13 W. R., Cr., 39), would distinctly favour the Deputy Magistrate's contention, as it would appear to follow that the separate charges could be treated separately.

"The second case, *Gunamanee* v. *Haree Datta* (18 W. R., Cr., 6), seems to be in opposition to the previous ruling. But it is a case which is entirely on all fours with the present case. As regards the facts, though owing to the change in the law, compensation could, of course, now be given for a charge of theft, and the words in which the District Magistrate summed up the case then are equally applicable to the present case.

"The accusation of assault was not frivolous. The general accusation was not frivolous or vexatious though the specific charge of theft may have been false."

The **judgment** of the High Court (**Macpherson** and **Banerjee, JJ.**) was as follows:—

We agree with the view expressed by the District Magistrate, and consider that in a case like this section 560 can only operate when there is a complete discharge or acquittal. The order directing the complainant to pay compensation must, therefore, be set aside, and the amount, if realised, refunded.

S. C. B.

[24 Cal. 55]

FULL BENCH.

The 4th September, 1896.

PRESENT:

SIR W. COMER PETHERAM, KNIGHT, CHIEF JUSTICE, MR. JUSTICE O'KINEALY, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN AND MR. JUSTICE BANERJEE.

Protap Narain Singh and others............First party, Petitioners

versus

Rajendra Narain Singh and another............Second party, Objectors.

Possession, Order of Criminal Court as to—Criminal Procedure Code (Act X of 1882), section 145—Initial proceedings—Parties concerned—Adding parties during the course of the proceedings.

Before initiating proceedings under section 145 of the Criminal Procedure Code, it is the duty of the Magistrate not only to be satisfied that a dispute likely to cause a breach of the peace exists, but also to ascertain, as far as possible, who are concerned in the dispute. The Magistrate has no power to add parties during the course of the proceedings unless in the initial proceeding he is satisfied that they are concerned in the dispute. If in the course of the proceedings it appears to the Magistrate that it is absolutely necessary that **[56]** other parties should be required to attend, the only course open to him is to initiate a new proceeding.

Ram Chunder Das v. *Monohur Roy* (I. L. R., 21 Cal., 29) discussed.

THIS case was referred to a Full Bench by O'KINEALY, BANERJEE and HILL, JJ. It was a reference by the Sessions Judge of Bhagulpur submitting the case to the High Court under section 438 of the Criminal Procedure Code for orders.

The letter of reference of the Sessions Judge was as follows:—

"The present petitioners appear to have been parties with others to two proceedings taken under section 145, Criminal Procedure Code, before the Deputy Magistrate of Supoul at about the same time The proceedings in respect of which this application is made related

to land in Daharia, and the other case related to lands in Kusaha. The same persons were the parties in both cases. In this case the petitioners were made the first party and Rajendro Narain and others were made second party, and in the Kusaha case *vice versa.*

"Both cases were fixed for hearing about the same time, this case being fixed for the 24th January last, and the other case for the 27th January 1896.

"When this case was called on for hearing the petitioners had not their witnesses ready, but had their witnesses present in the case of Kusaha. They applied for an adjournment, alleging that they were under the influence of a *bonâ fide* mistake that the Kusaha case would be taken up that day, and the Daharia case on the 27th January. The Deputy Magistrate refused the application. Another petition was put in asking for a day's adjournment, which was also refused. The Deputy Magistrate disposed of the case after taking the evidence of the second party, Rajendro Narain, only. He examined the petitioner, Lachmi Narain, who said he had been misinformed by a servant as to the date, and he also examined the petitioner's mukhtear, who said he had known that the 24th January was the date fixed for the Daharia case, but his clients had not been to him to ask him.

"In support of this application it is urged that this case should be sent back to the Deputy Magistrate for further inquiry :—

(a) Because petitioners were under the influence of a *bonâ fide* mistake as to the date, and the Deputy Magistrate ought not to have refused their application for an adjournment;

(b) Because, when from the evidence of the other party it appeared that Jugdeo Jha was interested in the land as a proprietor, the Deputy Magistrate ought, following the ruling in *Ram Chunder Das* v. *Monohur Roy* (I. L. R., 21 Cal., 29), to have granted the application of the petitioners and to have issued a notice to Jugdeo Jha, so that the case might have been heard in his presence, or he might have had an opportunity, as a party to the proceeding, of putting in any objection ; and

[57] (c) Because the order contains no specification of the lands in dispute, and while the proceeding drawn up by the Deputy Magistrate specified 3 bighas in 2 plots as the lands in dispute, the witnesses for the other party gave evidence with regard to 16 or 17 bighas.

"In opposition it is urged that the objection to the trial on the 24th January was not *bona fide*, and that the petitioners' only object was to get the other case tried first, so that the other party might first give their evidence. But this argument cannot apply to the application for one day's adjournment.

"It is also urged that the land referred to in the proceedings of the Deputy Magistrate is included in the 16 or 17 bighas deposed to by the witnesses. This may be so, but there is no proof that it is the case.

"It is not improbable that the Deputy Magistrate is right in holding that the petitioners wished to harass the other party by frequent postponements, but I do not think that this was sufficient reason for his refusal to grant the one day's adjournment prayed for, and I am far from being satisfied that the petitioners were not under a *bona fide* mistake as to the dates fixed for the two cases. The description of the present case in the order sheet seems to have been confused in the course of the proceedings. In my opinion the Deputy Magistrate ought to have granted the adjournment prayed for, so as to have enabled the petitioners to produce their evidence.

"The objection based on the ruling in *Ram Chunder Das* v. *Monohur Roy* (I. L. R., 21 Cal., 29) is also valid. When it came to the knowledge of the Deputy Magistrate that Jugdeo Jha was interested in the lands in dispute he ought to have made him a party to the proceedings and issued a notice to him.

"And lastly the objection as to the discrepancy between the amount of the lands said to be in dispute in the proceedings and deposed to as being in dispute by the witnesses appears

to be a good one, and the absence of any specification of lands in the order leaves it in doubt whether the order refers to 3 bighas of land or 16 or 17 bighas.

"For the above reasons I do not think that the order of the Deputy Magistrate can be upheld, and I consider that a further inquiry into the case is necessary. The order of the Deputy Magistrate should, in my opinion, be set aside, and the case should be remanded to the Deputy Magistrate to make a further enquiry into the matter, and to proceed to dispose of the case according to law. Jugdeo Jha should be made a party to the proceedings and notice issued to him; and opportunity should be given to both the present parties to the proceedings to produce evidence to support their allegations that they are in possession of the 3 bighas of land, which from the proceeding of the Deputy Magistrate appear to be in dispute."

The material portion of the explanation of the Deputy Magistrate was as follows:

[58] "Regarding the ruling in *Ram Chunder Das* v. *Monohur Roy* (I.L.R., 21 Cal., 29), I beg respectfully to state that the said judgment lays down 'that it is the duty of the Magistrate on the materials before him to ascertain, so far as he can, who are the persons interested in, or claiming a right to, the property in dispute, and to give notice to them all, so that the whole matter, so far as his Court is concerned, may be disposed of in one proceeding.' When the proceedings were instituted by me, and even when written statements were filed by both parties, there was no mention either in the police report or in the pleadings of either party that Jugdeo was interested in the land. It was only when the case was taken up for final disposal that the fact came to my notice. I beg respectfully to submit that the ruling requires me to make parties only those persons who appear to be interested in the land in dispute from the materials before me before the case is actually taken up for final disposal. The case remained pending in my file for full three months, but never before the last day of hearing was it brought to my notice that Jugdeo was a party interested."

"Regarding the specification of the lands in dispute, I beg to state that as the descriptions of the land furnished by the parties and the Police were not satisfactory, I myself and both the parties went to the land in dispute together and fixed locally the boundaries of the land in dispute. Hence there could be no doubt about the identification of the land actually in dispute."

The ORDER of O'KINEALY, BANERJEE and HILL, JJ., referring the case to a Full Bench was as follows:—

This is a reference made by the Sessions Judge of Bhaugulpur under section 438 of the Code of Criminal Procedure.

The original case was one under section 145 of the Code, and was disposed of by the Deputy Magistrate of Supoul. The Judge in his reference recommends us to set aside the order of the Deputy Magistrate and remand the case to him to make a further enquiry into the matter and decide the case according to law. He further recommends that we should in conformity with the decision arrived at in the case of *Ram Chunder Das* v. *Monohur Roy* (I.L.R., 21 Cal., 29) direct the Deputy Magistrate to make one Jugdeo Jha a party to the proceedings and have the question of actual possession decided in his presence.

Admittedly there is evidence that Jugdeo Jha is interested in the land which is the subject of dispute, but not otherwise concerned with the dispute.

[59] The reference turns upon what is the meaning of the words "the parties concerned in such dispute" in the first part of section 145. Section 145 differs from the corresponding section of the previous Code of Criminal Procedure in so far as the words "the parties," which occur in section 145, were "all the parties" in the corresponding section of the previous Code. In the case of *Gobind Chunder Ghose* v. *Anundo Chunder Sircar* (18 W. R., Cr., 54), it was held that the only parties entitled to notice were those concerned in the dispute likely to cause a breach of the peace. In the case of *In the*

matter of the petition of Kunund Narain Bhoop (I. L. R., 4 Cal., 650) the same view was adopted, and it was further decided that there was no provision in the Code of Criminal Procedure allowing an intervenor to come in in the middle of the proceedings. In the case of *Obhoy Chandra Mookerjee* v. *Mohamed Sabir* (I. L. R., 10 Cal., 78) the same course of decisions was followed, and the Criminal Courts were directed not to lend themselves to the decision of matters of simple possession which were properly cognizable by Civil Courts, and also to take care that before they assumed jurisdiction to decide any question under section 145, the foundation of their jurisdiction, that is to say, a dispute likely to cause a breach of the peace, did exist. A different view of this section has been taken by another Divisional Bench of this Court in the case of *Ram Chunder Das* v. *Monohur Roy* (I.L.R., 21 Cal., 29), to which the Sessions Judge has drawn our attention in his letter of reference. In that case it was held that the words "the parties concerned in such dispute" are not limited to persons who are disputing, but include persons who are interested in, or claiming a right to, the property in dispute. It further laid down the ruling that it is the duty of a Magistrate to ascertain, as far as he can, on the materials before him, who are the persons interested in, or claiming a right to, the property in dispute, and to give notice to them all, so that the whole matter may be disposed of in one proceeding.

Two of the Judges constituting this Divisional Bench do not acquiesce in this extended meaning of the words "the parties concerned in such dispute." They think that the view taken by the Judges in the cases previous to the one last referred to is correct. One of the Judges of this Bench considers that the meaning [60] attached to those words in the case last referred to, that is, the case of *Ram Chunder Das* v. *Monohur Roy* (I.L.R., 21 Cal., 29) is correct. This Divisional Bench therefore refers the case to a Full Bench for such orders as to the said Full Bench may seem fit.

Babu *Umakali Mukerji* and Babu *Harendra Narayan Mitter* for the Second Party.

Babu *Saligram Singh* for the First Party.

Babu *Umakali Mukerji.*—Section 145 occurs in Part IV of the Criminal Procedure Code which deals with "Prevention of Offences." Therefore only persons actually disputing or offending against the public peace are meant to be included by the words "parties concerned" in section 145. The Magistrate has no power to introduce as party any person not mentioned in the preliminary proceedings: *Bechu Sheikh* v. *Deb Kumari Dasi* (I.L.R, 21 Cal., 404); nor can he allow intervenors to come in; *In the matter of the petition of Kunund Narain Bhoop* (I.L.R., 4 Cal., 650). In order to be made a party a person should have an interest in the subject-matter and be also actually disputing: *Gobind Chunder Ghose* v. *Anundo Chunder Sircar* (18 W. R., Cr., 54). The case of *Ram Chunder Das* v. *Monohur Roy* (I.L.R., 21 Cal., 29) does not lay down anything different. The words "forbidding all disturbance, &c.," have been construed to affect only the persons actually on the record; *In the matter of Gopal Burnawar* (3 B. L. R., A. Cr., 13), followed in *Queen-Empress* v. *Kuppayar* (I.L.R, 18 Mad., 51).

Babu *Saligram Singh, contra.*—The words "parties concerned" should be construed to mean those actually engaged in the dispute, as well as those interested in the result of the dispute. The final order of the Magistrate should not be restricted so as to affect only those persons who are mentioned in the initiatory proceedings: *Bechu Sheikh* v. *Deb Kumari Dasi* (I.L.R., 21 Cal., 404). The judgment of RAMPINI, J., in that case points out that the words "none of the parties" in section 146 were substituted for "neither of the

parties" in order to obviate the objection of AINSLIE, J., *In the matter of the petition of Kunund Narain Bhoop* (I.L.R., 4 Cal., 650). See also *Queen-Empress* v. *Gobind Chandra Das* (I.L.R., 20 Cal., 520).

[61] The **judgment** of the Full Bench (**Petheram, C. J., O'Kinealy, J., Macpherson, J., Trevelyan, J.,** and **Banerjee, J.**) was as follows :—

The main question in the reference by the Sessions Judge, and the only one which has occasioned the reference to a Full Bench, is whether the Deputy Magistrate ought to have issued a notice to Jugdeo Jha on the ground that he was interested in the land in dispute as a proprietor? We are clearly of opinion, not only that the Deputy Magistrate ought not to have issued such notice, but also that he had no power to issue such notice in the proceeding which was before him. Section 145 of the Criminal Procedure Code only empowers a Magistrate to decide whether any, and which, of the parties, upon whom a summons is served under the first paragraph of that section, is in possession of the subject of dispute.

The first paragraph of section 145 empowers the Magistrate to summon parties if he is satisfied that there is a dispute likely to cause a breach of the peace, and that they are concerned in such dispute. A number of consistent decisions of this Court have held that the Magistrate's jurisdiction to determine questions of possession is dependent upon his being satisfied that there is a dispute likely to cause a breach of the peace. It would follow from these authorities that the jurisdiction to require particular individuals to attend the proceedings would equally depend upon the Magistrate being satisfied that they were concerned in the dispute. The Magistrate's duty before he initiates proceedings is not only to be satisfied that a dispute exists but to ascertain as far as possible who are "concerned in the dispute" (an expression the meaning of which it is not necessary for us in the view which we take of the facts to determine in this case) so that they may be required to attend and the question of possession may be as far as possible settled.

There is no power during the course of the proceeding to add parties unless in the initial proceeding the Magistrate is satisfied that they are concerned in the dispute any more than there is a power to substitute parties.

If in the course of the proceeding it appears to the Magistrate that it is absolutely necessary that other parties should be required **[62]** to attend, and he is satisfied that they are concerned in the dispute, the only course open to him is, if he be empowered in that behalf, and he is satisfied that danger of breach of peace still exists, to initiate a new proceeding.

The actual decision in the case of *Ram Chunder Das* v. *Monohur Roy* (I. L. R., 21 Cal., 29) is not inconsistent with this view; but if the learned Judges in that case intended to hold that a Magistrate could, in the course of the hearing without a fresh initial proceeding, issue notices to parties concerned, we think the Judges were wrong in entertaining such an opinion.

In the present case Jugdeo Jha was a minor. Although it is said that he was interested in the land as proprietor, it does not appear to what extent, if any, he was concerned in or with the dispute and there was nothing before the Magistrate when he initiated the proceeding to indicate that Jugdeo Jha was concerned in the dispute in any sense of the words.

Two other small questions arise in this matter. First, whether the Magistrate ought to have postponed the case. Second, whether his order is indefinite. As to the first question the Sessions Judge considers that it is not improbable that the Deputy Magistrate is right in holding that the petitioners wished to harass the other party by frequent postponements. This is sufficient reason to justify us in refusing to interfere on this ground.

The remaining ground is disposed of by the third paragraph of the Deputy Magistrate's explanation.

In the result we decline to interfere.

S. C. B.

NOTES.

[In **(1902) 30 Cal.**, **155** a Full Bench of five Judges regarded this decision obsolete in view of the sub-section 3 of sec. 145 of the Criminal Procedure Code. "The Judgment of the Full Bench in *Protap Narain* v. *Rajendra Narain Singh*, 24 Cal., 55, is obsolete in consequence of the modification of the law by the enactment of sub-section (3) for the obvious object of directing a public notification to be made on the locality of the order in writing. Taking proceedings under s. 145 can have been only with the intention of enabling others than those personally served with such order to come in, if they are affected by the proceedings taken. As one of the referring Judges, I would here explain that the third point put to the Full Bench proceeded only on that Judgment being in force"—per PRINSEP, C.J. BANERJEE and HILL JJ., also made similar observations.

The third point was about the continuity of the proceedings, and it was held that the proceedings were continuous.

The '*parties concerned*' are not merely the parties disputing; 4 C.W.N., 753; 24 Bom., 527; see also (1900) 5 C.W.N., 900; (1901) 6 C.W.N., 101; 27 Cal., 892; 25 Cal., 423. The leading case now is **(1902) 30 Cal., 155.**]

[24 Cal. 62]

The 17th, 18th August and 4th September, 1896.

PRESENT:

SIR W. COMER PETHERAM, KNIGHT, CHIEF JUSTICE, MR. JUSTICE O'KINEALY, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN AND MR. JUSTICE BANERJEE.

Ishan Chunder Sirkar and another...........Objectors

versus

Beni Madhub Sirkar and another......(Judgment-Debtor) and Decree-Holder.*

Civil Procedure Code (Act XIV of 1882), section 244—Representative of judgment-debtor—Purchaser at execution sale—Purchaser's right to be heard in support of his objections to the sale.

[63] The term 'representative,' as used in section 244 † of the Code of Civil Procedure, when taken with reference to the judgment-debtor, does not mean only his legal representative, that is, his heir, executor or administrator, but it means his representative in interest, and includes a purchaser of his interest, who, so far as such interest is concerned, is bound by the decree.

There is no reason for excluding from its signification an execution purchaser of the judgment-debtor's interest.

* Full Bench Reference in Appeal from Appellate Order No. 34 of 1895.

Questions to be decided by Court executing decree. † [Sec. 244 :—The following questions shall be determined by order of the Court executing a decree and not by separate suit (namely)—

(a) questions regarding the amount of any mesne profits as to which the decree has directed inquiry;

(b) questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit, between the date of its institution and the execution of the decree, or the expiration of three years from the date of the decree;

(c) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree.

Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree.]

Held, therefore, by the Full Bench, that the cases of *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury* (I. L. R., 16 Cal., 355), and *Narain Acharjee* v. *Gregory* (8 W. R., 304), so far as they decide that a purchaser at an auction sale of the equity of redemption in mortgaged properties cannot come in in execution proceedings under a decree upon the mortgage as a representative of the judgment-debtor under section 244 of the Code, are not rightly decided.

THIS case was referred to a Full Bench by PIGOT and STEVENS, JJ., on the 10th September 1895, with the following opinion:—

The appellant on the 4th November 1889 purchased one of the mortgaged properties at a sale in execution of a money-decree against the judgment-debtor. In July or August 1890 the decree-holder applied for execution of the mortgage decree by sale in the first instance of the property purchased by the appellant. On the appellant's objection, the Court then ordered that all the mortgaged properties should be sold together; after this the execution case was struck off. In July 1894 a fresh application for execution was made by the decree-holder; a sale proclamation was issued for sale in three lots, the property purchased by the appellant being mentioned as the first to be sold. The appellant objected, and this application was rejected on the ground that he has no *locus standi*, as he is not a "representative" within the meaning of section 244.

In *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury* (I. L. R., 16 Cal., 355) it has been held with reference to proceedings in execution of a mortgage decree, that a purchaser of the mortgagor's rights in the mortgaged property at a sale in execution of a money-decree is not a representative within the meaning of section 244; and in the present case the lower Courts have relied on the case of *Narain Acharjee* v. *Gregory* (8 W. R., 304) in support of the order made.

Were the question *res integra* we should hold that the appellant was entitled to come in under section 244. It is certain that he [64] has an interest in the property, the subject-matter of the proceedings; that that interest is derived from the judgment-debtor, albeit through sale in *invitum;* and that that interest will be bound by the proceedings, possibly at any rate to his prejudice. If so, it would be difficult to refuse him the right to bring a suit, however unprofitable it might be for him to do so having regard to the time that must elapse before he could get a hearing.

On the other hand, the object of section 244 is to prevent multiplicity of suits, and with that object it has been declared by the Judicial Committee that the section should receive a liberal interpretation as to the scope of its provisions.

We, therefore, refer to a Full Bench the question whether the cases of *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury* (I. L. R., 16 Cal., 355), and *Narain Acharjee* v. *Gregory* (8 W. R., 304), so far as they decide that a purchaser at an execution sale of the equity of redemption in mortgaged properties, cannot come in in execution proceedings under a decree upon the mortgage as a representative of the judgment-debtor under section 244, are rightly decided.

Dr. *Rash Behari Ghose* and Babu *Degumber Chatterji* for the Appellant.

Babu *Karuna Sindhu Mukerji* for the decree-holder, Respondent.

Dr. *Rash Behari Ghose.*—The case of *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury* (I. L. R., 16 Cal., 355) draws a distinction between a purchaser at a sale in execution of a decree and a purchaser who buys the property under a conveyance by the judgment-debtor. [PETHERAM, C.J.—The appellant bought one of these properties, and now that all the properties are going to be

sold in satisfaction of the mortgage decree, the property he bought is put up for sale first. Is that his objection?]. That is one objection. And he also wants to be put on the record. [PETHERAM, C.J.—You want to try under section 244 some questions arising between the parties to the suit in which the decree was passed or their representatives. Does the mere fact that you show that you are a purchaser of some portion of the property entitle you to be put on the record? Would it not be necessary to make an application [65]—not under section 244—to have the objector added as a party under the substitution section?] He wants to come on the record under section 372. [O'KINEALY, J.—It has been held that that section does not apply to execution proceedings.] That is only in the case of an execution of a decree for money. But where there is a mortgage decree the suit continues so long as the property is not sold and the money is not realised by the mortgagee. [PETHERAM, C.J.—The question comes to this—whether a purchaser of mortgaged property has a *locus standi* to be heard in the execution proceedings merely because he is a purchaser.] Or whether he ought to be placed on the record for that purpose. [PETHERAM, C.J.—We are not asked that.] PIGOT and STEVENS, JJ., practically decided that when they held that the objector had a right to appeal. [O'KINEALY, J.—They did not decide that; they referred it. BANERJEE, J.—If they have decided that question, what are we called upon to decide?] My contention is that the Court must now take it, having regard to the course the proceedings have taken, that the objector made an application to be added as a party. [O'KINEALY, J.—We have it on the record that he made none. Suppose section 372 applies, there can be only one appeal and that under section 588] That is so. But PIGOT and STEVENS, JJ., treated it as a second appeal. [TREVELYAN, J.—So far as I know, section 372 has been invariably held, on the Original Side of this Court, not to apply to anything after decree.] But for some purposes a suit may still under section 372 be treated as a pending suit even after a decree has been made—*Gocool Chunder Gossamee* v. *Administrator-General* (I. L. R., 5 Cal., 726 : 5 C. L. R., 569), and the order of PIGOT and STEVENS, JJ., affirming the right of the objector to a second appeal is an order which is still in existence. [O'KINEALY, J.—No, it is not. When a case is referred to a Full Bench the whole case must be decided, and nothing can be kept back. PETHERAM, C.J.—Section 244 provides that the questions between the parties or their representatives shall be decided in the execution procedings. As I understand, it has been held that section 372 does not apply after decree. It may possibly be open to you to contend that if section 372 does not apply, the representatives must [66] have a *locus standi* under section 244, although they have not been brought on the record. And that is what the learned Judges may have meant.] Possibly. But the only question now for the Court is whether the case of *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury* (I. L. R., 16 Cal., 355) has been rightly decided. [PETHERAM, C.J.—This case raises a question mentioned in section 244, and therefore comes within the definition of a decree in section 2 of the Code.] Yes. This is not an order by which anything is decided beyond the mere question of procedure. [PETHERAM, C.J.—What do you ask this Court to do?] I ask the Court to decide that the appellant has a *locus standi* to be heard, and to give him the opportunity of being heard which has been denied him. It cannot be contended that he would not be bound by proceedings taken by the decree-holder for the purpose of enforcing the mortgage.

It is quite clear that a purchaser under a compulsory sale is bound by the principle of *lis pendens* in precisely the same manner as a purchaser under a voluntary conveyance,—*Radha Madhub Haldar* v. *Monohur Mukerji* (I. L. R.,

15 Cal., 756: L.R., 15 I.A, 97); *Raj Kissen Mookerjee* v. *Radha Madhub Haldar* (21 W.R., 349); *Lala Kali Prosad* v. *Buli Singh* (I.L.R., 4 Cal., 789); *Jharoo* v. *Raj Chunder Dass* (I L R., 12 Cal., 299); *Gobind Chunder Roy* v. *Guru Churn Kurmokar* (I.L.R., 15 Cal., 94); *Ram Chundra Kolatkar* v. *Mahadiji Kolatkar* [I.L.R., 9 Bom., 141 (145)]; *Kishan Lal* v. *Ganga Ram* [I.L.R., 13 All., 28 (51)]. [TREVELYAN, J.—Your argument comes to this, that every purchaser of an interest before decree is entitled to come in after decree and ask to be made a party before the sale comes on.] Yes, it must go to that. [PETHERAM, C.J.—I should have thought that the question was, what was the mischief which section 244 was intended to prevent? I should have thought that that mischief was multiplicity of litigation. Why should not a man who owns part of the property affected be a representative *quoad* that part of the property?] The case of *Narain Acharjee* v. *Gregory* (8 W.R., 304) is clearly distinguishable. There the Court was not dealing with [67] a mortgage decree at all; it was only a decree for a sum of money. There was, therefore, no question of *lis pendens*. A person in the position of the appellant must be entitled either to come in and be made a party or to bring a separate suit; and of these two courses the more convenient and proper is to be made a party, because that would prevent multiplicity of suits. [O'KINEALY, J.--Apparently under section 91 of the Transfer of Property Act, a fractional owner has the right to redeem.] Yes. The question referred to the Court, is, in effect, whether the rule which confessedly holds good in the case of a voluntary purchaser applies also to an auction-purchaser. I contend that the purchaser of an equity of redemption is the representative of the mortgagor. There is no authority to the contrary; and there is no reason for making any distinction in this respect between the two classes of purchasers. In the case of *Enayet Hossain* v. *Girdharee Lall* [12 Moo. I. A., 366 (378): 2 B.L.R., P.C., 75 (78)] it is expressly laid down that "In the opinion of their Lordships, there is no foundation in principle or authority for any such distinction," *i.e.*, any distinction to be made in favour of a person claiming under an execution sale as contradistinguished from the representatives of any person claiming under an ordinary assignment or conveyance. True, their Lordships were there dealing with a question of limitation; but the principle is equally applicable here. And this proposition is not affected by the decision in the case of *Dinendro Nath Sannial* v. *Ram Kumar Ghose* (I.L R., 7 Cal., 107: L.R., 8 I.A., 65). A purchaser at a sale in execution of a decree has been held to be a "representative in interest" of the judgment-debtor within the meaning of section 21 of the Evidence Act, -*Unnopoorna Dassee* v. *Nufur Poddar* (21 W. R., 148).

On the question of adding parties, it is clear that persons whose interests are affected may be made parties under section 372, *Ahmedbhoy Hubibhoy* v. *Vullabhoy Cassumbhoy* (I. L. R., 8 Bom., 323), *Rabbaba Khanum* v. *Noorjehan Begum* (I.L. R., 13 Cal., 90). On the 15th September 1890 the appellant objected that his share of the property should not be sold first. His objection was allowed, and an order was made that the whole of the property should be sold together. So that [68] he was recognised as having a right to appear and be heard; and both sides were heard. And that order was not appealed from.

Babu *Karuna Sindhu Mukerji* for the respondent, the assignee of the mortgage decree.—The objector is not a representative within section 244 of the Code. Clause (*c*) of the section mentions, as questions that may be determined under that section, "questions between the parties to the suit *or*" (not *and*) "their representatives." That contemplates the death of the judgment-debtor, and shows that the legislature meant "personal representatives," some one who fully represents the estate and would be bound by any orders made. The last clause of the section also has the same meaning and intent. It does

not include a purchaser, whether he purchased privately or in execution of a decree. In other words, the Legislature points to those against whom the decree is to be executed; and those persons are mentioned in sections 231, 232 and 234 of the Code. They are the persons contemplated in the case of *Narain Acharjee* v. *Gregory* (8 W. R., 304) which is not really distinguishable.

As to adding parties after decree, that cannot be done. A fresh suit must be brought, *Goodall* v. *Mussoorie Bank* [I L R., 10 All., 97 (105)], [PETHERAM, C.J.—That was not a suit on a mortgage decree. And the decision is based on the argument that after decree no suit is pending.] That is so. Parties cannot be added after final judgment, though they may be added at any time before it,—*Attorney-General* v. *The Corporation of Birmingham* (L. R., 15 Ch. D., 423), Annual Practice, 1896, p. 368. The present proceedings for sale of the property cannot be considered a continuation of the original suit. [PETHERAM, C.J.--But if the suit and the decree in it may be for some purposes treated as in existence, how can you say there is no suit pending?] I contend that so far as the mortgaged properties are concerned, when the order absolute is made under section 89 of the Transfer of Property Act, the mere fact that the decree-holder may get another decree sometime afterwards is no reason why the decree should not be treated as the final decree in the suit. The words "pending the suit" in [69] section 372 of the Code relate to a suit in which no final order has been made, - *Gocool Chunder Gossamee* v. *Administrator-General* (I. L. R., 5 Cal., 728 : 5 C. L. R., 569). The word "representative" as used in clause (c), section 244 of the Code, only means any person who succeeds to the right of any of the parties to the suit after the decree is passed—*Kameshwar Persad* v. *Run Bahadur Singh* (I. L. R., 12 Cal., 458). Again, how can it be said that the objector is a representative on the record? He never applied to be put on. The mere fact that he made objections in the lower Court does not entitle him to be treated as a representative on the record. As his name was not on the record it is impossible to say that he ever became a representative of any party to the suit, within the meaning of section 244, clause (c) of the Code; *Halodhar Shaha* v. *Harogobind Dass Koiburto* (I. L. R., 12 Cal., 105).

There are many cases where a distinction has been drawn between a voluntary purchaser and a purchaser at an execution sale; for instance, *Dinendro Nath Sannyal* v. *Ramcoomar Ghose* (I. L. R., 7 Cal., 107 : L. R., 8 I. A., 65); and it has also been held that a purchaser at a Court sale is not a party or the representative of a party within the meaning of section 244 of the Code; *Vishvanath Chardu Naik* v. *Subraya Shivapa Shetti* (I. L. R., 15 Bom., 290); *Hira Lal Chatterjee* v. *Gourmoni Debi* (I. L. R., 13 Cal., 326).

Dr. *Rash Behari Ghose* in reply.

C. A. V.

The **judgment** of the Full Bench was delivered by **Banerjee, J.**, (**Petheram, C.J.**, and **O'Kinealy, Macpherson** and **Trevelyan, JJ.** concurring).

The respondent in this appeal is the assignee of a mortgage decree ordering sale of the mortgaged properties. The appellant is the purchaser of one of the mortgaged properties at a sale in execution of a money decree against the mortgagor, the date of his purchase being subsequent to that of the mortgage decree.

Upon a previous application by the respondent for execution of [70] the decree by sale of the property purchased by the appellant, the Court on the appellants' objection ordered that all the mortgaged properties be sold together; and after that order, the execution case was struck off.

A fresh application for execution having been now made, a sale proclamation was issued for sale in the three lots, the property purchased by the appellant being mentioned as the first to be sold. The appellant objected, and his objection was rejected by both the Courts below on the ground that he has no *locus standi* under section 244 of the Code of Civil Procedure.

Against that decision of the Courts below this appeal has been preferred; and the learned Judges before whom the appeal came on for hearing were of opinion that the decision was wrong. But as it is supported by the rulings of this Court in the cases of *Narain Acharjee* v. *Gregory* (8 W. R., 304), and *Gour Sunder Lahiri* v. *Hem Chunder Chowdhury* (I. L. R., 16 Cal., 355), they have referred the matter to a Full Bench.

The referring order, it is true, refers to the Full Bench only the question "whether the cases of *Gour Sunder Lahiri* v. *Hem Chunder Chowdhury* and *Narain Acharjee* v. *Gregory*, so far as they decide that a purchaser at an execution sale of the equity of redemption in mortgaged properties cannot come in execution proceedings under a decree upon the mortgage as a representative of the judgment-debtor under section 244, are rightly decided," whereas under Rule II of the Rules of the Court relating to Full Bench References (Chapter V of the Rules of this Court as published in 1891), the whole appeal ought to have been referred to it; but that does not make any difference in this case, seeing that the question referred to us is the only material question in the appeal, and the determination of the appeal depends upon the determination of that question. If the appellant is the representative of the judgment-debtor within the meaning of section 244 (*c*), then as the questions raised by him in the first Court were questions relating to the execution of the decree, they must be determined by that Court, and he is clearly entitled to be heard. If, on the other hand, he is not a representative of [71] the judgment-debtor within the meaning of that section, this appeal will fail as well on the merits as on the preliminary ground that no appeal lies.

The answer to the question stated in the reference, and the decision of this appeal, depend upon the meaning of the word 'representative' as used in section 244 with reference to the judgment-debtor. It may have only the meaning ordinarily attached to the expression 'legal representative;' that it includes only the heir, executor or administrator of the judgment-debtor, but not the purchaser of the judgment-debtor's interest, whether the purchase is made at a private sale or at an execution sale, as was held by the Allahabad High Court in *Zauki Lal* v. *Jawahir* (I. L. R., 5 All., 94), and *Jagat Narain* v. *Jagrup* (I. L. R., 5 All., 452); or it may mean a representative in interest, and include a purchaser of the judgment-debtor's interest who, so far as that interest is concerned, is bound by the decree, whether the purchase is made at a private sale or at an execution sale, as was observed by PONTIFEX, J., in *Rash Behary Mookhopadhya* v. *Surnomoyee* (I. L. R., 7 Cal., 403); or it may have a meaning intermediate between these two, being neither so narrow as the former, nor quite so broad as the latter, that is, it may mean a representative in interest and include a purchaser at a private sale of the judgment-debtor's interest who is bound by the decree, but not a purchaser at an execution sale, as was held by this Court in *Gour Sunder Lahiri* v. *Hem Chunder Chowdhury* (I. L. R., 16 Cal., 355). One thing, however, is clear; even if the word has either of the two comprehensive meanings and includes a purchaser of the interest of the judgment-debtor, such a purchaser must be one who is affected by the decree; but a purchaser of the interest of a party to a suit who is not affected by the decree cannot in any sense be regarded as a representative of that party within the meaning of section 244. Upon this point the authorities are all at one—see *Rash Behary Mookhopadhya* v. *Surnomoyee*

(I.L.R., 7 Cal., 403), *Zauki Lal* v. *Jawahir* (I.L.R., 5 All., 94), *Shivram Chintaman* v. *Jivu* (I.L.R., 13 Bom., 34). And this is conceded in the argument on behalf of the appellant, which proceeded on the assumption that the appellant as [72] purchaser of part of the mortgaged property after the passing of the mortgage decree was bound by that decree.

The questions that arise for consideration, therefore, are—

First.—Whether the term 'representative' as used in section 244 when taken with reference to the judgment-debtor means only his legal representative, that is his heir, executor or administrator, or whether it means his representative in interest and includes a purchaser of his interest who, so far as such interest is concerned, is bound by the decree; and,

Second.—Whether, if the term has this latter meaning, there is any reason for excluding from its signification an execution purchaser of the judgment-debtor's interest.

As to the first question, one reason for taking the term in its limited sense as including only the heir, executor or administrator, is thus stated by OLDFIELD, J., in his judgment in *Jagat Narain* v. *Jagrup* (I. L. R, 5 All., 452):— "In my opinion the word representative used in section 244 was not intended to include purchasers of a judgment-debtor's property. We find special provision in the Code for enabling transferees of decrees by assignment or operation of law to execute their decrees by section 232, and for a decree-holder to execute a decree against the legal representative of a deceased judgment-debtor (section 234). Had it been intended to give power to execute a decree against an assignee of a judgment-debtor, some similar provision to that in section 234 would probably have been made to effect that object, and its omission, coupled with the fact which is significant that 'legal representatives' as used in section 234 is confined to the heirs of a deceased judgment-debtor, may lead to the inference that the word 'representative' in section 244 has no more extended meaning than heir, devisee or executor, which also is the proper signification." Another reason in favour of the same view is said to be founded on the inconvenience which would result if the opposite view were held to be correct, and the purchaser of any small portion of the judgment-debtor's property were held entitled to come in as a representative of the judgment-debtor.

[73] These reasons are no doubt entitled to consideration. But it should be borne in mind that it is not every purchaser of the judgment-debtor's property that is sought to be included in the term "representative" of the judgment-debtor under section 244. It is only where the purchaser of the judgment-debtor's property is, so far as such property is concerned, bound by the decree that the purchaser according to the appellant's contention should be held to come within the meaning of the term, and in such a case it is difficult on principle to maintain that the purchaser is not a representative in interest of the judgment-debtor, or to deny him a hearing if he has any objection to urge against the execution. He is bound by the decree and is affected by the execution proceedings so far as they relate to the property purchased by him; while, on the other hand, the party who stands on the record as the judgment-debtor may be wholly unconcerned so far as the execution goes against such property, for the simple reason that he has no longer any interest in it. In such a case the execution is really proceeding against the purchaser, though nominally against the judgment-debtor on the record; and to allow it to go on without hearing the objections of the purchaser when he may be prepared to show that execution ought not to proceed as prayed, by reason of the decree being barred or satisfied, or for any other good reason, would be to take a course fraught with such manifest hardship to the purchaser that I should hesitate to affirm it as correct, unless the law was quite clear on the

point. But is the law so clear? I cannot say that it is. The Code of Civil Procedure in section 244 uses the term 'representative,' which may well include a 'representative in interest,' that is, a purchaser of the interest of the judgment-debtor in any property, which is affected by the decree, and this is the view taken by Mr. Justice PONTIFEX in *Rash Behary Mookhopadhya* v. *Surnomoyee* (I.L.R., 7 Cal., 403). The only case in this Court to which our attention has been called as apparently taking the opposite view is that of *Narain Acharjee* v. *Gregory* (8 W. R., 304); but upon examination that case does not appear to be one in point. There the decree sought to be executed was, as the Court found, a mere money decree, and the purchaser, **[74]** who was held not to be a party to the suit nor the personal representative of a party, and therefore not entitled under section 11 of Act XXIII of 1861 to appeal against the order of the lower Court disallowing his objection, was a purchaser of the interest of the judgment-debtor in certain property not covered by the decree. As for the case of *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury* (I.L.R., 16 Cal., 355), though it decides that an execution purchaser of the judgment-debtor's interest is not his representative within the meaning of section 244, yet it also expressly decides that a purchaser of the judgment-debtor's interest of a private sale is. I may add here that the object of section 244 being to prevent multiplicity of litigation, it should, as has been observed both by this Court and by the Privy Council—see *Punchanan Bandopadhya* v. *Rabia Bibi* (I.L.R., 17 Cal., 711 (718)) and *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (I. L. R., 19 Cal., 683)—receive a liberal interpretation.

Thus, while the balance of authority in this Court, if not decidedly in favour of, is certainly not opposed to, the view that a purchaser of the judgment-debtor's interest, who so far as that interest goes is bound by the decree, is his representative within the meaning of section 244, the balance of reason is clearly in favour of that view.

It remains now to consider whether there is any valid reason for limiting the signification of the term 'representative' so as to exclude an execution purchaser of the judgment-debtor's interest. As far as I can see there is no distinction in principle between the case of a purchaser of the judgment-debtor's interest at a private sale and that of a purchaser of his interest at an execution sale, so long as they are both bound by the decree in regard to the interest acquired by purchase. At one time there was some conflict of opinion as to the application of the doctrine of *lis pendens* to the case of the latter [see the case of *Gourmoney* v. *Read* (2 Taylor & Bell, 83), referred to in the judgment of this Court in *Rajkishen Mookerjee* v. *Radha Madhub Holdar* (21 W. R., 349)]. But the question must now be taken to be practically settled by the decision of the Privy Council in *Radha Madhub Holdar* v. *Monohur Mukerji* (I. L. R., 15 Cal, 756 : L. R., 15 I. A., 97), and it must be held that an execution purchaser **[75]** is bound by the doctrine of *lis pendens* quite as much as a purchaser at a private sale. The appellant made his purchase after the decree in the mortgage suit and before it was satisfied. His purchase is therefore subject to the rights created by the decree. But it is not necessary to discuss this point any further, as there is no question raised on either side as to the appellant being bound by the decree, and the arguments on both sides proceeded on the assumption that his purchase was subject to the rights created by the decree.

Of the two cases mentioned in the referring order I have already considered one, namely, the case of *Narain Acharjee* v. *Gregory* (8 W. R., 304), and that is clearly distinguishable from the present. The other case, namely, that of *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury* (I. L. R., 16 Cal., 355), is no doubt in point, and requires examination. The ground of decision, so far as

the point under consideration is concerned, is stated by the learned Judges in their judgment in these words: "The plaintiff Hem Chunder Chowdhury is a purchaser in execution of a money decree against the mortgagors. He is consequently not a voluntary purchaser, and as has been held by their Lordships of the Judicial Committee of the Privy Council, his title is not one of privity with the mortgagors, but in some respects adverse to them. We think, therefore, that he cannot be considered as a representative of the judgment-debtors, mortgagors within the terms of section 244. The cases to which we refer are *Dinendro Nath Sannial* v. *Ram Kumar Ghose* (I. L. R., 7 Cal., 107: L. R., 8 I. A., 65), and *Anandmayi Dasi* v. *Dharandra Chandra Mukerji* (8 B. L. R., 122: 16 W. R. P. C., 19), and we may also refer *Lala Prabhu Lal* v. *Mylne* (I. L. R., 14 Cal., 401)."

It is true that an execution purchaser makes his purchase, not from the judgment-debtor and often against his wish, and he is not bound by some of the acts of the judgment-debtor, such as alienations made by the latter to defeat the decree; but that does not show that his rights are not derived from the judgment-debtor, or that he is not the representative in interest **[76]** of the judgment-debtor in any sense or for any purpose. Even a purchaser at a private sale is not bound by any prior alienation made by the vendor to defraud him (see section 53 of the Transfer of Property Act); but that does not show that such purchaser is not a representative in interest of the vendor. As for the cases relied upon in the judgment in *Gour Sunder Lahiri* v. *Hem Chunder Chowdhury* (I. L. R., 16 Cal., 355), the two Privy Council decisions do not in my opinion afford any basis for the broad proposition deduced from them. The first mentioned case, *Dinendro Nath Sannial* v. *Ram Kumar Ghose* (I. L. R., 7 Cal., 107: L. R., 8 I. A., 65), decides that the rights of a purchaser at a sale in execution of a decree are in some respects superior to those of a purchaser at a private sale, the former acquiring the property freed from all alienations or incumbrances effected by the judgment-debtors subsequently to the attachment in execution of decree. In the second case, that of *Anandmayi Dasi* v. *Dharandra Chandra Mukerji* (8 B. L. R., 122: 16 W. R., P. C., 19), their Lordships say "that the title of a judgment-creditor, or a purchaser under a judgment-decree, cannot be put on the same footing as the title of a mortgagor, or of a person claiming under a voluntary alienation from the mortgagor," and they hold "that the possession of a purchaser under such circumstances is really not the possession of a person holding in privity with the mortgagor or holding so as to be an acknowledgment of the continuance of the title of the mortgagor."

These cases only show that the rights of an execution purchaser are in some respects different from those of a purchaser at a private sale; but because that is so, it does not follow that the execution purchaser is not to be regarded as a representative in interest of the judgment-debtor even in those respects in which, and for those purposes for which, his rights are no higher than those of the judgment-debtor whose right, title and interest he has purchased; where, as in this case, it is admitted that the purchaser at a sale in execution of a money decree is bound by the mortgage decree sought to be executed, in the same way as the judgment-debtor is bound, it is difficult to understand **[77]** why he should not be treated as a representative in interest of the judgment-debtor.

The third case relied upon in the judgment in *Gour Sunder Lahiri* v. *Hem Chunder Chowdhury* (I. L. R., 16 Cal., 355), namely, that of *Lala Prabhu Lal* v. *Mylne* (I. L. R, 14 Cal., 401), does not require any detailed examination, as it is based chiefly upon the two Privy Council decisions just referred to.

On the other hand, in the recent case of *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (I. L. R., 22 Cal., 909), their Lordships of the Privy Council have held that the equitable principle of estoppel laid down in the case of *Ram Coomar Koondoo* v. *Macqueen* (11 B. L. R., 46: 18 W. R., 166), which applies to any person is equally binding on the purchaser of his right, title and interest at a sale in execution of a decree.

For the foregoing reasons I am of opinion that the question stated in the referring order should be answered in the negative, and that the appellant should be held entitled to be heard in support of his objections as a representative of the judgment-debtor within the meaning of section 244 (*c*) of the Code of Civil Procedure.

I would accordingly decree this appeal with costs, set aside the orders of the Court below, and send the case back to the first Court with directions to hear and determine the objections urged by the appellant.

H. W.

NOTES.

[' REPRESENTATIVES '—

The term '*legal representative*' is defined in the C. P. C., 1908, sec. 2, cl. 11. For the purposes of sec. 244, C. P. C., 1882 ; (sec. 47 C. P. C., 1908) the term '*representative*' was interpreted in several cases.

"To determine whether a particular person is a representative of a party to the suit, the two tests to be applied are, *first*, whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit, has, by act of parties, or by operation of law, vested in the person who is sought to be treated as representative ; and, *secondly*, if there has been a devolution of interest, whether so far as such interest is concerned, that person is bound by the decree" :—(1909) 9 C. L. J., 485 *per* MOOKERJEE, J.

It has been held that the purchaser is bound by the estoppel binding on the judgment-debtor, etc. :—(1909) 10 C.L.J., 150 ; (1907) 7 C.L.J., 644.

The question of *onus* is not affected by the representative character :—(1900) 5 C.W.N., 403 ; (1907) 6 C.L.J., 659.

The following persons were held to be representatives on the test of being bound by the decree :—

(*a*) purchaser at execution sale :– (1902) 29 Cal., 813 ; (1902) 7 C.W.N., 54 ; (1907) 30 Mad., 507 . 17 M.L.J., 291 :
(*b*) purchaser at private sale :–(1904) 26 All., 447 ;
(*c*) alienee from the judgment-debtor pending attachment .—(1900) 28 Cal., 492 ;
(*d*) assignee from the decree-holder :—(1898) 26 Cal., 258 ; (1901) 28 Mad., 87 ;
(*e*) mortgagee-purchaser :—(1901) 25 Mad., 529;
(*f*) decree-holder-purchaser .—(1908) 31 All., 82 ;
(*g*) auction-purchaser at a sale on the second mortgage *even before confirmation*, in a suit on the first mortgage . –(1907) 11 C.W.N., 195 :
(*h*) subsequent mortgagee who had foreclosed .—(1913) 41 Cal., 418 ;
(*i*) persons taking joint-family property by survivorship :—(1906) 11 C.W.N., 163 : 5 C.L.J., 80 ;
(*j*) the Mitakshara son bound by the decree against the father . –(1909) 9 C.L.J., 485 ;
(*k*) persons who are bound by a decree when the party holds a representative character, *e.g.*, manager of a joint family :–(1901) 24 Mad., 689 ; (1904) 8 C. W. N., 843 ;
(*l*) unregistered transferee prior to rent-decree against the transferor when he is bound by the decree .—(1904) 9 C.W.N., 134 ; (1905) 32 Cal., 1031 : 9 C.W.N., 824 ; (1905) 10 C W.N., 240 ; (1906) 11 C.W.N , 312 ; (1908) 13 C.W.N., 98 : 8 C.L.J., 327, *contra* (1901) 6 C.W.N., 127.

But the following were not held to be representatives :—

(*a*) alienee in questions disputed with his transferor whether decree-holder or judgment-debtor :- (1908) 31 All., 82 F.B. ; (1899) 27 Cal., 264 ;
(*b*) rival attaching creditors :– (1906) 11 C.W.N., 433 : 6 C.L.J., 437 ;
(*c*) attaching creditor : –*ibid* ;
(*d*) previous alienee in simple money-decrees :—(1911) 15 C.W.N., 711 ; (1912) 14 I.C., 40 (Punj.).]

[24 Cal. 77]

APPELLATE CIVIL.

The 22nd July, 1896.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Sheo Shankar Gir............Plaintiff

versus

Ram Shewak Chowdhri and others............Defendants.[1]

Hindu law—Endowment—Alienation by de facto *Manager of an endowment—Limitation Act (XV of 1877), Schedule II, Art. 91.*

The principles of *Hunooman Persaud Pandey's* case (6 Moo. I. A., 393) apply to the alienation of property by the *de facto* manager of an Hindu endowment.

Unni v. *Kunchi Amma* (I. L. R., 14 Mad., 26) and *Sikher Chund* v. *Dulputty Singh* [I. L. R., 5 Cal., 363 (370)], cited.

[78] The possession of such manager cannot be treated as adverse to the endowment.

Sembie.—Article 91* of Schedule II of the Limitation Act (XV of 1877) has no application to a suit to set aside such alienation.

THIS was a suit by the mohunt of a religious endowment for recovery of an endowed property alienated by one Balraj Gir, a previous mohunt, and for a declaration that the deed of sale under which the alienation was made was invalid, collusive and ineffectual. One of the pleas taken in defence was that the suit was barred by limitation, and the principal point of law discussed in appeal was the question of limitation. The suit was instituted on the 3rd December 1892. The facts and pleadings are sufficiently given in the judgment of the High Court.

The plaintiff appealed to the High Court.

Mr. *W. C. Bonerjee* and Babu *Umakali Mukerjee* for the Appellant.

Mr. *Jackson* and Babu *Lakshmi Narayan Singha* for the Respondents.

Mr. *Bonerjee*.—The suit is not barred by the three years' rule in the Limitation Act. Article 91 of Schedule II has no application to the present claim, as the cancellation of the deed of sale is not essential. *Unni* v. *Kunchi Amma* (I. L. R., 14 Mad., 26) following the principle laid down in *Sikher Chund* v. *Dulputty Singh* [I.L.R., 5 Cal., 363 (370)] is in point. See also *Sundaram* v. *Sethammal* (I.L.R., 16 Mad., 311), *Abdul Rohim* v. *Kirparam Daji* (I.L.R. 16 Bom., 186). [TREVELYAN, J., referred to a judgment recently delivered—Regular Appeal 103 of 1893, decided 3rd July 1896.] That case lays down that it is to be seen in each case whether cancellation of the deed is an essential element. The plea of adverse possession is also unfounded. *Mulji Bhulabhai* v. *Manohar Ganesh* (I. L. R., 12 Bom., 322).

Mr. *Jackson* for the Respondents.—Balraj after his deposition held the property without any title; he was therefore in adverse possession from 1873. The first *zaripeshgi* was in 1866; that [79] was never paid off, and the

[1] Appeal from Original Decree No. 264 of 1894, against the decree of Babu Amrita Lal Chatterjee, a Subordinate Judge of Tirhoot, dated the 30th of June 1894.

* [Art. 91:—

Description of suit.	Period of limitation.	Time from which period begins to run.
To cancel or set aside an instrument not otherwise provided for.	Three years ...	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.]

possession of the defendants as *zaripeshgidars* also became adverse. The case of *Mulji Bhulabhai* v. *Manohar Ganesh* (I.L.R., 12 Bom., 322) is not good law, it gives a fresh start to the successor. As to Art. 91, the plaintiff in this case cannot succeed without setting aside the deed of sale. The Mohunt, Balraj, was not a stranger, and his acts are valid so long as they are not set aside. The plaint and issues show that cancellation is essential in this case. *Mahabir Pershad Singh* v. *Hurrihur Pershad Narain Singh* (I. L. R., 19 Cal., 629). The Full Bench case of *Meda Bibi* v. *Imaman Bibi* (I. L. R., 6 All., 207) supports this view. See also *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chowdhri* (I. L. R., 13 Cal., 308); *Raghubir Dyal Sahu* v. *Bhikya Lal Misser* (I. L. R., 12 Cal., 69); and *Janki Kunwar* v. *Ajit Singh* (I. L. R., 15 Cal., 58: L. R., 14 I. A., 148). The cases of *Unni* v. *Kunchi Amma* (6 Moo. I. A., 393) and *Sundaram* v. *Sethammal* (I. L. R, 16 Mad., 311) were of a different nature. *Hasan Ali* v. *Nazo* (I. L. R., 11 All, 456) and *Radhabai* v. *Anantrao Bhagvant Deshpande* [I. L. R., 9 Bom., 198 (231)] were also cited.

Mr. *Bonnerjee* was heard in reply.

The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ.**) so far as it was material for this report, was as follows :—

This suit was brought by the present mohunt of the Kaplossar Asthan in the Nepal Terai for the purpose of obtaining possession of *mouzah* Mahtour, which is situate in the district of Tirhoot. The plaint asks—

1. That it may be declared that Mahtour forms a *deotar* estate belonging to the Kaplessar Asthan.

2. That it may be declared that the deed of sale, dated the 5th of March 1881, was altogether invalid and collusive and ineffectual, and that under it the defendants have acquired no right in that estate.

3. That the Court may be pleased to pass a decree in favour of the plaintiff in respect to the entire *mouzah* Mahtour. This last prayer we read as a prayer for possession.

[80] The defendants plead that the suit is barred by limitation, and that they have acquired a right by adverse possession. They also plead that *mouzah* Mahtour is not *deotar* property, and deny all the allegations contained in the plaint. Lastly, they plead that the deed of sale under which they claim was executed for legal necessity by the then mohunt of the Asthan.

The Subordinate Judge has held that the property in suit is *deotar* property appertaining to the Asthan, but that the suit is barred by limitation, and that a portion of the money advanced by the defendants was actually applied for payment of the rents of the Asthan property and of debts due by the mohunt. He therefore dismissed the suit.

There can be no doubt that this *mouzah* was *deotar* property. The *sanad* by which it was given many years ago, viz., 1166 Fusli, to a mohunt named Harjih Gir who was a predecessor of the present plaintiff in the mohuntship, distinctly shows that the property was given for the purpose of the Asthan. It was given to the mohunt as such, and the succession was prescribed to be in his disciples. The purposes of the trust were to feed *fakirs* and mendicants. This was a trust for charitable purposes, the successive occupiers of the mohuntship being the trustees.

We also agree with the learned Subordinate Judge in holding that *mouzah* Mahtour belongs to the Asthan Harlaki, which is a dependency of Asthan Kaplessar. It is clear that the mohunt of Kaplessar was *de jure* mohunt of Harlaki.

A predecessor of the plaintiff in this mohuntship was one Balraj Gir. He was deposed from the *guddi* by order of the Maharajah of Nepal, on the 22nd of February 1873. It is the case of both sides that the Maharajah of Nepal had power to appoint and depose mohunts of the Kaplessar Asthan; and as a

matter of fact it is clear that in his name such appointments and depositions were from time to time made. It is not for us to consider the propriety of the action of the Maharajah of Nepal.

The *guddi* of this Asthan was held upon a very uncertain tenure, and at the will of the Maharajah or his counsellors a mohunt might at any moment lose his office. On Balraj Gir's deposition one Balwant Gir succeeded him. Balwant Gir was succeeded by Sham [81] Gir, but in 1886 an order was made for the reinstatement of Balraj. Balraj died before he could be reinstalled, and a *sanad* was granted to the plaintiff. It appears from the evidence in this case that although Balraj between 1873 and 1886 was neither *de jure* nor *de facto* mohunt of Kaplessar, he did not cease to exercise control over the property belonging to Harlaki. The deed, which is the subject of the present suit, was executed by Balraj in 1881 when he was not *de jure* mohunt of Harlaki, although, as far as we can see from the evidence, he was *de facto* mohunt and had not ceased to exercise his functions as mohunt. On the 5th of March 1881 he executed a deed of sale of *mouzah* Mahtour in favour of the defendants.

Although it is unnecessary in the view which we take of the facts of this case to determine the question of limitation, we think it desirable that, as it has been argued, we should express our opinion with regard to it. In the first place it is quite clear to us that there is no question of adverse possession. The only way in which it is attempted to set up adverse possession is by adding the tenure of Mahtour by Balraj, after his deposition in 1873, to the possession held by the defendants since 1881, that is to say, by holding that from 1873 the possession of Balraj became adverse. But Balraj continued to hold, not adversely to the endowment, but as *de facto* trustee thereof. He continued as mohunt, and in his dealing with the property in 1881 he acted in that capacity. That being so, it is difficult to see how his action can in any way be treated as being adverse to the endowment. A person who wrongly holds as trustee and pretends to act as trustee cannot be entitled to reprobate the right which he asserts and to contend that he holds adversely to his *cestui que trust*. In our opinion this is perfectly clear, and no question of adverse possession arises up to 1881. Although the defendants had for some time held this land as *zur-i-peshgidars* they did not assert any rights adverse to the endowment. Even if the effect of the sale of 1881 were to start an adverse title, twelve years had not elapsed when the suit was instituted.

We also think that we must hold that Article 91 of the Limitation Act has no application to the present case. A forcible argument was addorssed to us on behalf of the respondents in order to induce us to hold that that Article applied, and a large number [82] of authorities were cited to us. In no one of them do we find that Article 91 has been applied to an alienation by the manager of an endowment, the manager of an infant heir, a Hindu widow, or any other of the persons whose powers are placed in the same footing by *Hunooman Persaud Pandey's* case (6 Moo. I. A., 393), and the cases which follow the decision in that case. On the contrary, in two cases we find express authority that twelve years is the period of limitation in a case of that kind. The case of *Unni* v. *Kunchi Amma* (I. L. R., 14 Mad., 26) is a case in many respects similar to the present, and in a case in this Court, *Sikher Chund* v. *Dulputty Singh* [I. L. R, 5 Cal, 363 (370)], a Division Bench considered that Article 91 was inapplicable. If the person who executes the document had no authority in law to execute it, the plaintiff need not sue to set it aside, but may treat it as of no effect.

The next question raised is as to the position Balraj occupied at the time of the execution of the deed in question. He was not *de jure* mohunt, but he was *de facto* mohunt of the subordinate Asthan Harlaki to which Mahtour

belonged. We see no reason why the observations of the Privy Council in *Hunooman Persaud Pandey's* case with reference to the manager for an infant heir should not apply equally to a *de facto* manager of an endowment. The persons with whom the mohunt deals are not bound to look further than the authority which is apparent to them. It is impossible to expect a person dealing with a mohunt who is in possession of land in British territory to know much, or indeed to care much, about what action is from time to time being taken by the Nepal Raj with regard to the status of the mohunt. At page 412 of 6 Moore's Indian Appeals their Lordships of the Privy Council say: "Upon the third point it is to be observed that under the Hindu Law the right of a *bonâ fide* encumbrancer who has taken from a *de facto* manager a charge on lands created honestly for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge, had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title."

The same reasons which would induce the Court to support **[83]** the case of a *de facto* manager of an infant heir would, in our opinion, justify it in supporting the case of a *de facto* mohunt, especially where that mohunt had recently been *de jure* mohunt, and the alteration of his rights had been effected by a foreign Government in the main with reference to territory within the jurisdiction of that Government.

The only remaining question is whether this deed can be supported as being based on necessity.

* * * * * *

[After considering the evidence on this question, which is not material to this report, their Lordships continued:] We think that this evidence shows that there was a necessity for the sale. There were in existence bonds which had been given for necessary purposes and which could be enforced, and there was a decree. The family of the defendants had for many years been financing this Asthan. They acted not only *bonâ fide*, but it appears to us they exercised a good deal of care in the different transactions. There is nowhere in the case for the plaintiff anything to suggest that his predecessor on the *guddi* acted improperly in raising money or otherwise than for necessity.

We think therefore that on the merits this appeal fails and must be dismissed with costs.

S. C. C. — *Appeal dismissed.*

NOTES.

[I. The Privy Council in overruling (1903) 30 Cal., 990 stated (in a suit by a reversioner to recover property alienated by a Hindu widow after her death) that as between Art. 91 and Art. 140 or 141, the test is not simply whether the alienation was *void* or *voidable*. The mere fact of the alienation being *voidable* (25 Cal., 1) was held there to be insufficient, in the absence of an election on the plaintiff's part. The way he elected was shown by his bringing a suit. Neither did it matter that in that suit there was a prayer for a declaration that the *ijara* was inoperative as against him. See also (1905) 33 Cal., 257; (1904) 8 C.W.N., 802; (1907) 31 Bom., 1.

II. As regards shebait's powers of alienation, see also (1906) 34 Cal., 249: 11 C.W.N., 261: 6 C.L.J., 442; (1903) 25 All., 296; **(1911) 13 I.C., 85.**

III. Alienations by persons with limited powers under the Hindu Law, are *void* when those powers are exceeded:—(1910) 20 M.L.J., 371.

IV. A document executed by a person without authority may be treated as a nullity:—(1897) 24 Cal. 77; (1910) 32 All. 392; (1912) 17 C.L.J. 233.

V. When a person obtains property in the character of a trustee he cannot be heard to say that he holds it in a hostile character:—31 Mad. 257.]

[24 Cal 83]

The 17th July, 1896

PRESENT

MR JUSTICE MACPHERSON AND MR JUSTICE HILL

Sarkum Abu Torab Abdul Waheb and others . . Defendants

versus

Rahaman Buksh and others Plaintiffs*

Res judicata—*Code of Civil Procedure (Act XIV of 1882), section 13, Explanation (2) —Different subject matters of suits —Limitation Act (XV of 1877), Schedule II, Article 124 -Suit for declaration of baradari rights Subsequent suit for assertion of khadimi rights —Sale of office to which are attached conduct of religious worship, and performance of religious duties—Mahomedan Law —Custom*

Section 13 Explanation (2) of the Code of Civil Procedure applies only to cases in which the plaintiff having on a former occasion sued for certain **[84]** relief on the strength of one title afterwards claims the same relief on the ground of another title of which he might have availed himself in the former suit It does not apply to cases where the subject-matters of the two suits are different

The plaintiffs in the year 1881 instituted a suit for a declaration of private *baradari* rights in connection with the daily receipts and offerings at a certain Mahomedan place of worship alleging that the defendants had dispossessed them on the 27th September 1881, but they did not assert any claim as *khadims* The suit was decreed but the decree was reversed on appeal On the 7th March 1892 the plaintiff instituted a suit for a declaration that they were the *khadims* of a certain *durga* and as such entitled to perform the duties attached to that office for 21 days in each month and during that period to receive the offerings made by worshippers at the *durga* They also claimed an injunction restraining the defendants from interfering with them in the exercise of that office The plaintiffs claimed their *khadimi* rights partly by inheritance and partly by purchase a custom of transferability by sale having been long recognized

Held that the relief claimed in the second suit was not *res judicata* the subject matters of the two suits being distinct

Denobundhoo Choudhry v Kristomonee Dossee (I L R 2 Cal 152) *Woomatara Debia v Unnopoorna Dassee* (11 B L R 158) *Kameswar Pershad v Rajkumari Ruttan Koer* (I L R 20 Cal 79 L R 19 I A 234) *Durga Persad Singh v Doorga Konwari* (I L R 4 Cal 190 L R 5 I A 149) *Vijaya Raghunadha Bodha v Katima Natchiar* (11 Moo I A 50) *Soorjomonee Dayee v Suddanund Mohapattur* (12 B L R 304 L R I A, Sup Vol 212) and *Krishna Behari Roy v Bunwari Lal Roy* (I L R 1 Cal., 144 L. R, 2 I A 283) distinguished

Held, also, that the second suit being a claim to an hereditary office fell under Article 124 of the Limitation Act and was not barred by limitation

Semble, that a Mahomedan office to which are attached substantially the conduct of religious worship and the performance of religious duties is not legally saleable, any custom to the contrary notwithstanding and that therefore in so far as the title of the plaintiffs depended upon purchase the suit failed

Juggurnath Roy Choudhry v Kishen Pershad Surmah (7 W R, 266), *Kuppa Gurukal v Dorasami Gurukal* (I L R 6 Mad, 76) *Mancharam v Pranshankar* (I L R, 6 Bom, 298), and *Vurma Valia v Ravi Vurmah Kunhi Kutty* (I L R 1 Mad, 235 L R., 4 I A, 76) referred to

* Appeal from Appellate Decree No 1401 of 1894, against the decree of R H Greaves Esq, District Judge of Sylhet, dated the 28th of May 1894 affirming the decree of Babu Kailash Chundra Mozumdar, Subordinate Judge of that District dated the 10th of July 1893

[85] THE facts of this case and the arguments are sufficiently stated in the judgment.

Dr. *Rash Behari Ghose* and Moulvi *Syed Shamsul Hudda* for the Appellants.

Babu *Tara Kishore Chowdhry* and Moulvi *Mahomed Habibullah* for the Respondents.

The **judgment** of the Court (**Macpherson** and **Hill, JJ.**) was as follows:—

The plaintiffs in this suit pray for a decree declaring them to be the *khadims* of the *durga* of Hazrat Shah Zilal, and declaring them also as *khadims* to be entitled to perform the duties attached to that office for twenty-one days in each month, and during the same periods to receive the offerings (*nazar-niaz*) made by worshippers at the *durga*. They also ask for an injunction restraining the principal defendants from interfering with them in the enjoyment of these offerings as well as in the performance of their *khadimi* duties.

The suit has been decreed by both the Courts below. The defendants now in appeal to this Court question the correctness of these decrees on the grounds that the suit is barred by the operation of the rule of *res judicata*; that it is barred by limitation; and that the rights which form the subject-matter of the suit are not transferable either by sale or by inheritance, more particularly through a female.

The plaintiffs' case is that the rights which they claim of serving at the *durga* and of collecting and enjoying the offerings made by worshippers have devolved upon them in part by inheritance from the original *khadims* of the *durga*, and in part by purchase. They assert that the office of *khadim* is hereditary, and that it has always carried with it a right to share in the offerings in question. They also allege that for a long time the transferability of the *khadimi* rights by sale has been recognized. They deduce their immediate title from one Khair Mahomed and his sister Akhara Banu, the latter of whom was the wife of the first plaintiff and the mother of the second, third and fourth plaintiffs. Khair Mahomed, it is alleged, was originally entitled as a *khadim* to a two-thirds share in the service and offerings of the *durga* for ten [86] and half days in each month, his sister Akhara Banu being entitled to the remaining one third share. On her death in the year 1280 B. S., (1873) her share, it is said, devolved upon the plaintiffs and a daughter, since deceased, as her heirs. The other ten and half days' share which goes to make up the twenty-one days' share in suit had belonged to the first defendant, but in execution of certain decrees obtained against him by Khair Mahomed and Akhara Banu, it was brought to sale on the 21st April 1875, and purchased in the proportions of two-thirds and one-third by Khair Mahomed and the heirs of Akhara Banu, respectively. In this manner Khair Mahomed became the owner ultimately of a fourteen days' share in the service and offerings of the *durga*.

This share, it is alleged, was afterwards in the year 1877 bought by the 1st plaintiff at a sale in execution of a decree held by him against Khair Mahomed.

According to the case thus made, it appears therefore that the first plaintiff claims to be entitled in his own right by purchase to a 14 days' share, and jointly with his co-plaintiffs to a 7 days' share, of which one-half came to them by inheritance from Akhara Banu, and the other half was acquired by purchase from the first defendant. It is alleged that the plaintiffs enjoyed the interests in the office of *khadim* jointly with the other *khadims* as they accrued to them from time to time in the manner abovementioned, until they were forcibly interfered with and dispossessed by the defendants. Various dates were assigned in the plaint in the alternative as the date of the accrual of the cause f action.

It is, however, unnecessary to specify them, since at the argument of this appeal, the 12th Assin B. S. corresponding with the 27th September 1881, was treated by both parties as the date of the plaintiff's actual dispossession, and as the date accordingly from which the period of limitation applicable to the suit would begin to run.

The defence to the suit raised substantially the same questions as are now raised by the pleas taken in appeal.

The first question for our consideration is whether the suit is barred by the rule of *res judicata*. In support of this plea it is urged that in a previous suit brought by the plaintiffs in the year 1881, shortly after their dispossession, against some of the present defendants, and the predecessors in title of the others, they [87] claimed unsuccessfully precisely the same right which they now claim, to collect and enjoy the offerings made at the *durga*, and it is argued that, although in the present suit they have claimed the right on the footing that they are *khadims* of the *durga*, and in that character entitled to the offerings, while on the previous occasion they did not put forward their *khadimi* title, this can make no difference, since the 2nd Explanation to section 13 of the Code of Civil Procedure would preclude them from now availing themselves of the title as being a matter which on the previous occasion they might and ought to have made ground of attack.

In our opinion these contentions are unsustainable, because in point of fact the subject-matters of the present and the former suit are different. It is apparent from the pleadings and decisions in the suit of 1881 that what the plaintiffs there sought was the establishment only of their right to the enjoyment of the offerings made at the *durga*—a right described in the course of the suit as a "*private baradari right*," independently of any title they might possess to the office of *khadim*. The existence of such a right was denied by the defendants, and the suit failed because the plaintiffs were unable to prove that a right of that nature existed. Such clearly was the interpretation placed both by the parties and the Courts which dealt with the case upon the issue upon which the decision of the suit turned; namely, "Is it true that there is a specific right called *baradari* right in connection with the daily receipts of Shah Jalal's *durga*?" Passing by the judgment of the Subordinate Judge, whose decree was in favour of the plaintiffs for the recovery of possession of the *baradari* right for 21 days, the ground upon which the District Judge dismissed the suit when it came before him in appeal, is thus stated in his judgment: "I consider that the plaintiff has proved the right of himself and of his two minor sons and minor daughter by purchase as acquired from *khadims* to the *khadimi baradari* rights for 21 days in the month; but as the plaintiff has not sued under *khadimi* right, he and his children cannot obtain any decree for any private *baradari* rights."

The case then came before this Court in second appeal, and the decree of the District Judge was affirmed. The learned Judges in delivering judgment thus describe the nature of the suit. [88] "The plaintiffs in this case seek to recover what they call a *baradari* right, which they claim to exercise for 21 days during each month in respect of a Mahomedan place of worship." They then proceed: "The defendants denied the existence of any such right, and put the plaintiffs very distinctly to the proof of the right set up by them. The origin of the right is not stated in the plaint, and there is no grant or pretended grant." Then they go on to say: "The Judge in the Court below, having considered the evidence, was of opinion that although this evidence might prove a *baradari* right in a *khadim* (a *khadim* being a person responsible for the ministration and the service of the sacred place), yet that the evidence failed to prove a *baradari* right of a private nature, that is a *baradari* right

existing in and exercised by a private individual who was not connected with or responsible for the service or worship conducted at the sacred place." Then after referring to the nature of the evidence by which possibly such a right as that claimed by the plaintiffs might have been sustained, and observing upon the absence of all such evidence, the learned Judges say: "We do not, however, rest our decision upon this point. We decide that there is no point of law which can be raised here, seeing that the Judge below has carefully considered the evidence, and has come to the conclusion that the evidence does not support a *baradari* right of a private nature and unconnected with the office of *khadim*, this being the right which the plaintiffs assert."

In the suit now before us, what is asserted is a right to the possession and enjoyment of the office of *khadim* and to perform the duties and receive the emoluments of that office without disturbance or interference on the part of the defendants, and if in fact restoration to the office involves the recovery of the enjoyment of the worshippers' offerings, that is a consideration with which in relation to the present question it does not seem to us we need concern ourselves.

The subject-matter of the present and the previous suit being then distinct, the 2nd Explanation to section 13 has, in our opinion, no application to the case. It is not a case in which the plaintiffs having on a former occasion sued for a certain relief on the strength of one title, afterwards claim the same [89] relief on the ground of another title of which on the former occasion he might have availed himself, and it is to cases of that nature that the application of the explanation is confined.

Certain cases were cited by the learned vakil for the appellant in support of his argument, to which it is necessary shortly to refer. Most of them, it may be said, are cases in which the property claimed in the later suit was identical with that claimed in the earlier, and they merely afford illustrations of the application of the principle contained in Explanation II to section 13, and may be distinguished upon that ground. Thus in *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (I. L. R., 2 Cal., 152) the question before the Full Bench was "whether a plaintiff who has brought a suit to recover property upon the strength of one title and has been defeated in that suit can bring a suit to recover the same property upon the strength of another title of which he might have availed himself at the time the former suit was brought but which he did not set up in the plaint then filed?" This question was answered in the negative by a majority of the Full Bench. But the subject-matter of both the suits there in contemplation was identical, and the case therefore cannot be regarded as an authority in the present case. So in *Woomatara Debia* v. *Unnopoorna Dassee* (11 B. L. R., 158) the plaintiff claimed in the later suit the same property which she had unsuccessfully claimed in a previous suit under a different title. It was the same in *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (I. L. R., 20 Cal., 79: L. R., 19 I. A., 234), where the plaintiff on the strength of an agreement between the defendant and the original debtor, who was a Hindu widow, by which the former on being placed in possession of the property held by the widow as heir to her husband had undertaken to discharge her debts, sued for the balance of a debt for which he had previously sued both the widow and the defendant, alleging then as his cause of action against the latter that he was in possession of the property upon which the debt was charged. That suit had failed as against the defendant, and it was held that the later suit was barred as the agreement relied on ought under Explanation II to section 13 to have been made a ground of attack in the previous suit. The subject-matter of the later suit was a [90] portion of the debt claimed in the earlier. Similarly in *Doorga Persad Singh* v. *Doorga Konwari* (I. L. R.,

4 Cal., 190 : L. R., 5 I. A., 149) the property in suit in both suits was the same. The question being whether the plaintiff, who was a party to the former suit in which the present defendant had obtained a decree for possession as against him and others as heiress of the last proprietor, was debarred from setting up in the later suit a family custom for the purpose of showing that he was entitled to possession in preference to her, and it was held that the former suit constituted a bar. The last case of this class which was cited, *Muthumadeva Naik* v. *Sivathmuthumadeva Naik* (7 Mad., H. C. 160) is merely another example of the same principle. The cases of *Vijaya Raghanadha Bodha* v. *Katamar Natchiar* (11 Moo. I. A., 50), *Soorjoomonee Dayee* v. *Suddanand Mahapatter* (12 B. L. R., 304 : L. R, I. A., Sup. Vol., 212) and *Krishna Behari Roy* v. *Bunwari Lal Roy* (I. L. R., 1 Cal., 144 : L. R., 2 I. A., 283) were relied upon. These cases go to show that when a question has necessarily been decided in effect though not in express terms between the parties to a suit, it cannot be raised again although in a different form between the same parties in another suit. But this rule can have no application in the present case. In the suit of 1881 the question of the title of the plaintiffs as *khadims* was not raised either directly or indirectly. They sued then as strangers to the office, and failed in their suit in consequence of having put their claim exclusively upon that footing.

Then as to the question of limitation. The suit is in substance for a declaration of the plaintiffs' right to and for possession of the office of *khadim*. They claim it as an hereditary office, and that that is its character has been found by the Courts below, a view from which we see no reason for dissenting. The suit therefore falls under Art. 124 of the second Schedule of Act XV of 1877, and since it was instituted within 12 years from the 27th September 1881, the date of dispossession, it is within time.

With respect, next, to the validity of the sales upon which the plaintiffs rely and under which they seek to make title, it appears to us that, speaking generally, an office to which are attached **[91]** essentially the conduct of religious worship and the performance of religious duties is not legally saleable. This principle has been followed in many cases relating to shebaitships and other offices connected with Hindu worship, though there is apparently no reported case in which the question has been decided in relation to a Mahomedan office. But the reasons which have led the Courts to refuse to recognise such sales in the case of Hindus are of general application and apply equally to the case of Mahomedans. In the case of *Juggurnath Roy Chowdhry* v. *Kishen Pershad Surmah* (7 W. R., 266) for example, it was sought to bring to sale, under a decree for a personal debt, the judgment-debtor's right as *shebait* to perform the services of a certain idol and also to sell his right to the surplus proceeds of the *sheba*. The Court held that rights of that nature were not so saleable, MACPHERSON, J., observing in delivering judgment : "Such a sale would practically destroy the endowment, or have the effect of defeating the whole object of its creation. There would be no guarantee that the service would be properly kept up, for the purchaser, whoever he might be, even if a Mahomedan or a Christian, would have the right of performing the worship of this Hindu idol." Again in *Kuppa Gurukal* v. *Dorasami Gurukal* (I. L. R., 6 Mad., 76), where the sale was of a private nature, and it was sought to sustain it on the ground that the purchaser was of the same caste and sect as the vendor, and therefore qualified to discharge the duties of the office, the Court was of opinion that that consideration was not in itself sufficient to validate the sale, assigning as their reason that "To hold so would tend to public mischief in inducing needy incumbents of hereditary religious offices, who desire to sell them, to give a

dishonest recognition to qualifications which in fact were not the qualifications demanded by the nature of the office." So in *Mancharam* v. *Pranshankar* (I. L R., 6 Bom., 298), in which the alienation, which however was not by way of sale, was upheld, the Court after referring to several cases with approval in which the inalienability of religious offices had been maintained, and to the reasons upon which those decisions proceeded, remarked: "It may be admitted also that it would not be desirable to lay down any such rule regarding such alienations as would involve the Courts in nice questions of [92] caste distinctions bearing upon the capacity of a particular individual to perform the worship of and prepare food for a Hindu idol." Several other cases to the same effect were cited to us by the learned vakil for the appellant, but we have referred to these more particularly because they disclose most fully the reasons by which the Courts have been influenced in holding that such sales as those now in question are not valid. And it is clear that these reasons apply with equal force to all religious offices whatever may be the form of religious faith with which they are connected. The only case to which we were referred in which the alienation of such an office was allowed to stand was that of *Mancharam* v. *Pranshankar* (I. L. R., 6 Bom., 298). That case was however of a peculiar nature, and the alienation was not, as has been observed above, by way of sale. The alienee took under the will of his uncle on the death of the latter. He was a member of the founder's family and stood in the line of succession to the office, and it was upon these grounds that the alienation was upheld. But it may be inferred from what was said by the learned Judges in the course of their judgment with respect to the transferability by sale of such offices, that their decision would have been otherwise if the transfer then before them had been by sale.

It would certainly appear from the description of the duties attached to the office of *khadim* contained in the plaint in the present case as well as from the enumeration of those duties contained in the written statement of one of the defendants, the accuracy of which was not questioned, that some of the duties essentially connected with the office are of a religious nature. Among those mentioned by the plaintiffs, is, for example, "the reading of *namaz* and the *Koran* in due form for the spiritual benefit of the Hazrat," while in the written statement referred to among many duties which could not be performed by a person other than a Mahomedan are mentioned: "Consecrating things offered as *nazar niaz* and reading *durud*." It was not indeed disputed that the office is of a religious nature, and it appears to us, therefore, that in so far as the sales now in question depend for their validity upon the general law, they cannot be sustained.

It was, however, sought in the Courts below to support them [93] apparently on the ground of custom. There was no issue directed specifically to this question. But the lower Courts have held the office to be transferable by sale, because instances have occurred in which it had been so transferred. We very much doubt whether a custom or practice sanctioning the sale of a religious office for the pecuniary benefit or for the private debts of the incumbent could under any circumstances be sustained, and we may refer in this connection to what was said by the Privy Council in the case of *Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (I. L. R., 1 Mad., 235: L. R., 4 I. A., 76). Speaking of the duties and powers of the trustees of a religious foundation, and after quoting from the case of *Muttu Ramlinga Setupati* v. *Perianayagum Pillai* (L. R., 1 I. A., 209) the following passage: "But the constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to

ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation and to be guided by them," their Lordships say: "Their Lordships are of opinion that no custom which can qualify the general principle of law has been established in this case, and they desire to add that if the custom set up was one to sanction, not merely the transfer of a trusteeship, but, as in this case the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law." It appears to us, however, that it is unnecessary that we should decide the question. For, assuming that the custom or practice set up could be sustained at law, the evidence to which our attention was called, and upon which the Courts below proceeded is, in our opinion, insufficient to establish a custom or practice which would validate these sales. The only instances of which evidence was given in which the transfer of the office took place by public sale appear to have been those in which the plaintiffs themselves and the persons through whom they claim immediately were concerned, and even the instances of private transfers relied upon, which however appear to us to [94] stand on a very different footing and would seem to have been confined to the co-sharers in the office were few.

The result must, we think, be that in so far as the title of the plaintiff depends upon the purchase of the interests of the 1st defendant and of Khair Mahomed in the years 1875 and 1877, respectively, that is as to a 17½ days' share out of the 21 days claimed, the suit fails.

The only remaining question is as to the 3½ days' share claimed by inheritance from Akhara Banu. It was contended that Akhara Banu being a female was incapable of holding the office, and was incapable therefore of transmitting an interest in it to her heirs, and Mr. Justice AMEER ALI'S work on Mahomedan Law (Vol. I., p. 348) was referred to in support of this position. It is there no doubt said that when the duty of officiating at religious festivals is attached to the office of *mutwalli*, for which office a woman is generally eligible, she is precluded by her sex from holding the *tantial*, and this is put apparently on the ground that the office of *mutwalli* being one of personal trust, the duties of the office cannot be discharged by deputy, so as to make a person incapacitated by sex from performing those duties herself, capable of holding the office. Whether this would be so with respect to the office of *khadim* may be a question, but we think we should not be justified under the circumstances of this case in deciding it. The question was decided by the Court of First Instance in favour of the plaintiffs. That Court held that Akhara Banu had succeeded to the office by right of inheritance, and that her heirs were entitled to succeed her on her death. Whether the Subordinate Judge was right in this view or not, it appears to have been acquiesced in by the defendants. At all events there is nothing to show that it was raised in the Lower Appellate Court, and we think, therefore, that we should not be well advised in allowing it to be raised again at this stage.

In the result the appeal will be decreed and the suit dismissed with respect to 17½ days out of the 21 days' share claimed in the worship and offerings of the *durga*, with respect to the remaining 3½ days' share the appeal is dismissed. The appellants having succeeded substantially in the appeal are, we think, entitled to their costs in this Court as well as of both the Courts below in proportion [95] to their success. It has been agreed between the parties to the appeal that the 3½ days in each month decreed to the plaintiffs shall be counted from

the beginning of the terms consisting of 21 days in each month claimed by the plaintiffs by their plaint, and we decree accordingly.

H. W. Appeal allowed.

NOTES.

[As regards the scope of Exp. II to sec. 13, C.P.C., 1882, see also (1897) 24 Cal., 711; (1900) 25 Bom., 189; (1904) 1 C.L.J., 248; (1903) 8 C.W.N., 385; (1908) 35 Cal., 979 : 8 C.L.J., 82 : 12 C.W.N., 862.

The alienation of a religious office for consideration is invalid : -(1914) 23 I.C., 72.]

[24 Cal. 95]

The 31st July, 1896.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Annoda Prosad Chatterjee............Defendant

versus

Kali Krishna Chatterjee (Plaintiff) and others... .....Defendants Nos 2—5.*

Probate—Revocation of Probate—Probate and Administration Act (V of 1881), section 50, Expl. 4 " Just Cause"—Mismanagement by executor.

Mismanagement by the executor of an estate is not, under section 50, Expl. (4) of the Probate and Administration Act, a just cause for revoking the probate. *Held*, therefore, that the order of revocation made by the District Judge for that cause, was made without jurisdiction and must be set aside.

The words "just cause" as explained in section 50 of the Probate and Administration Act are not illustrative merely, but exhaustive.

DURGA DAS CHATTERJEE died in March 1890, having, on the 6th April 1885, made his last will and testament, of which he appointed his eldest son, Annoda Prosad Chatterjee, executor. Probate of the will was granted on the 8th December 1890. In 1891, Kali Krishna Chatterjee, a minor grandson of the testator, applied, through his guardian, for a revocation of the probate; but the application was dismissed on the 25th January 1892. Later in 1892, Thakomoni Debi, the testator's widow, brought a suit for revocation of the probate and for the removal of the executor from his office. That suit was dismissed on the 24th June 1893 On the 20th February 1894, Kali Krishna Chatterjee, who had meanwhile attained majority, filed a petition under section 50 of the Probate and Administration Act, for the removal of the executor, for revocation of the probate granted to him, and for the appointment of a receiver. The grounds of the petition were the misconduct of the executor and his mismanagement of the estate. On the 27th July 1894, the District Judge of Bankura, by **[96]** an order of that date, ordered that the probate obtained by the defendant should be revoked.

The defendant appealed to the High Court.

Babu *Dwarka Nath Chuckerbutty* and Babu *Joygopal Ghose* for the Appellant.

Babu *Tarakishore Chowdhry* for the Respondents.

The **judgment** of the Court (**Ghose** and **Gordon, JJ.**) was as follows :—

This is an appeal from a decision of the District Judge of Bankura revoking probate of the will of one Durga Das Chatterjee. The will bears date the 6th April 1885, and the testator died in March 1890. Thereafter, the testator's

* Appeal from Original Decree No. 274 of 1894 against the decree of G. Gordon, Esq., District Judge of Bankura, dated the 19th of July 1894.

eldest son, Annoda Prosad Chatterjee, the appellant before us, obtained probate as executor of that will on the 8th December 1890. Subsequently, Kali Krishna Chatterjee, the grandson of the testator (son of another son, Baroda), a minor, through his guardian applied in the year 1891 for revocation of the probate, and his application was dismissed on the 25th January 1892. Then a suit was brought in 1892 in the Subordinate Judge's Court by Thakomoni Debi, the widow of the testator, for the purpose of obtaining revocation of the said probate and removing the present appellant from his post as executor and that suit also was dismissed on the 24th June 1893. Now, Kali Krishna Chatterjee having come of age, has filed the present petition for revocation of the probate. The application purports to be made under clause 4 of the Explanation to section 50 of the Probate and Administration Act; and the learned District Judge has revoked the probate under that clause, on the ground that the executor, Annoda Prosad Chatterjee, has been guilty of misconduct and mismanagement as such executor, and that, therefore, he is not a fit and proper person to retain the management of the estate.

On appeal, it is contended that the District Judge had no jurisdiction, under clause 4, section 50 of the Probate and Administration Act, to make the order he has made; and we think that this contention is sound. Clause (4) runs as follows: "That the grant has become useless and inoperative through circumstances." We think that the District Judge has misunderstood the real meaning [97] of these words. The meaning of the words "useless and inoperative through circumstances" are explained in the illustrations attached to the section; and we are unable to say that mismanagement by an executor comes within the purview of clause 4, section 50 of the Act. No doubt the question may arise whether the words "just cause," as explained in section 50, are exhaustive, or illustrative. If they are illustrative, and not exhaustive, it might be said that the District Judge had jurisdiction to remove the executor on the ground of mismanagement, but certainly not under clause 4. We think, however, that these words are exhaustive; and this view is supported by the fact that the Legislature thought it necessary to amend section 50 of Act V of 1881 by Act VI of 1889 by adding to the explanation a fifth clause relating to the wilful omission by an executor to exhibit an inventory or account, and to the exhibiting of a false inventory or account. Had the words "just cause," as explained in section 50, been merely illustrative, there would have been no necessity to add to it this fifth clause.

Further, we observe that sections 146 and 147 of the Probate and Administration Act make an executor or administrator liable for devastation or neglect to get in any part of the property, which we think also shews that the Legislature did not intend to include within the purview of section 50 of the Act a case of mismanagement by an executor. In this view of the matter, we think that the order of the learned Judge is based upon a misconception of the law, and that therefore it must be set aside.

We may add that this decision will not debar the respondent from making an application to the District Judge under clause 5, section 50 of the Act, or from making any other application as he may be advised.

The appeal is decreed with costs.

H. W. *Appeal allowed.*

NOTES.

[See also (1902) 26 Bom., 792; (1905) 28 Mad., 161 at 164; (1912) 16 C.W.N., 880: 15 I.C., 44 where this was followed.]

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[98] *The 11th August, 1896.*

PRESENT :

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Beni Pershad Kuari............Plaintiff

versus

Nand Lal Sahu and others...........Defendants.*

Second Appeal—Remand to the Appellate Court—Additional evidence in Appellate Court—Finding of fact upon evidence taken after remand—Procedure in the second Court of Appeal—Civil Procedure Code (Act XIV of 1882), sections 568, 584, 585, 587.

In a second appeal, the High Court set aside the decrees of the lower Courts on the ground that certain issues raised in the suit were not considered by those Courts, and remanded the case to the Lower Appellate Court for a proper decision of the case. The Lower Appellate Court took evidence on the issues not tried before, and came to findings of fact on that evidence.

Held, that the Lower Appellate Court tried the case, not as an original case, but as an appeal, and acting under the powers given to it took fresh evidence.

Held, that on second appeal the High Court is precluded by the Code of Civil Procedure from going into facts, and that restriction of power is not confined only to cases where evidence is taken in the first Court.

Gopal Singh v. *Jhakri Rai* (I. L. R., 12 Cal., 37) followed. *Balkishen* v. *Jasoda Kuar* (I. L. R., 7 All., 765) referred to. *Hinde* v. *Brayan* (I. L. R., 7 Mad., 52) not followed.

THE facts material to this report and the arguments on either side appear from the judgment of the High Court. The material portion of the previous order of the High Court remanding the case to the Lower Appellate Court was:

" For the foregoing reasons, the judgments of the Courts below cannot stand, and for the proper decision of the case the following questions require determination :—

" *First.* —Whether the sale to the plaintiff was made with intent to defeat or delay the defendants who were judgment-creditors of Sheolochan, and whether the plaintiff purchased otherwise than in good faith and for fair value.

" *Second.*—Whether the conduct of the plaintiff, in asking for and obtaining time to complete his purchase with an offer to pay [99] off all the decree holders of Sheolochan, in any material way misled the defendants or influenced their conduct as to their mode of seeking satisfaction of their decree against Sheolochan ?

" If either question is answered in the affirmative the plaintiff must fail, but if both are answered in the negative, he will succeed.

" The result then, is, that the decrees of the Courts below must be set aside, and the case sent back to the Lower Appellate Court for the determination of the case in accordance with the directions contained in this judgment."

The plaintiffs appealed to the High Court.

Mr. *Pugh*, Babu *Hem Chandra Banerjee*, Babu *Raghunandan Pershad* and Babu *Jogendra Chandra Ghose* for the Appellant.

Dr. *Rash Behari Ghose* and Dr. *Asutosh Mukerjee* for the Respondents.

* Appeal from Appellate Decree No. 1107 of 1895, against the decree of G. G. Dey, Esq., District Judge of Shahabad, dated the 13th of March 1895, affirming the decree of A. C. Mitter, Esq., Subordinate Judge of that District, dated the 21st of December 1891.

The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ.**) was as follows :—

This case comes up to us on appeal from an order made by the District Judge of Shahabad on a remand by this Court.

The first and only important question in the case is whether the appellant is entitled to treat the appeal as a first appeal on the question decided by the Lower Appellate Court on the evidence which has been taken subsequent to the remand. As we expressed ourselves after the argument on this portion of the case had been concluded, we are of opinion that the ordinary rules of second appeals apply to this appeal, and that it is not competent for us to interfere with the findings of the Lower Appellate Court on the facts.

The question has arisen in this way:—

Two of the issues framed, the 1st and the 7th, were not considered by either of the lower Courts. When the case came up on appeal to this Court, the learned Judges forming the Division Bench by which the appeal was heard, after discussing the other questions in the appeal, considered that those issues should be tried. They framed two issues, which evidently were intended to put in clear and unambiguous language the questions which the parties had raised in the 1st and 7th issues. The first of **[100]** those issues as raised in this Court was, "whether the sale to the plaintiff was made with intent to defeat or delay the defendants, who were judgment-creditors of Sheolochan, and whether the plaintiff purchased otherwise than in good faith and for fair value ;" and the second was, "whether the conduct of the plaintiff, in asking for and obtaining time to complete his purchase with an offer to pay off all the decree-holders of Sheolochan, in any material way misled the defendants or influenced their conduct as to their mode of seeking satisfaction of their decree against Sheolochan ?" Having pointed out that the judgment of the Lower Appellate Court could not stand, the learned Judges set aside not only the decree of the Lower Appellate Court, leaving the appeal to be determined on those issues by that Court, but *also the decrees of the first Court*. They did not send the case back to the first Court whose decree was set aside, but they sent it to the Lower Appellate Court "for the determination of the case in accordance with the directions contained in this judgment." The learned Judges did not in their judgment expressly say whether fresh evidence was to be taken, but inasmuch as no evidence had been taken with regard to one of the issues at any rate, the 1st, the taking of fresh evidence was obviously contemplated.

It is contended before us that the practical effect of this order is to make the Lower Appellate Court retry the case on remand as an original Court, and that there is an appeal to this Court on the facts. The learned Judges of this Court did not order the case to be tried by the Lower Appellate Court otherwise than in exercise of the jurisdiction which it possessed in this case as a Court of Appeal, and the case when it went down was treated in the Lower Appellate Court as an appeal. The learned Judge treats it as an appeal throughout his judgment, and, as far as we can see, the parties did the same.

The idea that this was an appeal on the facts was not present to the minds of the legal advisers of the parties when this appeal was first presented to this Court. Although, of course, the appellant ought not to be impeded by any mistaken view, if it was a mistaken view, of his legal advisers, at any rate this indicates that the parties treated this order of remand as an order to **[101]** the Lower Appellate Court to try the appeal before him. In our opinion the Lower Appellate Court tried the case as an appeal, and acting under the powers given to it took fresh evidence. So the question reduces itself really

to this, whether, when a Lower Appellate Court takes fresh evidence, the High Court can in second appeal consider that evidence. There is no doubt that that question has been expressly determined by a Division Bench of this Court in the case of *Gopal Singh* v. *Jhakri Rai* (I. L. R., 12 Cal., 37); and the same question was determined by a Full Bench of the Allahabad High Court in *Bal Kishen* v. *Jasoda Kuar* (I. L. R., 7 All., 765). There are remarks made in a case, *Hinde* v. *Brayan* (I. L. R., 7 Mad., 52), which might tend to a contrary conclusion.

We are of opinion that the decision of this Court is one which we ought to follow. It has not, as far as we know, been doubted by any subsequent decision, and we believe it to be in accordance with what was intended by the Civil Procedure Code. If it was intended that there should be any general rule that in every case where evidence is taken on a question of fact the parties would be entitled to the decision of two Courts, such general intention would have been expressed in the Code. On second appeal we are precluded by the Code from going into facts, and that restriction of our powers is not confined only to cases where the evidence is taken in the first Court. If it was intended that we should go into and discuss the evidence taken by the Lower Appellate Court, we should expect to find an exception providing for that event included in the section which deals with our powers in second appeals. In our opinion we cannot go into the facts. So it remains for us to see whether there is any exception to be taken to the findings arrived at by the lower Court. Those findings are expressly directed to the issues which were laid down for the decision of the Lower Appellate Court by this Court. As to the first issue the first portion of it, it is true, is answered in favour of the appellant, but the second portion is answered against him, and it is found that he did not purchase in good faith or for fair value. Therefore, the first question is not answered in the negative, one portion of it being answered in **[102]** the affirmative It follows, therefore, according to the decision in this case that the plaintiff fails. We are not competent, in appeal after remand, to question in any way the decision of this Court in the case.

Some observations were addressed to us as to whether the arrangement in this case could be treated otherwise than one come to in good faith. There is undoubtedly evidence upon which the Lower Appellate Court could arrive at the conclusion it has come to in this matter. Leaving aside everything else, the arrangement as to the gift of the garden and house to the son is one which any Court dealing with facts must have viewed with the greatest suspicion, even if it did not affirm that it tainted the whole transaction with fraud. An arrangement of that kind could only have been come to for the purpose of defeating at any rate some classes of creditors. It is difficult to conceive how it could be otherwise. That circumstance of itself is abundant evidence upon which the learned Judge could arrive at the conclusion he has come to.

With regard to the other question, that has been found in the affirmative. Therefore the plaintiff fails.

In our opinion this appeal fails, and must be dismissed with costs. In order to prevent any misapprehension as to the effect of our judgment, we think we ought to make it clear by saying that the appeal is dismissed, and the suit stands dismissed with all costs.

S. C. C. *Appeal dismissed.*

[24 Cal. 102]

ORIGINAL CIVIL.

The 17th September, 1896.

PRESENT:

MR. JUSTICE SALE.

Calcutta Trades Association

versus

Ryland.*

Attachment—Subjects of attachment—Pay of Military Officer in Indian Staff Corps—Officer not officer of Regular Forces—Civil Procedure Code (Act XIV of 1882), section 266, clause (h)—Army Act (1881) section 151—Public Officer.

An Officer of the Indian Staff Corps is a "Public Officer" within the meaning of clause (*h*) of section 266 of the Civil Procedure Code, read with [103] the interpretation clause (section 2) of the Code. His pay is therefore subject to attachment in execution of a decree against him, but the operation of the attachment must be restricted to pay received from the Indian Government. The pay of an Officer of the Regular forces is not so subject to attachment.

The attachment in this case was allowed subject to a decree previously passed against the defendant by which, under section 151 of the Army Act, half his pay was ordered to be deducted and applied in payment of the amount due under that decree—the repeal of that section not affecting a decree previously passed under it, and the right to enforce such a decree continuing until satisfaction has been obtained.

THIS was an application in chambers for the attachment in execution of a decree of the pay of Major H. G. Ryland, an Officer of the Indian Staff Corps and Assistant Commissary General at Allahabad, in the hands of the Pay Examiner, Bengal Command, Military Accounts Department, Calcutta. In another suit against him a decree had been passed, in execution of which half his pay had, under section 151 of the Army Act, 1881, been ordered to be deducted and applied in satisfaction of the decree. Section 151 has since been repealed by subsequent Army Acts. The following note furnished by the Registrar (Mr. Belchambers) sets out fully the present state of the law.

"In 1875 the question whether the pay of a Military Officer was liable to attachment in execution under the provisions of the Code of Civil Procedure (Act VIII of 1859), was considered by the High Court of the North Western Provinces. The result is thus stated:— "The pay of a Military Officer is not expressly made liable to attachment under the provisions of that Act. If it be so liable it would be necessary for an attaching creditor to show that the pay falls within the provisions of section 205 of the Act and is a debt due to, or in some form or other the property of, the judgment-debtor. It is a general rule that a debt which the debtor cannot sue for cannot be attached, and, as far as we are able to ascertain, the pay of an Officer does not become his property until it actually reaches his hands. He is not in a position to maintain any action or suit for its recovery * * Until it can be established that the pay is a *debt* or *property* within the meaning of section 205, it cannot

* Suit No. 43 of 1895.

be attached under the provisions of Act VIII of 1859 "—*Bansi Lall* v. *Mercer* (7 All. H.C., 331).

" Subsequently by section 151 of the Army Act, 1881, it was provided that: " A Civil Court or Court of Small Causes, upon adjudging payment of any sum by any person subject to Military law, other than a soldier of the regular forces, may either award execution thereof generally, or, may direct [104] specially that the amount named in the direction, being the whole or any part of the said sum, shall be paid by instalments or otherwise out of any pay or other public money payable to the debtor, and the amount named in the direction not exceeding one-half of such pay and public money, shall, while the debtor is in India, be stopped and paid in conformity with the direction."

" This was a special enactment, the object of which was to enable a Civil Court either to stop the pay or other public money payable to an Officer, or award execution generally under the ordinary rules of procedure.

" That section has now been repealed by the Army (Annual) Act, 1895, but without affecting the right to enforce unsatisfied decrees previously obtained which is preserved by section 38 of the Interpretation Act, 1889, (52 and 53 Vict., C. 63). An Officer is thus freed from the operation of that section except as to liabilities incurred under its provisions previous to its repeal. That being so, what is the effect of this alteration in the law in regard to his pay? Is that placed beyond the reach of his creditor?

" It appears that by the Army (Annual) Act, 1895, the Army Act was amended not only by the repeal of section 151 but also by the modification of other sections, including 136, to which was added the words " or by any law passed by the Governor-General of India in Council." That section with the added words, is as follows: " The pay of an Officer or soldier of Her Majesty's regular forces shall be paid without any deduction other than the deductions authorised by this or any other Act or by any Royal Warrant for the time being or *by any law passed by the Governor-General of India in Council.*"

" This authorizes deductions to be made from the pay of an officer. Under this section, without the added words, only such deductions could be made as were 'authorized by this' (the Army) ' Act or by any other (English) Act, or by any Royal Warrant for the time being,' but now, with the added words the pay of an officer is also made liable to deductions under ' any law passed by the Governor-General of India in Council.'

" This suggests the question whether any law has been passed by the Governor-General in Council under which deductions can be made from the pay of an Officer.

" Act VIII of 1859, under which it was held that the pay of an Officer was not liable to attachment, was repealed. Its provisions, as re-enacted with extensive additions and modifications, are now contained in Act XIV of 1882. One of the additions to the Interpretation Clause is as follows: ' Public Officer ' means a person falling under any of the following descriptions, namely, * * * ' Every Commissioned Officer in the Military and Naval Forces of Her Majesty while serving under Government.'

[105] " A wide meaning is given to the term ' Government,' which includes the Government of India as well as the Local Government.

" Section 205, referred to in the decision of the High Court of the North West Provinces, has also been modified, and in its present form, as section 266, contains new provisions. It states what is liable to be attached in execution, including ' *debts* ' and ' saleable property ' and adds—' Provided that the following particulars shall not be liable to such attachment or sale.' The particulars are mentioned in various clauses; those mentioned in clause (*h*) with which we are immediately concerned being as follows: ' The salary of a public officer or of any servant of a Railway company or local authority to the extent of—

' (I) The whole of the salary where the salary does not exceed twenty rupees monthly;

' (II) Twenty rupees monthly where the salary exceeds twenty rupees and does not exceed forty rupees monthly; and

' (III) One moiety of the salary in any other case.

"This clause, read with the Interpretation Clause, which extends the meaning of 'Public Officer' so as to include a Military Officer, would seem to alter the previously existing conditions and to place a Military Officer on the same footing as any other Public Officer whose salary is liable to be attached under section 266. This would be so but for the words in the Interpretation Clause 'while serving under Government.'

"Military Officers not only hold their Commissions from the Crown; but Officers of the regular force, who perform purely regimental duties, also receive their pay from the Crown out of money granted by Parliament. It cannot be said that such officers are serving under the Government of India or any Local Government; or that the pay of such Officers is liable to be dealt with under the provisions of the Code applicable to Public Officers.

"Officers, whether of the British or Indian forces, are, after two years service, of which one must be in India, and a further period of probation, eligible for Commissions in the Staff Corps of one of the Indian Presidencies. Officers so commissioned leave their regiments and are employed, according as the Government of the Presidency to which these corps belong direct, in any Military or Civil employment irrespective of their ranks in the Staff corps"—*Manual of Military Law, p. 259.*

"Officers so employed answer the description of 'Public Officer' within the meaning of the Interpretation Clause:—

Presumably these officers while serving under Government receive pay from Government and not from the Crown, but if they also receive pay from the Crown, to such pay the decision of the High Court of the North Western Provinces would still be applicable, but not to pay receivable from **[106]** Government which would stand on the same footing as the pay of a Public Officer and would be liable to be dealt with as such."

Mr. *Upton* (Messrs. *Sanderson & Co.*) appeared for the applicant in chambers.

Sale, J.—This is an application for an attachment of the pay of a Military Officer in execution of a decree.

I have been furnished with a note by the Registrar, Mr. Belchambers, which gives, I think, a correct view of the present state of the law on the subject. It would appear that while the pay of an Officer of the regular forces is not liable to attachment the pay of an officer of the Indian Staff Corps is liable to attachment, the reason for the distinction between the two cases being that an Officer of the Staff Corps is a Public Officer within the meaning of clause (*h*), of section 266 of the Civil Procedure Code read with the Interpretation Clause, whereas an Officer of the regular forces is not.

The defendant, Major Ryland, who is described as "Assistant Commissary General, Allahabad," is, I understand, an Officer of the Staff Corps, but it appears that in another suit a decree has been obtained against him by which, under section 151 of the Army Act, half his pay was ordered to be deducted and applied in satisfaction of the amount due under the decree. Section 151 has since been repealed, but the repeal of that section, as pointed out in Mr. Belchambers' note, does not affect a decree previously passed under it. The right to enforce such a decree in the manner therein provided continues, until full satisfaction has been obtained.

The attachment asked for may be made, but it must be subject to the decree to which I have referred, and its operation must be restricted to pay which the defendant receives from Government.

Attorneys for the Applicant: Messrs. *Sanderson & Co.*

C. E. G.

NOTES.

[There is a conflict of case law on this point; see (1896) 24 Cal., 102; (1901) 25 Mad., 402; (1911) 10 I.C., 719 (Oudh); (1914) 23 I.C., 935 (Oudh) and (1911) 33 All., 529; (1912) 37 Bom., 26.]

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[107] APPELLATE CIVIL.

The 12th August, 1896.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Sabhapat Singh ....Plaintiff

versus

Abdul Gaffur and others............Defendants.*

Jurisdiction of Civil Court—Civil Procedure Code (1882), section 11—Bengal Municipal Act (Bengal Act III of 1884)—Election of Municipal Commissioners—Right to vote and stand as candidate at an election – Suit for declaratory decree.

At an election of Municipal Commissioners held under the Bengal Municipal Act (Bengal Act III of 1884), *S*, one of the candidates, was declared to have been elected : a poll was demanded and *S* was again declared by the presiding officer to have been duly elected. An objection was then taken by the defeated candidates before the Magistrate of the district on the ground that some of the voters gave more votes than there were vacancies, and also on the ground that *S* was not qualified to be registered as a voter and to stand as a candidate for election. The Magistrate set aside the election on both grounds ; and *S* brought a suit in the Civil Court for a declaration of his right to vote and stand as a candidate and for a declaration that he was duly elected.

Held, that the suit was one of a civil nature, and under section 11† of the Code of Civil Procedure (XIV of 1882) such a suit would lie in the Civil Court.

Held, also, that the Magistrate should not have been made a defendant in the suit, and that the plaintiff was not entitled to a declaration that the election of the plaintiff was good and valid ; but that the decree of the first Court granting a declaration of plaintiff's right to vote and stand as candidate was correct.

THIS was a suit for adjudication and declaration of plaintiff's right to vote and stand as candidate at an election of Municipal Commissioners held in Chuprah in December 1893, and for a declaration that he was duly elected at that election. The facts necessary for this report are fully given in the judgment of the High Court.

[108] Both the lower Courts decided adversely to the plaintiff's claim, and the plaintiff appealed to the High Court.

Babu *Umakali Mukerjee* and Babu *Nalini Nath Sen* for the Appellant.

The *Government Pleader* (Babu *Hem Chandra Banerjee*), Babu *Tarak Nath Palit* and Babu *Kritanta Kumar Bose*, for the Respondents.

Babu *Umakali Mukerjee*.—The Lower Appellate Court was wrong in holding that the Civil Court had no jurisdiction. Section 15 of the Bengal Municipal Act, as amended by Bengal Act IV of 1894, saves the jurisdiction

* Appeal from Appellate Decree No. 722 of 1895 against the decree of G. W. Place, Esq., District Judge of Sarun, dated the 5th of February 1895, affirming the decree of Babu Jogendra Nath Chuckerbutty, Munsif of Chuprah, dated the 14th of September 1894.

† [Sec. 11 :—The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force.

Courts to try all civil suits unless specially barred.

Explanation.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.]

of the Civil Court. [TREVELYAN, J.—Does a suit lie for a public office like this?] Section 42 of the Specific Relief Act is wide enough for declarations like these, and section 11 of the Civil Procedure Code gives a right of suit in all cases of a civil nature. There is a suit allowed on the Original Side of this Court under section 45 of the Specific Relief Act, and it is not probable that a different law was intended for the mofussil. [TREVELYAN, J.—That seems to be the old jurisdiction of the Supreme Court to issue a writ of *mandamus*.] At all events, there is nothing to prevent a suit under section 11 of the Procedure Code, and section 15 of the Municipal Act is in favour of my contention. Then as to the merits of the case, the question of the legality of the election could have been decided by the presiding officer only and in a summary way then and there—see Rules 32 and 34, passed under the Bengal Municipal Act. All proceedings taken by the Magistrate after the order of the presiding officer are *ultrâ vires*. Even if the polling was bad in law, there having been no objection on that ground before the presiding officer, the declaration duly made by him was final in this case. As to the plaintiff's qualification, his name was registered as a voter and was included in the list of candidates. Rules 13 and 20. The objection raised was founded upon a want of qualification as a voter, but the register was a final record of voters, and no such objection could be raised at the election.

Babu *Hem Chandra Banerjee* for the respondent, the Magistrate of Sarun.—The question of qualification refers to the particular election held on the 14th December 1893: the Court cannot declare the plaintiffs to be qualified for future elections for which there **[109]** would be new lists. [BEVERLEY, J., referred to Rule 8.] The District Magistrate, Mr. Manisty, has been sued by name. He is not the Magistrate now, but supposing the suit to be directed against the Magistrate in his official capacity it ought to have been brought against the Secretary of State, and there should have been a notice as required by the law. Then the present suit itself is not one which can be dealt with by the Civil Court; no damages are claimed by plaintiff, but simply a question of election to an honorary public office is raised. Reading the sections of the Act and the Rules passed in 1889, it does not appear that election matters were intended to be brought before the Civil Court. The present suit is nothing better than an application for a temporary injunction under section 493 of the Civil Procedure Code, but no injury has been done; the order of the Magistrate as to the illegality of the election was a good order, and even if the suit lay for a declaration, this Court would in the exercise of its discretion decline to make any declaration in this case.

Babu *Tarak Nath Palit* for the respondents 2 and 3 followed the Government Pleader.

The **judgment** of the High Court (TREVELYAN and BEVERLEY, JJ.) was delivered by

Trevelyan, J.—This appeal raises a question of importance. The object of the suit was to obtain a declaration that the plaintiff was qualified to vote and to stand as a candidate at the election of Municipal Commissioners which was held in Chupra in December 1893. The plaintiff also asked for a declaration that at that election he had been duly elected.

The Munsif before whom the case first came gave the plaintiff a declaration as to his qualification, but held that the election at which the plaintiff contended that he was elected had not been validly held. The District Judge before whom the case came on appeal and cross-appeal has dismissed the whole suit. The plaintiff has now appealed to this Court, and the questions which have been argued before us are, *firstly*, whether a suit of this kind will lie at all in the

Civil Court, and, *secondly*, whether, assuming that the Civil Court has jurisdiction to deal with questions as to the qualifications of voters and candidates and the validity of [110] elections, this is a case in which the Court can, and ought to, give a declaration of the kind asked for here.

The facts necessary for the purposes of our decision are not many. The plaintiff, when he became a candidate for this election, was on the Register of persons qualified to vote, and, therefore, it would follow under the law (Bengal Act III of 1884, section 15) that he was a person qualified for election to be a Commissioner. There were three vacancies. At the election the presiding officer, on a show of hands, declared three persons, Bunsidhur Gupta, Suraj Prashad, and Sabhapat Singh, the present plaintiff, to be elected. A poll was claimed against two of these three candidates, namely, Suraj Prashad, and Sabhapat Singh. No poll being claimed against Bunsidhur Gupta, he was declared duly elected. The election then proceeded for the purpose of filling up the remaining two vacancies. There can be no doubt that under rule 24 of the Rules of the 14th August 1889, which were made in pursuance of the Municipal Act and which have the force of law, each voter is entitled to vote for as many candidates as there are vacancies. The same Rule provides that he may give all or any number of the votes to which he is entitled to any one candidate, and that being so, and there being after Bunsidhur Gupta had been declared duly elected only two vacancies, it follows that each voter had two votes. As a matter of fact some, if not all, of the voters gave three votes. This mistake arose from the circumstance of there originally having been three vacancies. At this election the two vacancies were declared to have been filled up by the plaintiff and Suraj Prashad. That was on the 14th December. On the same day the defeated candidates put in a petition to the Magistrate, first of all complaining of the error of each voter being allowed to give three votes when they were only entitled to two. They also made a complaint with regard to the votes for Suraj Prashad, a matter which is not before us now, and they added an objection to the present plaintiff's right to be a candidate, that is his right to be on the Register. These objections were considered by the Magistrate, who held that the objection to the qualification of the plaintiff was a valid one, and that the election was irregular. He set aside the election and directed a fresh election to be held. The plaintiff then brought this suit making [111] as party defendants thereto the three defeated candidates at the election at which he had been elected, and the Magistrate of the district, Mr. Manisty, the then Magistrate, being described by name as a defendant. The Munsif restrained the fresh election by a temporary injunction. That injunction only operated up to the time when the Munsif gave his decision. The Munsif having in his decision held that the election was a bad one, a new election, we are told, has been held. These are the facts.

The first question is, does a suit lie at all for a purpose of this kind. This question must be determined with reference to section 11 of the Civil Procedure Code, which enacts that "the Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force." The learned Government Pleader who appears in this case, as we understand, for the Magistrate and the learned Vakil Babu *Tarak Nath Palit*, who appeared for two of the defeated candidates, were unable to draw our attention to any enactment barring the cognizance of a suit of this kind by a Civil Court. There is no doubt that the suit is one of a civil nature. It is for the purpose of maintaining a civil right of a most important description, and in reality when we come to examine it there can be no reason whatever why a civil court

should not determine a question of the kind. This Court in its Original Jurisdiction has power given to it by the Specific Relief Act (section 45) to determine a right like this and many other questions connected with the exercise of a similar franchise in this city. It would, as pointed out to us, be somewhat extraordinary to suppose that whereas rights of voters and candidates in this city can be amply safe-guarded and questions with regard to them determined in Calcutta, there can be no way of upholding and maintaining rights in the districts. The contention of the defendants would make the election officers the sole tribunal for the determination of a question of this kind. For this we know of no authority. Before we can say that the jurisdiction of the Civil Courts is excluded, it is necessary for us to find that there is an enactment barring their jurisdiction. There is nothing in the Municipal Act or any other enactment which would bar such jurisdiction, and [112] we can well understand that the Legislature did not desire to exclude all remedy for what might be a serious wrong. Moreover, on the question as to whether the Legislature intended to exclude the jurisdiction of Civil Courts, we have the language of a subsequent enactment on the same subject by the same Council. It is true that *that* enactment was passed after this particular election was held, but there are occasions where expressions used by the Legislature in subsequent enactments can be used for the purpose of interpreting earlier enactments. In 1894 an Act was passed amending the Act under which this election was held, and by that amending Act the following proviso was inserted in section 15, which deals with the matters now in question, namely, the mode of electing Municipal Commissioners: "Provided that nothing contained in this section, nor in any rules made under the authority of this Act, shall be deemed to affect the jurisdiction of the Civil Courts." That obviously shows that it was in the mind of the Legislature which passed this amending Act, that the Civil Courts had some jurisdiction (whatever it may be) with regard to elections under section 15, that is, the section relating to the election of Municipal Commissioners. This reference can only relate to suits. The provisions of section 45 of the Specific Relief Act do not apply to elections under the Act now in question, so the only way Civil Courts can exercise jurisdiction with regard to Municipal elections outside Calcutta is by way of suit. We invited the learned Government Pleader to suggest to us any suit except a suit of the class now in question over which the Civil Courts, according to his contention, might have jurisdiction in determining any question under section 15. He was unable to suggest any possible suit other than a suit of the kind we are now discussing. To carry his argument further the learned Government Pleader invited our attention to a letter from the Officiating Secretary to the Government of Bengal to all the Commissioners of Divisions. There can be no doubt that a letter of that kind could not be used for the construction of an Act. As a matter of fact there is nothing in it in the smallest degree favouring the view of the defence, and it only shows, as is shown by the amending Act, that it was contemplated that the Civil Courts had some jurisdiction, at any rate, in matters of this kind.

[113] Lastly, we would refer to the terms of section 42 of the Specific Relief Act, which, if anything, furnishes an argument in favour of the suit. That section says: "Any persons entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled." The words "legal character" are wide enough to include the right of franchise and also a right of being elected as a Municipal Commissioner. The defendants are persons who, both before and after the institution of the suit, denied the title

of the plaintiff to such character. Therefore, we think that section 42 of the Specific Relief Act tends to show that a suit like the present can be brought under that section.

Holding, as we do, therefore, that a suit lies, the next question which arises is, against whom does it lie? The suit has been brought against the defeated candidates, at whose instance the Magistrate set aside the election, that is to say, at whose instance the Magistrate interfered with the right which is claimed in this suit. Section 42 of the Specific Relief Act allows a suit against any person denying or interested to deny the right of the plaintiff to any legal character. So far as the persons who filed the petition to the Magistrate are concerned the suit must lie against them, if it lies at all. They denied the right of the plaintiff and put in force machinery which excluded his exercise of that right. Of all persons they must be the proper persons to be sued for the purpose of determining questions as to the right, which they have denied. It is said by Babu *Hem Chandra Banerjee* that the suit is not properly instituted against the Magistrate, and that it ought to have been instituted against the Secretary of State. The learned Judge also seems to have been of that opinion. It does not appear that at the time when the law requires objections of that kind to be taken, any objection was made to the omission of the Secretary of State from the category of defendants, so an objection as to his being omitted cannot now be entertained, and, indeed, we are not prepared to say that the Secretary of State was a necessary party. The question remains as to whether the Magistrate ought to have **[114]** been made a defendant. Some question was raised in the lower Courts as to whether the Magistrate ought to be made a party by name; and the learned Judge has held that it was incorrect of the plaintiff to sue the Magistrate by name. This is not a suit, as we understand, brought against Mr. Manisty personally, and although it may be an error, it is merely surplusage to put in the name of the gentleman who happens to be holding the office of Magistrate. No one has in any way been misled by the mistake of adding Mr. Manisty's name on the record. We find that the gentleman who succeeded him in office puts in a written statement which he described as being filed on behalf of the Magistrate of Sarun. He at that time, in May 1891, accepted the position that the Magistrate was being sued and not Mr. Manisty personally; and as far as we can make out it was the Magistrate of the District who has conducted this defence. Therefore, we think, that the case must be treated as if the Magistrate was sued.

It is exceedingly doubtful whether there is any right at all against the District Magistrate as such. What he did was done in pursuance, or at any rate purported to be done in pursuance, of authority given to him by law. There is a question whether he had any authority to do what he did, and whether the presiding officer was not the only person who could have acted in the matter; but even if that be so, the Magistrate acted *bonâ fide* in pursuance of what he believed to be the duties of his office, and therefore he would not be liable to an action in respect of it. He would certainly not be liable to any action for damages, and as far as a declaration against him is concerned, this is not a matter in which he really had any interest. It is true that in a written statement he raises a defence, but the Vakil for the appellant does not insist upon a decree against him. We think it very doubtful whether such a decree could be given, and certainly as a matter of policy it would not be right for us to do anything which would compel Magistrates of districts to be brought in in suits of this kind when the contest is really one between the parties who have opposed one anoher at an election. So far therefore as this appeal is against the Magistrate, we think it must be dismissed.

To proceed with the case as regards the other defendants, we have held that the suit lies and lies against them. So far as the [115] suit is for a declaration that the election of the plaintiff was a good election we agree with both the lower Courts that the plaintiff is not entitled to that declaration.

There is no doubt that the election was invalidated by the defect to which we have referred, namely, that the voters were allowed three votes although there were only two vacancies at the time. Even if we accede to the contention of the appellant that this question of the validity of the election could only have been determined there and then by the presiding officer under the terms of Rule 34 of the Rules to which we have referred, and although he may be correct in his contention that the subsequent proceedings before the Magistrate were *ultrâ vires*, yet we think we ought not to give a declaration that the election was a good one unless we are satisfied that it was free from reproach in every respect. There can be no doubt that the voters wrongly were allowed more votes than they were entitled to, and that was a defect which in our opinion ought to have vitiated the election at the time, and would have justified the presiding officer in setting it aside. We ought not to do anything to validate an election which is open to this very grave objection.

To deal with the further questions, the plaintiff claimed to be entitled to vote at this election as being on the Register. The defendants' objection was that the plaintiff did not come within the definition of a " resident " to be found in Rule 1, paragraph (*d*) of the Rules of the 14th August 1889 to which we have referred. It is unnecessary for us to discuss the application of that Rule to this case, as in the first place this question has been determined in favour of the plaintiff, and, in the second place, it was not an objection which could be raised at that stage. Rule 13 provides: " The register as amended by the Magistrate after the hearing and decision of claims and objections shall be considered as the final register of persons entitled to vote at the election, and no person whose name does not appear in the register shall be permitted to vote." The plaintiff's name was on the register.

Then as regards his right to be a candidate for election, we come to Rule 20, which says: " The final list of candidates shall be published in each Ward and at the Municipal Office, or if there is no Municipal Office, at such place as the Magistrate may appoint, at least [116] one week before the date fixed for the commencement of the elections. No candidate whose name is not contained in such list shall be eligible for election." The plaintiff's name was included in that list.

Then with regard to the manner of holding elections we find it laid down how objections are to be made and what objections can be made. Rule 32 says: " When a poll is demanded the names of the voters and the votes given by them shall then and there be recorded by the presiding officer, or by the members of the election committee under his personal supervision. All objections to voters, shall, if possible, be summarily decided by the presiding officer after reference to the register. No objections shall be entertained other than objections arising out of matters subsequent to registration under Rule 10." So far therefore as voters are concerned the presiding officer cannot deal with matters antecedent to the registration. Then Rule 34 says: " The presiding officer shall then and there declare such candidates as have a clear majority of votes to be duly elected." (That is what he did as a matter of fact in this case.) " Provided that if the majority for any candidate consists only of votes to which objections have been raised, and if the presiding officer has been unable to decide such objections summarily as provided by Rule 32, he shall adjourn the proceedings and report the matters to the Magistrate." But this Rule must be read

with Rule 32, which states clearly that no objections can be entertained at an election other than objections arising out of matters subsequent to registration. It is true that the objection raised was not an objection to the plaintiff *quâ* voter but *quâ* candidate. But that objection was based upon his right to vote, and so it follows, we think, that the objection could not be taken at the time of the election. The effect of the objection put forward by the defendants was to dispute the right of the plaintiff not only to be a candidate but also to be a voter in the Municipality. This, in our opinion, is a matter reaching far beyond the election of December 1893. It is a matter which affects not only the plaintiff's right to vote as long as that register of voters remains unaltered, but which may seriously affect his right to vote and to be a candidate on future occasions. From every point of view we think it is a right in respect of which he is entitled to demand an adjudication by a Civil Court. [117] The learned District Judge, although he agrees with the Munsif in holding that the plaintiff was at the time of the election duly qualified both as voter and candidate, gives no reason for refusing to the plaintiff the relief to which he was entitled on the basis of that finding, and for setting aside the decree of the Munsif. In our opinion the decree of the Munsif is correct and must be restored so far as the defendants other than the Magistrate are concerned. We have already said that the appeal as regards the Magistrate must be dismissed. But we think that in this litigation, particularly for the reason that the plaintiff has failed to obtain a declaration that he was duly elected to be a Municipal Commissioner, which was the main object of this suit, the right order to make is that each party do bear his own costs.

The result is that the decree of the lower Appellate Court is set aside and that of the first Court restored so far as concerns the defendants other than the Magistrate. As regards the Magistrate this appeal is dismissed, except that the decree of the lower Appellate Court is altered by setting aside that portion of it which orders the plaintiff to pay the Magistrate's costs, the costs throughout being borne by the parties respectively.

S. C. C. *Appeal allowed.*

NOTES.

[See also (1911) 21 M.L.J., 878 : 12 I.C., 311.]

[24 Cal. 117]

ORIGINAL CIVIL.

The 11th and 19th August, 1896.

PRESENT:

MR. JUSTICE AMEER ALI.

Dhoroney Dhur Ghose
versus
Radha Gobind Kur.*

Practice—Inspection of Property—Civil Procedure Code (Act XIV of 1882), section 499—Judicature Acts, Order 50, Rule 3—Form of order for inspection.

The plaintiff brought an action against the defendant for damages alleged to have been caused to his house by the erection by the defendant of an adjoining house. On an application by the defendant for an order allowing him or his agents 'to enter into the house of the plaintiff for the purpose of inspecting, examining and surveying the alleged injuries and for the purpose of examining the materials employed therein and the formations thereof and to dig excavations for the purpose of exposing the foundations,' it was objected by the plaintiff that the Court had no jurisdiction to make the order, as the [118] house of which inspection was sought was not the 'subject of the suit' within section 499† of the Civil Procedure Code, and that if the order could be made for inspection of the house it could not be made for inspection of the house including the zenana apartments, and further that no order could be made for the excavation of the foundations.

Held, that the house and premises of the plaintiff formed the "subject of the suit" within the meaning of section 499, and under that section the Court had power to make the order applied for. *Held*, also, that this was a case in which the order should be made.

THE suit in which this application was made was instituted for the recovery of Rs. 5,000 as damages for certain injuries alleged to have been sustained by the plaintiff's house No. 110-2, Shambazar Street, by the manner in which the defendant constructed his house No. 110/4, Shambazar Street. The application was made on notice by the defendant for an order that the defendant or his agents might be at liberty to enter into the house of the plaintiff for the purpose of inspecting, examining and surveying the injuries alleged to have been sustained by the plaintiff's house, and also for the purpose of examining the materials employed therein and the formations thereof, and to dig excavations for the purpose of exposing such foundations. The defendant stated in his affidavit that he had frequently applied to the plaintiff to allow him inspection of his house for the purpose of examining the nature and extent of the

* Application in Original Civil Suit No. 475 of 1895.

Power to make order for detention, &c., of subject-matter, and to authorize entry, taking of samples and experiments.

† [Sec. 499 :—The Court may, on the application of any party to a suit, and on such terms as it thinks fit,

(a) make an order for the detention, preservation or inspection of any property being the subject of such suit;

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c) for all or any of the purposes aforesaid, authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

The provisions hereinbefore contained as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this section.]

damages alleged to have been sustained, and that the plaintiff had refused to do so; that he denied that any injury had been caused to the plaintiff's house by any act or omission or negligence on his part in constructing his house No. 110/4 Shambazar Street; that the plaintiff had built his house in a careless and unworkmanlike manner without proper foundations or a proper bed of concrete over a loose soil; and that it would be unsafe for the defendant to go to trial without evidence as to the nature of the alleged injuries and the nature of the construction of and materials employed in the plaintiff's house.

The affidavit of the plaintiff was to the following effect: That the defendant had made excavations close to the wall of the plaintiff's house by which the land and buildings of the plaintiff were deprived of necessary support; that such excavations were carried out in a negligent and careless manner, and that by reason thereof the plaintiff's house was injured, its foundations **[119]** sank and an archway fell; that he denied that he had built his house in a careless or unworkmanlike manner; and that his house was used as a family dwelling house, and it would put him and the female members of his family to considerable trouble and inconvenience if the defendant or his agents were permitted to enter his house.

Mr. *Dunne*, for the Defendant, applied for an order in the above terms.

Mr. *Pugh* and Mr. *R. N. Mittra*, for the Plaintiff, opposed the application.

Mr. *Pugh*.—The Court has no jurisdiction to make the order asked for under section 499 of the Civil Procedure Code, and if an order can be made for the inspection of the house it cannot be made for inspection of the zenana apartments. No order can be made allowing the defendant to make excavations for the purpose of inspecting the foundations. The house is not the 'subject' of the suit within section 499. That section is taken from order 50, rule 3 of the Rules of the Supreme Court, 1883, but is not identical in terms with it. The words in order 50, rule 3 are "order for the detention, preservation, or inspection of any property or thing being the subject of such cause or matter or *as to which any question may arise therein.*" The terms there are much wider than in section 499. That section deals with an order for the inspection of any 'property' being the subject of the suit; sub-sections (*b*) and (*c*) deal with an order authorising any person to enter upon any land or building for the purpose of taking samples or trying experiments. The section does not apply to a case like this. No such order as this could have been made in England before the Judicature Acts. *Ennor* v. *Barwell* (1 De. G. F. & J., 529). Since the Judicature Acts it is otherwise—*Lumb* v. *Beaumont* (L. R., 27 Ch. D., 356). In the case of the *Nawab of Murshidabad* v. *Hurdut Dass* (unreported, HILL, J, 16th July 1891) inspection was refused. Daniell's Chancery Practice, 6th Ed, Vol. II, p. 1804, was also referred to.

Ameer Ali, J.—The suit in which this application is made has been brought by the plaintiff to recover Rs. 5,000 for **[120]** damages alleged to have been caused to his house 110-2, Shambazar Street, in Calcutta, by the construction by the defendant of his premises now numbered 110-4.

The plaintiff states in substance that owing to the manner in which the defendant's house has been built the foundations of his house have sunk, and one at least of the arches has given way, and various cracks have appeared in his premises, for the repairs of which he has been put to considerable expense, and he estimates his damages at Rs. 5,000. The defendant's case, as stated in his written statement, is that the plaintiff erected his house on a defective foundation, and that the cracks which have appeared are primarily due to that circumstance and also to defective workmanship. He denies *in toto* that any

damage has been caused to the plaintiff's premises in consequence of or as resulting from the house which he has built. As early as May 1895 the defendant applied to the plaintiff's attorney to allow him inspection of the plaintiff's premises with the object of testing how far his case as to the cause and extent of the alleged damages was correct. This was not complied with and the defendant has been compelled to seek the assistance of the Court. In a matter like this I should have expected that the plaintiff would have been advised to allow the inspection asked for readily and unhesitatingly, for obviously any objection or hindrance would be regarded with suspicion, and be likely to operate against the plaintiff. That the plaintiff and his advisers should have taken up an attitude from which it might be inferred that inspection would not suit their purpose is to say the least ill-advised.

Mr. *Pugh*, who appeared to oppose the application, did so on the ground that this Court had no jurisdiction to make a compelling order for inspection. That is a proposition which seemed to me to be opposed to the practice of the Court, and upon enquiry made by the Registrar at my request it appeared that orders for inspection had been made without objection, and that one had been made so recently as the 10th September 1895 by SALE, J., in the case of *Greesh Chunder Seal* v. *Zemin*.

In that case the jurisdiction of the Court was not questioned. **[121]** It has now been questioned, and it is necessary to consider what the Court's jurisdiction is in regard to this matter. The application is made under the provisions of section 499 of the Civil Procedure Code, which is as follows: "The Court may, on the application of any party to a suit, and on such terms as it thinks fit -(*a*) make an order for the detention, preservation or inspection of any property being the subject of such suit: (*b*) for all or any of the purposes aforesaid, authorize any person to enter upon or into any land or building in the possession of any other party to such suit . and (*c*) for all or any of the purposes aforesaid, authorize any samples to be taken or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. The provisions hereinbefore contained as to execution of process shall apply *mutatis mutandis*, to persons authorized to enter under this section." This section is taken from and is similar to Rule 3 of Order 50 of the Rules passed under the English Judicature Acts. That rule runs thus: "It shall be lawful for the Court or a Judge, upon the application of any party to a cause or matter and upon such terms as may be just, to make any order for the detention, preservation or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorize any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorize any samples to be taken, or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence."

In section 499 of the Civil Procedure Code the words are "inspection of any property being the subject of such suit." In the English rule the words are "inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein." The words are disjunctive.

Mr. *Pugh* contended that the last words not being contained in section 499 the powers contained in rule 3 were not intended to be given by the Code. I entirely differ from that view. It seems to me that the words "or as to which any question **[122]** may arise therein" were omitted because it was

thought that the words "the subject of such suit" were sufficiently comprehensive to cover all matters in issue in the suit. Now, it is said that the house of which inspection is sought is not the subject of the suit. Damages are sought in respect of alleged injuries to or constructive trespass on premises belonging to the plaintiff of which inspection is asked. The damages sought to be recovered must relate to some thing existing in substance which in reality would form the subject of the suit. In my mind it would be wrong to say that the house is not the subject-matter of the suit. If the substance is kept in view the meaning of the section is perfectly clear, *i.e.*, that the matter in dispute is damages alleged to have been caused to the premises of the plaintiff in consequence of the acts of the defendant. The cases in England under the English rule clearly lay down the principle under which orders of this kind are made, and it seems to me that those cases are applicable to cases arising here. In the case of *Bennitt* v. *Whitehouse* (28 Beav., 119) inspection was sought by the plaintiff of the defendant's premises on the ground that without ascertaining the correct manner in which the defendant was working the colliery it would be impossible for the plaintiff to go to trial. The application was opposed, and the Master of the Rolls in giving his judgment stated that "it is established by the cases, that if a person is making use of his property to the injury of the property of his neighbour, the latter is entitled to an inspection in order to ascertain the extent of the injury."

That was with reference to a plaintiff's right, but it would, it seems to me, apply equally to a defendant's case. A defendant when he comes into Court is entitled to be in a position to test the statements of the plaintiff made in his plaint, and obviously the defendant in the present case cannot do so unless allowed to see the alleged cracks, &c. To refuse inspection would seriously prejudice the defendant at the trial. To allow inspection cannot possibly injure the plaintiff's case, if true. The grounds on which the application is opposed are contained in the last two paragraphs of the plaintiff's affidavit. In one of them he says he would be inconvenienced, as he is living in the house with his [123] family. In the other he says that if excavations are made they might injure the house. The Courts have always taken precautions against injury or inconvenience, and Mr. *Dunne* at the very outset offered to be put on conditions. In the case of *Lumb* v. *Beaumont* (L. R., 27 Ch. D., 356), which seems to me very analogous to the present case except that the application there was made by the plaintiff, and the order was made notwithstanding the objection of the defendant's Counsel that under the circumstance the Court ought not to make the order, PEARSON, J., held that the case of *Ennor* v. *Barwell* (1 De. G. F. & J., 529), which Mr. *Pugh* also cited, had no application, nor in my opinion has it any application to the present case. The unreported case referred to by the learned Counsel for the plaintiff has not been found. In the case of the *Nawab of Murshidabad* v. *Hurdut Dass* (unreported. HILL, J., 16th July 1891) referred to by Mr. *Mitter* the circumstances were totally different. The plaintiff had administered interrogatories to the defendant to compel him to give particulars of the land claimed by the plaintiff. Having failed in that he applied under section 499 for inspection, but HILL, J., thought that he ought not to give the plaintiff the order to enable him to obtain particulars which he had failed to get by interrogatories. There was in that case no question of jurisdiction. The only question was whether the Court in its discretion should make the order. I, therefore, hold that the Court has power under section 499 to make an order for inspection whenever it thinks that inspection should be had of the premises in suit, and that there is nothing in the objection which has been taken. I propose, therefore, to make this order: That leave be given to the defendant to inspect the premises of the plaintiff so far as the cracks

and damages alleged by the plaintiff are concerned upon giving forty-eight hours' notice to the plaintiff; such inspection to be made by the defendant or his agents with the assistance of any expert he may employ, and on three several occasions at such hours as would not put the family of the plaintiff to any inconvenience and when they are not employed in the necessary duties appertaining to a Hindu family; the defendant in making any excavations he may be advised to make for the purpose of inspecting the foundations will abide by the opinion of [124] any expert of the plaintiff that they should not go further; the cracks and openings in the walls and excavations made by the defendant to inspect the foundations to be put right at once at the defendant's expense, and the costs of the expert employed by the plaintiff to be paid by the defendant.

Costs of this application will be costs in the cause.

Attorneys for the Plaintiff: Messrs. *Remfry & Rose*.

Attorney for the Defendant: Babu *B. N. Bose*.

F. K. D.

NOTES.

[The only change in the corresponding section in the C.P.C., 1908, O. 39 r. 7, clause (*a*), is that instead of the words '*being the subject of such suit*' after '*property*', the following words appear:—'which is the subject-matter of such suit *or as to which any question may arise therein*'.]

[24 Cal. 124]

SMALL CAUSE COURT REFERENCE.

The 8th January, 1896.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE PRINSEP, AND MR. JUSTICE PIGOT.

A. Yule & Co.

versus

Mahomed Hossain and others.

Contract—Sale of unascertained goods—Appropriation by vendor—Passing of property—Breach of Contract—Power of re-sale—Contract Act (IX of 1872), section 107—Measure of damages.

The contract was for sale by description of 15 bales of grey shirtings (to arrive) at an agreed price. It was found that the 15 bales which were tendered by the plaintiff did answer the description, but the defendants refused to accept them, alleging that they were wrongly marked. Under the contract of sale the plaintiffs had an express power of re-sale. After giving notice to the defendants they had the goods re-sold at auction and bought them in themselves as the highest bidders. Then they brought an action for the difference between the contract price and the price realized at the re-sale, framing the suit as for loss on re-sale and not for damages for breach of the contract.

Held, the defendants having refused to accept the goods, the property in them remained in the vendors (plaintiffs), and the re-sale had no effect whatever. To such a case as this

* Small Cause Court Reference No. 1 of 1895.

neither section 107* of the Contract Act nor the proviso for re-sale in the contract itself can have any application. Such power is required when the property in the goods has passed to the purchaser subject to the lien of the vendor for the unpaid purchase money. The plaintiffs were entitled to receive only the difference between the market price of the day and the contract price, and that was the true measure of damages.

THIS was a reference by the Second Judge of the Calcutta [125] Small Cause Court under section 69 of the Presidency Small Cause Court Act (XV of 1882) and section 617 of the Civil Procedure Code (Act XIV of 1882).

The facts of the case and the questions referred appear from the following letter of reference :—

"This is a suit to recover the loss sustained on a re-sale of goods sold by the plaintiff to the defendant, and the question referred to the High Court seems to me to be briefly this: Can a vendor exercising his power of sale buy the goods himself at a public auction duly advertized, the whole transaction being perfectly open and *bonâ fide?*

"The facts are these: The plaintiff by a contract, dated the 20th October 1893, sold to the defendant 15 bales (to arrive) of grey shirtings at Rs. 4-11 per piece. The 15 bales arrived, and were appropriated to the defendant, but the defendant refused to take delivery, alleging that the goods were wrongly marked.

"The plaintiff gave notice of re-sale on the 11th July 1894, and instructed Messrs. Mackenzie Lyall & Co. on the 16th July to sell 15 bales, specifying the numbers of 13 only out of the 15 bales appropriated to the defendants, the numbers of 2 other bales being excluded apparently by mistake.

"The sale was duly advertized every day for a week and the bales were sold at public auction on the 23rd July by Mackenzie Lyall & Co. at their usual sale of piece-goods to the plaintiff, who was the highest bidder amongst several bidders, at Rs. 4-4-3 per piece, on account of and at the risk of the defendant.

"The plaintiff under the contract for sale had an express power of re-sale in the following words. If they (the goods) are not taken delivery of and paid for as herein agreed, the sellers may re-sell them, or any portion of them, or at their option cancel this contract, and they have absolute discretion as to when and how to re-sell the goods. The buyers, in case of any re-sale, shall pay to the sellers any loss or deficiency arising from such re-sale, together with interest at 12 per cent per annum. Should there, however, be any surplus after payment of the contract price, charges, costs and expense of re-sale, the same shall belong to the sellers.

"I found that the defendant wrongfully refused to take delivery, that the sale to the plaintiff was a good sale and perfectly *bonâ fide*, and I gave a decree to the plaintiff for Rs. 600 as the loss on the 13 bales only, contingent upon the opinion of the High Court upon the points referred.

"No evidence was given as to what the plaintiff did with the goods subsequent to the re-sale. There was no suggestion either that the plaintiff concealed the fact of his being the purchaser or that the price obtained was not a proper price; but it was contended for the defence upon the authority of [126] *Buchanan* v. *Avdall* (15 B. L. R., 276) that the re-sale was vitiated by the fact of the plaintiff being himself the purchaser, and Mr. *Sowton*, the defendant's attorney, has submitted the following questions for the opinion of the High Court:—

"1. Have the plaintiffs a right to recover on their plaint before the Court the loss alleged to have been sustained by them at the sale held on the 23rd of July by Mackenzie Lyall & Co., without accounting for what ultimately became of the goods.

* [Sec. 107 :—Where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him, or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may, after giving notice to the buyer of his intention to do so, re-sell them, after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit, which may occur on such re-sale.]

Re-sale on buyer's failure to perform.

"2. Whether in case the plaintiffs have a right to recover, the amount of damages should not be limited to the expenses incurred at the re-sale.

"3. Whether the plaintiffs are entitled to recover any damages at all by reason of their having re-sold only 13 out of the 15 bales.

"As to the 3rd question, it is sufficient to say that the plaintiffs had power to sell a portion only of the goods under the express provision in the contract.

"As to the 2nd question, if the re-sale is bad the plaintiff cannot recover from the defendant the expenses incurred by him in effectuating such re-sale.

"The 1st question really resolves itself into this: Is the sale to the plaintiff a good re-sale? For a loss however great incurred by the plaintiff by the ultimate sale of these goods could only possibly enable him to recover the loss sustained upon a former re-sale if such re-sale is held to be bad.

"The case of *Buchanan* v. *Avdall* does not decide that a vendor exercising his power of re-sale can never become the purchaser of the goods himself, and I cannot find any decision to that effect, but it decided that the re-sale could not be upheld under the particular circumstances of the case; the particular circumstances being that the vendor hurried on the sale with the least possible notice and purchased the goods under another person's name at a price far below the real value of the goods.

"Apart from the wide power of re-sale given to the plaintiff under the contract in this case, the position of a vendor in the exercise of his power of re-sale under section 107 of the Contract Act is not that of a trustee for the vendee, neither does he sell *qua* pawnee, for the whole of the sale proceeds are his, and he would seem to be in a better position than that of an agent for the vendee: see *Lamond* v. *Davall* (9 Q. B., 1030), and yet an agent for sale of land even may purchase from his principal if he deals openly with him at arm's length and after a full disclosure of all that he knows with respect to the property: *Murphy* v. *O'Shea* [2 L. & J., 422 (425)].

"For these reasons I think a vendor exercising his right of re-sale may himself become the purchaser of the goods, if (as in this case) he shows that he has [127] re-sold the goods in the manner best calculated to secure the highest price possible."

Mr. *C. P. Hill* for the Defendants.—The sale to the defendants being a sale of unascertained goods the property in them did not pass on mere appropriation by the vendor, because that appropriation was not assented to by the purchasers: see section 83 of the Contract Act. The property remained and was in the vendor at the time of the alleged re-sale; there was therefore in fact no re-sale: see section 77 of the Contract Act. No suit for loss on re-sale would lie. The action might have been for breach of contract. In such an action the damages would be the difference between the contract price and the market price. If the plaintiff were now allowed to amend his plaint and to treat the suit as one for damages for breach, the plaintiff would still fail on the evidence as it stands, no evidence of market price having been given.

Mr. *R. Allen* for the Plaintiffs.—The goods were appropriated to the defendants and the property in them had passed. The re-sale was a valid re-sale. If the suit be treated as one for damages for breach, then the price fetched at the auction sale is good evidence of the market price, and damages may be assessed on that.

The **opinion** of the High Court (PETHERAM, C.J., PRINSEP, J., and PIGOT, J.) was delivered by

Petheram, C.J. (Prinsep, J., concurring).—My answers to the questions are:—

1. The plaintiffs cannot on the plaint before the Court recover the loss alleged by them to have been sustained at the sale held on the 25th July.

2. In an action properly framed the amount of damages would not be limited to the expenses incurred at the sale.

3. In an action properly framed the plaintiffs would not be prevented from recovering damages because they only professed to sell 13 out of the 15 bales.

The case has been entirely misunderstood, and neither of the questions proposed really arises in it at all.

The contract was for the sale of 15 bales of grey shirtings, and would have been satisfied by the delivery of any 15 bales which answer to the description in the contract.

It is found by the Judge that the 15 bales which were tendered **[128]** by the plaintiffs did answer the description, but as they were at once refused by the defendants and were never taken by them into their possession, the property in the goods never passed to the purchasers but remained in the vendors in the same way that it was vested in them before the tender. The case is the simple one of a breach of a contract to accept and pay for goods sold by description at an agreed price in which the measure of the damage is the difference between the contract price and the market price at the time of the breach. As the property in the goods remained in the vendors that which took place at the sale had no effect whatever, as the plaintiffs were merely offering their own goods for sale, and when they were knocked down at their bid, they only bought in their own goods. To such a case as this neither section 107 of the Contract Act nor the proviso for re-sale in the contract itself can have any application, as no such power is required to enable a man to sell his own goods. Such powers are required when the property in the goods has passed to the purchaser subject to the lien of the vendor for the unpaid purchase money, and it is to that class of cases that both the proviso and the section apply.

In the present case the right of the plaintiff was to recover the difference, if any, between the contract price and the market price at the time of the refusal. No such case was made in the plaint or at the hearing, and there is no evidence of the market price unless the fact that a certain price was obtained at the auction can be so treated, but, as Mr. *Hill* pointed out, that cannot be, as it was not tendered for that purpose and no question as to the market rate was raised.

The proper course in this case would have been to amend the plaint by adding an averment that the market price at the time of the breach was less than the contract price, and by adding a claim for damages on that basis. Then at the trial evidence might have been given of what the market price was at the time when the goods were refused, and the judgment should have been for the difference if any was shown to have existed.

Pigot, J.—I agree.

Attorneys for the Plaintiff: Messrs. *Dignam & Co.*

Attorneys for the Defendants: Messrs. *Sowton & Son.*

S. C. B.

NOTES.

[The Full Bench in (1898) 25 Cal., 505: 2 C.W.N., 288, overruled the dictum in this case (which was followed in 24 Cal., 177), holding that the power of re-sale was irrespective of the passing of property. See also to the same effect (1898) 23 Mad., 18; (1899) 22 All., 55.]

[129] ORIGINAL CIVIL.

The 24th July, 1896.
PRESENT :
MR. JUSTICE AMEER ALI.

A. Yule & Co.............Plaintiffs
versus
Mahomed Hossain and others............Defendants.

Small Cause Court, Presidency Towns—Practice and Procedure—Judgment contingent upon opinion of the High Court—Presidency Small Cause Court Act (XV of 1882), section 69—Civil Procedure Code (Act XIV of 1882), sections 373, 617, 618, 622.

The Small Cause Court passed a decree for the plaintiffs, but contingent upon the opinion of the High Court. On the reference the High Court decided that upon the plaint before the Court the plaintiffs could not recover

Held, that the Small Cause Court on the receipt of the copy of the judgment of the High Court was bound to enter judgment for the defendants.

IN this case the Small Cause Court passed a decree in favour of the plaintiffs, but contingent upon the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV of 1882). Upon the reference it was held by the High Court that the plaintiffs could not recover on the plaint before the Court. The judgment of the High Court was transmitted to the Small Cause Court, and subsequently the Officiating Second Judge of that Court allowed the suit to be withdrawn with liberty to the plaintiffs to bring a fresh suit. Thereupon the defendants obtained this rule under section 622 of the Civil Procedure Code, calling on the plaintiffs to show cause why the order of the Small Cause Court allowing the suit to be withdrawn should not be set aside.

Mr. *Allen* for the Plaintiffs.

Mr. *W. C. Bonnerjee* for the Defendants.

Ameer Ali, J.—The question involved in this rule is of some importance. The parties showing cause brought a suit in the Small Cause Court for damages alleged to have accrued to them in consequence of the refusal of the defendants in that suit, the now applicants, to take delivery of certain goods they had agreed to purchase from the plaintiffs. On such refusal the plaintiffs re-sold the goods, and then sued for the difference between the [130] contract price and the price obtained at the re-sale. It appears that at the re-sale the plaintiffs themselves bought in the goods The objections raised by the defendants at the hearing of the suit were overruled by the learned judge of the Small Cause Court, who held that there was no objection to the plaintiffs having themselves purchased the goods on the re-sale, and that they were entitled to recover the amount claimed.

The judgment, however, was made contingent on the opinion of the High Court. When the reference to the High Court came on for hearing, it was found that none of the questions submitted for consideration really arose in the suit. And the High Court's answer to the first question was "the plaintiffs cannot on the plaint before the Court recover the loss alleged by them to have been sustained at the sale held on the 25th July."

The learned Judges then proceeded to say : "In an action properly framed the amount of damages would not be limited to the expenses incurred at the

sale. * * * In an action properly framed the plaintiffs would not be prevented from recovering damages because they only professed to sell 13 out of the 15 bales. * * * The case has been entirely misunderstood, and neither of the questions proposed really arises in it at all. * * * The proper course in this case would have been to amend the plaint by adding an averment that the market price at the time of the breach was less than the contract price, and by adding a claim for damages on that basis. Then at the trial evidence might have been given of what the market price was at the time when the goods were refused, and the judgment should have been for the difference if any was shown to have existed."

The judgment of the High Court was transmitted to the Small Cause Court, and the Officiating Second Judge read it out, and on the 29th of January 1896 after certain adjournments allowed the suit to be withdrawn with liberty to the plaintiffs to bring a fresh suit. Thereupon on the 21st of May last the defendants obtained a rule from this Court calling on the other side to show cause why the order of the Small Cause Court made in the suit should not be set aside, and why this Court should not pass such other order thereon as it should think fit.

The rule was granted under section 622 of the Civil Procedure [131] Code on the ground that the Judge had acted without jurisdiction, or if with jurisdiction then "illegally or with material irregularity."

Mr. *Allen* showed cause for the plaintiffs, and his contention is that the Small Cause Court Judge acted rightly in making the order under section 373 of the Civil Procedure Code. It must be borne in mind that the reference to this Court was made under section 617 of the Civil Procedure Code coupled with section 69 of the Small Cause Court Act. It is unnecessary to refer particularly to section 617, but the provisions of section 618 should be considered. That section runs thus :—

"The Court may either stay the proceedings or proceed in the case, notwithstanding such reference, and may pass a decree or order contingent upon the opinion of the High Court on the point referred ; but no execution shall be issued, property sold, or person imprisoned, in any case in which such reference is made, until the receipt of a copy of the judgment of the High Court upon such reference "

Section 619 is as follows: "The High Court shall hear the parties to the case in which the reference is made in person or by their respective pleaders, and shall decide the point so referred, and shall transmit a copy of its judgment under the signature of the Registrar to the Court by which the reference was made: and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court."

It should be observed that the words "the case" in the last part of the section refer to "the case" in the first part, showing clearly that what is intended is the suit and not the subject of the reference. In this case the evidence had been taken, and the Judge had come to the conclusion that the plaintiffs were entitled to a decree and had accordingly passed a decree in their favour.

The High Court came to the conclusion that the plaintiffs were not entitled to recover the loss alleged on the plaint before the Court. In other words they held that the plaintiff's suit as it then stood must fail. They proceeded to give reasons and to state what might have been done if the plaintiffs had taken another course, but the conclusion was that the plaintiff having taken the course he had, the suit must fail, and this they expressed most clearly in their judgment which was transmitted to the Small Cause Court.

[132] Section 619 provides that on transmission of a copy of the judgment of the High Court, "under the signature of the Registrar to the Court by which the reference was made, such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court."

It has been contended that under that section, on receipt of the judgment of the High Court, the Small Cause Court was bound to declare its own judgment rescinded, but having done that it was then at liberty to proceed with the case as it liked. This contention carried to its legitimate extent must land us in serious difficulties. A case may, as in the present instance, proceed to decree contingent upon the opinion of the High Court. That Court may hold that the action as framed was not maintainable. If the contention be well founded, the Small Cause Court may, after a suit has been decided, give the plaintiff leave to amend his plaint and proceed with the suit *de novo*. This may happen any number of times, for there would be nothing to restrict the discretion of the Small Cause Court. Such an eventuality would not be likely to occur in practice except rarely, but it may be referred to as a fair test to apply in the construction of the section. I cannot accept the argument put forward by learned Counsel, as it seems to me the meaning of the section is perfectly plain, and I must deal with the question from a common sense view.

The Small Cause Court had passed a decree for the plaintiffs contingent on the opinion of the High Court. The High Court held that upon the case presented by the plaintiffs they could not recover. As the result, judgment could only be entered for the defendants, and the Small Cause Court was bound on receipt of the decision of the High Court to dispose of the case in accordance therewith. The method suggested by Mr. Allen would render it possible to help parties who have made mistakes and who have had their cases heard and obtained the decision of the Court on the basis of those mistakes; but that certainly is not contemplated by the section, which requires the Court to "proceed to dispose of the case in conformity with the decision of the High Court." Had the case been referred in an interlocutory or intermediate stage the final judgment being withheld until the decision on the point referred to the High Court, the Small Cause Court would then have been in possession [133] of the case, but having pronounced judgment contingent upon the opinion of the High Court, which opinion was against that judgment, there was only one course to take.

It seems to me that the Small Cause Court did not possess the jurisdiction it exercised, and that it did not act in conformity with section 619 in disposing of the matter as it did. The order which it purported to make was therefore bad for want of jurisdiction, and must be set aside. The matter must go back with this expression of opinion.

Rule made absolute with costs.

Attorneys for the plaintiffs: Messrs. *Dignam & Co.*

Attorneys for the defendants: Messrs. *Sowton & Sen.*

F. K. D.

[24 Cal. 133]

APPELLATE CIVIL.

The 4th May, 1896.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE HILL.

In the Matter of Basharat Ali Chowdhry (a Lunatic).*

Lunatic—Residence—Lunatic resident in mofussil—Guardian of Lunatic's Person—Position of Guardian towards local Court appointing him—Temporary Suspension of Guardian—Jurisdiction of District Judge—Irregularity—Act XXXV of 1858, sections 10, 15 and 22—Superintendence of High Court—Civil Procedure Code (Act XIV of 1882), section 622.

Although Act XXXV of 1858 contains no express provisions as to the place of residence of a lunatic governed by the Act, it contemplates that he shall reside within the jurisdiction of the Court that has found him to be a lunatic.

The guardian of such a lunatic's person is, in matters connected with the guardianship, subordinate to the District Court which appointed him.

A guardian, having obtained leave from the District Judge to take the lunatic out of the jurisdiction for a specified time, was, at the expiration of that time, ordered to return with the lunatic to his residence within the local jurisdiction. He failed to comply with the order. Without further notice, the District Judge, by certain orders which he gave by letter and telegram through the manager of the lunatic's estate, suspended the guardian from his office, and directed him to make over the custody of the lunatic to the manager. The guardian made over the custody accordingly; [134] and then applied to the High Court under section 622† of the Code of Civil Procedure, to set aside those orders, and restore the custody of the lunatic to him at Calcutta (outside the jurisdiction of the Court to which the lunatic was subject). The High Court declined to interfere, even though the orders were made irregularly; because no case for its intervention had been made out, and because the lunatic ought not to be removed out of the local jurisdiction.

BASHARAT ALI CHOWDHRY was a lunatic, so found under Act XXXV of 1858. Syed Mahomed Hashim was appointed guardian of his person in 1890, and Mr. Sandys manager of his property in 1893. In November of 1894 the District Judge of Tipperah—within whose jurisdiction the lunatic resided—gave the guardian permission to take his ward for a tour in the North-West Provinces for four months, from November 1894 to February 1895. The tour was begun accordingly; but about the 22nd December 1894 the guardian and his ward went to Calcutta, where they remained until March 1895. On the 18th February 1895 the guardian wrote to the District Judge a letter asking for an extension of leave until the end of March, on the ground that the son of the lunatic desired his father's presence at his daughter's salt-tasting ceremony. The District Judge refused the extension, and directed the manager to telegraph to the guardian to return to

* Civil Rule No. 814 of 1895.

†[Sec. 622:—The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity; and may pass such order in the case as the High Court thinks fit.]

Power to call for record of cases not appealable to High Court.

Comilla immediately. The guardian thereupon procured a medical certificate from Dr. Crombie to the effect that there was no objection to the lunatic's remaining in Calcutta, and that he (Dr. Crombie) was informed that the lunatic's mental condition was improved by the change. The guardian forwarded this certificate to the District Judge in the hope of obtaining the extension of leave which had previously been refused.

The District Judge again sent orders, through the manager, by letter and telegram, directing the guardian to return. The guardian did not at once obey the order to return, and it was repeated on the 4th March. Being asked, on the 11th March, why he did not return, the guardian replied that his ward was under medical treatment. After some further communications had passed between the manager (acting under the orders of the District Judge) and the guardian, the manager on the 14th March enquired of Dr. Gibbons (who was attending the lunatic) [135] whether he could return to Comilla, and Dr. Gibbons replied that he did not recommend the journey. On the 18th March the guardian wrote to the District Judge a letter complaining of the interference of the manager, and enclosing an opinion or certificate of Dr. Gibbons, to the effect that the lunatic had expressed a desire not to return to Comilla but to remain in Calcutta, that it would be advisable to allow him to please himself in the matter, and that forcing him to live in a place to which he appeared—from the remarks made to Dr. Gibbons—to have contracted a marked dislike, was calculated to retard his recovery.

On the 21st March the District Judge gave the manager a letter of authority to go to Calcutta and take back the ward with as little delay as possible. The letter ended with these words: "Syed Mahomed Hashim, at present guardian of the person of the ward, is hereby suspended till further orders." Mr. Sandys left for Calcutta the following day, and on the 25th March, he telegraphed to the District Judge a request for an order directing the guardian to hand over the ward to him. The District Judge telegraphed to the manager the order asked for. In pursuance of that order, the manager took over the custody of the ward from the guardian, and took him back to Comilla on or about the 28th March.

In April 1895 the guardian presented a petition to the High Court, complaining that the District Judge was not competent to pass the order of suspension, that he had no jurisdiction to order the manager to take over charge of the lunatic from the guardian, and that the District Judge before suspending the petitioner should have held a proper inquiry into the matter and given the petitioner an opportunity of being heard: he therefore prayed the Court to send for the papers relating to the matter, to set aside the orders made by the District Judge, to direct that the lunatic be made over to the petitioner at Calcutta, and to make such other order as it thought fit.

The Court (NORRIS and GORDON, JJ.) issued a rule on the District Judge and on the manager to show cause why the orders contained in the District Judge's letter and telegram dated respectively the 21st and 25th March should not be set aside, and why the custody of the lunatic should not be made over to the [136] guardian at Calcutta; and the Court further ordered the District Judge to transmit without delay all the papers connected with the matter.

The rule was heard on the 17th June 1895, when neither the District Judge nor the manager appeared to show cause either in person or by Counsel or Pleader. The District Judge had submitted to the Court a written explanation of the matter; but the Court, holding that such explanation could not be looked at, and that it was not a proper method of showing cause, made the rule absolute.

On the 15th August 1895, the District Judge and the manager applied for a review of the order making the rule absolute on the grounds that the Court had no jurisdiction to order the custody of the lunatic to be given to the guardian at Calcutta; that the applicants had in fact good and sufficient cause to show against the order if they were allowed to lay the facts before the Court; and that it was by a *bonâ fide* mistake on the part of the District Judge that he not only did not show cause in regular form, but also instructed Mr. Sandys that it would be unnecessary for him to appear either.

The Court granted a rule for a review, which was on the 20th December 1895 admitted by GORDON, J., sitting alone. NORRIS, J., having in the meantime retired from the Bench—his Lordship holding that the matter had not been heard on the merits, and that it ought to be.

The matter, thus re-opened, eventually came on before MACPHERSON and HILL, JJ., on the 30th April 1896.

Sir *Griffith Evans*, Mr. *Wilson*, and Moulvie *Mahomed Mostafa Khan*, showed cause against the rule obtained by the petitioner, the guardian.—Act XXXV of 1858 deals with lunatics not residing within the jurisdiction of the Supreme Court: and although it provides for the care of the lunatic's person and the management of his property, there is no provision for allowing the lunatic to go out of the local jurisdiction. The English law must, therefore, be looked to; and under it a practice has grown up of allowing the committee of a lunatic to take the lunatic out of the jurisdiction upon giving security to bring him back when called upon. The general rule, both as to infants and lunatics is that they must not be removed [137] without leave of the Court out of the jurisdiction, Pope on Lunacy (2nd Ed.), p. 144: Tudor's Leading Cases (6th Ed.), II, 747. Here the District Judge allowed the lunatic to be taken out of the jurisdiction; and when the guardian disobeyed the order to bring his ward back, the Judge, having no power to issue a warrant, sent the manager of the lunatic's property to take charge of him and conduct him home. It is true that the Act does not specifically provide a power to suspend the guardian: but there is a power to discharge him, and that must include the power of suspension. The guardian now contends that the District Judge's orders are *ultra vires*: and he asks for the lunatic to be sent back from Comilla, where he ought to be, to Calcutta, where he ought not to be. He has sought the assistance of this Court under s. 622 of the Civil Procedure Code, which contemplates the decision of a case, but this is not a case. Even if the Court had the power to order the lunatic to be brought to Calcutta, this is not a case in which the Court would exercise that power. The same rule must apply here as exists in England with regard to not interfering with the local jurisdiction, and the reason is that, so long as the guardian is not within the local jurisdiction, he is out of control: moreover the lunatic was not subject to the Supreme Court; and this Court not having jurisdiction over mofussil lunatics, cannot order his removal from Comilla. And as to setting aside the order of suspension, that would be quite useless except as a preliminary step to bringing the lunatic to Calcutta, which ought not to be done. It is merely an interlocutory order and therefore this Court cannot deal with it under s. 622. *In re The Nizam of Hyderabad* (I.L.R., 9 Mad., 256). If this order is a final order, this Court cannot deal with it until the appeal is preferred which is given by s. 22 of Act XXXV of 1858. And if it is not a final order, the petitioner must wait until a final order is made, and then prefer his appeal. The cases on section 622 are collected in Mr. Justice O'KINEALY'S work on the Code (4th Ed.), p. 547. Nothing would be gained by setting aside the order: it was merely a direction to hand over the lunatic at that time, and it was complied with.

As to the merits of the case, the affidavit put in by Mr. Sandys [138] shows that upon his arrival in Calcutta he found that the guardian was neglecting his ward, and abusing his position as guardian to promote his own interests and pleasure; that the ward was badly housed in an insanitary quarter; that the deponent was informed by the lunatic's personal servants that the guardian had used threats to his ward, and had represented to him that he was to be taken back to Comilla by force. The affidavit further declares that all acts done by the manager had been done under the direct orders or with the immediate approval of the District Judge.

The *Advocate-General* (Sir *Charles Paul*), Mr. *St. John Stephen*, and Babu *Gonesh Chunder Chunder*, in support of the rule.—The Court has ample power under the Charter to interfere, and it ought to have the inclination. The wishes of the lunatic should have been consulted in any matter affecting his health. He wished to remain in Calcutta, and his medical adviser said he had better stay: but he was not allowed to. Again, until a guardian is duly discharged, he is entrusted with the care of the lunatic. Had he been discharged, instead of merely suspended, he could have applied for a *habeas corpus*. To that application there would have been no answer: indeed there is no answer to the case now. To argue that a power of removal includes a power of suspension is to beg the question. [MACPHERSON, J. It may have been improper for the Judge to give his orders to the guardian through the manager; but surely they are both subordinate to him?] Certainly not: the Act does not say anything of the kind. [MACPHERSON, J.—So long as there was a guardian, no Court, other than that of the District Judge, could interfere.] No; but the guardian has never been removed, even up to now. The Court cannot remove him conditionally; and it must do so upon notice or not at all,--see s. 18 of the Act. [MACPHERSON, J.—Does not the power to remove include the power to suspend?] No. Suppose the petitioner is suspended, who is the guardian? If he is not doing his duty he may be removed: but he must be served with a rule to show cause why he should not be removed. It is clear, then, that no order of suspension is possible, because there would be no one duly appointed to take charge of the lunatic; and that, even if the power of removal included the power of suspension, the suspension must be upon good cause, and the procedure must be the same as in the case of discharge, that is to say the Judge must proceed properly under [139] section 18 of the Act. Further, the very irregularity of these acts deprives the petitioner of the right of appeal given him by section 22 of the Act: the Court can therefore get rid of them either under section 622 of the Civil Procedure Code, or under section 15 of the Charter. There has been material irregularity, and therefore this Court can interfere – *In the matter of Arathoon* (2 Boul., 74). No man's rights should be affected without his having a full and fair opportunity of being heard,—*Cooper* v. *Wandsworth Board of Guardians* [32 L. J. C. P., 185: 14 C.B. (N. S.) 180]. Besides, a telegram is no order of Court; there is no appeal against a telegram. And the District Judge's letter is not an order under the Act either; indeed it is no judicial order at all.

The only thing to be considered in these cases is the benefit of the lunatic. Dr. Gibbon's certificate was ample justification for the petitioner's non-compliance with the Judge's letter. No act of the Court should be against the lunatic's welfare, but it was decidedly against his welfare to make him undertake a long and fatiguing journey like that from Calcutta to Comilla. It is argued that the guardian was in contempt: I deny that. It is then suggested that he wished to remain in Calcutta for his own interests. But even if he did stay in Calcutta that is no reason for depriving him of the custody of his ward. In *In re Bruere* (L. R., 17 Ch. D., 775) a person resident

out of the jurisdiction was appointed committee of a lunatic upon his giving security. If Mr. Sandys had acted in England as he has acted here, he would have been in high contempt,—see Elmer's Law of Lunacy, p. 58. The petitioner had no other course open to him than the one he has adopted. He very reasonably asks to be restored to the guardianship; and he is willing to give security to the satisfaction of the Court if the Court will allow the lunatic to remain in or near Calcutta.

The *Advocate-General* then applied for leave to read an affidavit in reply filed by the petitioner. The Court gave him leave, and also gave permission to Counsel on the other side to comment on the affidavit. The petitioner, in the affidavit, denied *in toto* the statements sworn to by Mr. Sandys; he complained of that gentleman's interference, because the petitioner was in **[140]** no sense subordinate to him: he deposed that it was not his pleasure or interest to remain in Calcutta, inasmuch as in March 1895 his wife, who resided at Comilla, was seriously ill, and she died in April 1895; and he set up Dr. Gibbon's certificate or report as a justification for his conduct in keeping his ward in Calcutta.

C. A. V.

On the 4th May 1896 the **judgment** of the Court (**Macpherson** and **Hill, JJ.**) was delivered in the following terms:—

We have read the affidavits and have heard learned Counsel on both sides, and are clearly of opinion that this is not a matter in which we should interfere even if we could properly do so.

It appears that Basharat Ali Chowdhry, a resident of the Tipperah District, was many years ago declared under Act XXXV of 1858 to be a lunatic by the Chief Civil Court of that District. When the occurrences complained of took place, Mr. Sandys was the appointed manager of his estate, and the petitioner, Syud Mahomed Hashim was the appointed guardian of his person. The latter under the Act was charged with the care and maintenance of the lunatic ward, but unquestionably he was in the performance of his duties in complete subordination to the Civil Court, which appointed him and could remove him for sufficient cause.

On the 18th November 1894 the petitioner and the lunatic were allowed to leave the Tipperah District, for a 4 months' tour in the Upper Provinces, the object being to give the lunatic the advantage of change of air and scene. On the 22nd December they went to Calcutta and remained there till the 18th February 1895, when the petitioner applied to the District Judge for the extension of the time allowed for tour. This was refused, and he was directed to return immediately with his ward. We need not refer in detail to the correspondence which then ensued, and which is set out in the affidavits; it is enough to say generally that the petitioner was, through Mr. Sandys, repeatedly directed to return with his ward, and that he made repeated excuses for not doing so, mainly on the ground that the ward was unwilling to go, and that he had been placed under medical treatment, which rendered it inadvisable that he should go.

On the 21st March the District Judge sent Mr. Sandys to **[141]** Calcutta to bring back the ward, and gave him a letter which concluded thus: "Syud Mahomed Hashim, at present guardian of the person of the ward, is hereby suspended until further orders." On the 25th he telegraphed to Mahomed Hashim to make over the ward to Mr. Sandys immediately. The ward was made over and taken back to Tipperah, and a copy of the Judge's letter of the 21st was sent by Mr. Sandys to the petitioner. We are asked to do two things,—to reinstate the guardian, and to direct that the lunatic be made over to his care in Calcutta: for that purpose the lunatic must be taken out of the

jurisdiction of the Court which has control over him to a place where that Court would have no control over either him or the guardian. We have to consider the interests of the lunatic quite apart from the interests of the guardian, and it in no way follows that the interests of both are the same.

Act XXXV of 1858 certainly contemplates that a lunatic who is brought under the operation of the Act should remain where he ordinarily resides, that is within the jurisdiction of the Court which has found him to be a lunatic, and which has appointed the manager of his estate and the guardian of his person. The Act does not provide for residence out of the jurisdiction, although there may be cases, in which this is very desirable for a time at least. In England it has been allowed, on the committee giving security to produce the lunatic when called upon to do so.

Possibly this Court would interfere if a strong case was made, and a District Court had unreasonably and improperly refused permission. We need not however consider what the power of the Court in this respect is, as in our opinion no case for the exercise of it in the interest of the lunatic has been made. We are not satisfied that it was in March 1895, much less than it is now, necessary for the lunatic to remain in Calcutta. It would require much stronger proof than is furnished by the affidavit of the petitioner to induce us to direct the removal of the lunatic from the jurisdiction of the Court which has control over him. We may add that the District Judge has shown no disinclination to allow the lunatic to leave the jurisdiction when it was considered for his benefit to go, and there is no [142] reason to suppose that he will not continue to do what he considers beneficial to him.

Even, therefore, if we considered that the Judge should have allowed the lunatic to remain in Calcutta in March 1895, we could not, on the materials before us, direct that he be sent back there.

Now as regard the guardian. Some strong comments have been made on the action of Mr. Sandys, the irregularities in the proceedings of the Judge, and the injustice said to have been done to the petitioner, and we think it right to express briefly our view of the matter.

The Judge was certainly under the impression that the petitioner wished to remain in Calcutta for his own convenience rather than for the benefit of the ward, and a perusal of the affidavits has failed to convince us that the impression was wrong.

From the 22nd December to the 18th February we hear nothing of the lunatic being under medical treatment, and the application of the last mentioned date had nothing to do with his condition mental or bodily. When that failed he was taken to a leading practitioner, who gave a very guarded certificate to the effect that there was no objection to the lunatic remaining longer in Calcutta, and that his mental condition was improving under the effect of change. The latter view was obviously, however, not the result of personal observation, and must have been based on information received. The certificate when submitted to the Judge did not produce the desired effect, and it is not till the 11th March that there is any suggestion of the lunatic being put under medical treatment for the infirmity from which he had been suffering for so many years. On the 17th March a certificate was obtained from another leading practitioner, and we do not doubt the truth of what is stated in it. To our minds it does not, however, prove very much, and furnishes no sufficient excuse for the disobedience of the guardian. The lunatic ward had not been and was not then suffering from any illness which prevented his return, and the idea of putting him under treatment for his mental infirmity was clearly an afterthought.

We must, however, say that the Judge's mode of communicating with the guardian through Mr. Sandys was not right, and [143] probably created unnecessary friction. The guardian was not subordinate to the manager, and many of the orders, which were very peremptory, did not even purport to be in the Judge's name, although it was doubtless known that they emanated from him. The manager also sent him a letter containing serious reflections on his character, which certainly ought not to have been sent.

It is argued that the order for suspension was illegal and that the guardian has been greatly prejudiced, as, if there had been an order for removal properly communicated, he would have had a right of appeal. We do not think he is entitled to any consideration on this account. He was, when suspended, acting in contempt of the Judge's authority, and he has never since made submission to it. He has not attempted to account to the Judge for his conduct or asked to be reinstated, and he cannot, under the circumstances, gain anything by the omission to make a final order for his removal. He wants, indeed, now to be reinstated on his own terms, which are, apparently, that he is to remain in Calcutta, and that the lunatic ward is to be brought from Tipperah and made over to his care here. This cannot be allowed.

The rule is discharged. We make no order as to costs.

H. W. *Rule discharged.*

NOTES.

[In (1908) 32 Mad., 253, it was held that the District Judge who appointed a guardian for a lunatic under Act XXXV of 1858 had jurisdiction to make an order requiring such guardian to obtain his permission before marrying the lunatic

The Indian Lunacy Act IV of 1912 repealed Act XXXV of 1858 and 'consolidates and amends the law relating to Lunacy'.]

[24 Cal. 143]

The 1st July, 1896.

PRESENT:

MR JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN, MR. JUSTICE GHOSE, MR. JUSTICE HILL, AND MR. JUSTICE GORDON.

Jawadul Huq................Plaintiff

versus

Ram Das Saha............Defendant.*

Bengal Tenancy Act (VIII of 1895), section 22, clause (2) —Co-owner's purchase of occupancy right, Effect of.

There is no law which prevents one of several co-proprietors from holding the status of a tenant under the other co-proprietors of land which appertains to the common estate.

The effect of the purchase, by one co-owner of land, of the occupancy right, is, not that the holding ceases to exist, but only the occupancy right which is an incident of the holding. *Sitanath Panda* v. *Pelaram Tripati* (I. L. R., 21 Cal., 869) referred to.

[144] THE plaintiff owned an 8-annas share of a certain taluk, and the defendant No. 1 owned the remaining 8-annas share. The latter brought a suit against his tenant for his share of the arrears of rent; and in execution of the decree which he obtained, he put up the holding for sale and purchased it himself. The plaintiff then sued the defendant for *khas* possession to the extent of his share in the *jote*, alleging that under section 22, clause 2 of the Bengal Tenancy Act, the holding was extinguished by the defendant's purchase.

* Appeal under section 15 of the Letters Patent No. 50 of 1894, against the decree of the Hon'ble HENRY BEVERLEY, one of the Judges of this Court, dated the 12th of June 1894, in appeal from Appellate Decree No. 1927 of 1893.

The Munsif, however, held that although the occupancy right had merged, the holding was not extinguished, and that therefore the defendant was entitled to hold on as a tenant. The suit was accordingly dismissed. On appeal to the Subordinate Judge, that decision was reversed on the ground that the defendant purchased nothing, the only effect of the purchase being to extinguish the entire tenancy.

The defendant appealed to the High Court; and on the 12th June, BEVERLEY, J., set aside the judgment and decree of the Subordinate Judge and restored those of the Munsif. The valuation of the appeal did not exceed Rs. 50.

The **judgment** of **Beverley, J.**, was as follows :—

This was a suit brought by the plaintiff to obtain *khas* possession to the extent of his share in a certain *jote* of five bighas of land in which the principal defendant had put up to sale and purchased the occupancy right of the tenant, the principal defendant being the plaintiff's co-sharer in the taluk in which the said *jote* is situated. The plaintiff based his suit upon the provisions of section 22, clause (2) of the Bengal Tenancy Act.

The Munsif held that although the clause in question declares that in a case like the present the occupancy right transferred to the defendant has ceased to exist, there is nothing in the section to warrant the proposition that the holding itself is extinguished. He held, therefore, that the principal defendant who had purchased the *jote* was entitled to hold it as a tenant, and that the plaintiff was not entitled to obtain *khas* possession of his share. He accordingly dismissed the plaintiff's suit. That decision was reversed by the Subordinate Judge, who has held that under the clause in question the pincipal defendant purchased nothing, the effect of that purchase being to extinguish the entire tenancy. He **[146]** says: "If the right of occupancy fails, it is difficult to make out what other right remains ; certainly the defendant cannot claim the status of an ordinary tenant against the will of the co-sharers, and if he is once allowed to hold on as a tenant, the result will be that he will continue to do so for ever until partition, for the other co-parceners will have no right to turn him out, and the provisions of section 22, clause (2) in that case will become nugatory."

The question which arises in this suit has recently been considered by me in several cases. No doubt the wording of the section in question is somewhat obscure and not altogether free from doubt, but having further considered the matter, I am still of opinion that the view taken by the Munsif in this case is the right one. Section 22, clause (1) declares that when an occupancy holding is held immediately under a proprietor or permanent tenure-holder, and the entire interest of the landlord and the raiyat, meaning the occupancy raiyat, in the holding become united in the same person by transfer, succession or otherwise, the occupancy right shall cease to exist ; but nothing in this clause is to affect prejudicially the rights of any third person. By this clause, therefore, as I understand it, when an occupancy holding is purchased by a full proprietor or permanent tenure-holder, such proprietor would be at liberty to deal with the land as though the occupancy right had ceased to exist, in other words, he would be at liberty to let the land again unfettered by any occupancy right, subject to the rights of any under-tenant, who may be on the land. If there are under-tenants, this condition would seem to show that the holding is not extinguished by the transfer.

Clause (2) then goes on to say : "If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, it shall cease to exist, but nothing in this sub-section shall prejudicially affect the rights of any third person."

Here, again, it is the occupancy right and not the holding which the section says is extinguished by the transfer; and just as in the former case, the saving of the rights of under-tenants would seem to show that the holding itself is not extinguished by the transfer. Nor is it reasonable to suppose that the Legislature intended that the purchase of an occupancy holding by one co-sharer should enure to the benefit of the other co-sharers [146] who had paid nothing for it. It is not unusual for one co-sharer to hold land as a raiyat under himself and the other co-sharers, and the saving of the rights of third parties would appear to extend to the right of the co-sharers to their share of the rent.

It seems to me, therefore, from these considerations, that the effect of the clause in question is not to extinguish the holding altogether but merely to divest it of the incidents attached to an occupancy holding; in other words, the purchaser will continue to hold it divested of those incidents. Whether or not the consequences will be those stated by the Subordinate Judge seems to me to be an immaterial consideration. The principal defendant in this case, having purchased the holding, is entitled, in my opinion, to the benefit of his purchase and whatever rights the plaintiff may have against him. I do not think that section gives him the right to eject him from any portion of the land or to obtain direct possession of the land jointly with the defendant.

It seems to me, therefore, that the plaintiff's suit was properly dismissed, and this appeal must be allowed. The decree of the lower Appellate Court will be reversed, and that of the first Court restored, the suit being dismissed with costs in all Courts.

From this decision the plaintiff appealed under section 15 of the Letters Patent. The case was heard by PETHERAM, C.J., and RAMPINI, J., who, after hearing the pleader on each side, sent the appeal to be heard before a Bench of five Judges.

Moulvie *Seraj-ul-Islam* for the Appellant.—The view of the law taken by BEVERLEY, J., is not correct. The effect of such a purchase as the present could not be to make the landlord-purchaser a raiyat in relation to his co-owners. The judgment seems to contemplate the right of occupancy as consisting of two things,—(1) the tenant's right, and (2) that portion of the right by which the right of occupancy is perfected; and that this latter portion, if taken away, leaves something on the strength of which the purchaser may retain possession of the land. A non-occupancy right may develop into an occupancy right. [TREVELYAN, J.—That only means that new incidents are added to the tenure, not that [147] it becomes a new tenure. GHOSE, J.—In that case does the non-occupancy right come to an end?] It is perfected in that way. The question is what is it that has ceased to exist? The proviso to section 22 means that if, for instance, the occupancy tenant has sub-let his land, then a sale of the land does not affect the sub-lessees. [TREVELYAN, J.—By your argument, not only does the purchaser get nothing by his purchase, but, by the very act of purchasing, he destroys what he has purchased. GHOSE, J.—And for the benefit of the other co-owners. Suppose the occupancy raiyat mortgaged his interest. What would be the position of the mortgagee?] He would not be affected. [GHOSE, J.—Suppose he afterwards sells the right under a decree?] It is only the right of the landlord-purchaser that is affected ; that is clear from the saving clause of the section. If this judgment is correct, then a co-proprietor becomes a non-occupancy raiyat under the other co-proprietors, without their consent ; and that he cannot be. [GHOSE, J.—Suppose a third party made the purchase; he would become your tenant without your consent.] Yes ; but a co-proprietor cannot. Otherwise the occupancy right having ceased to exist the non-occupancy right would

become transferable ; but such a right is not transferable directly or indirectly. The very definition of a non-occupancy raiyat shows that by such a purchase a proprietor cannot become one.

The fact that the other co-owners benefit by the defendant's purchase is not to be considered in determining the question before the Court. If this judgment stands, one co-owner can deprive the others of their rights by purchasing the occupancy rights of the tenants ; and such a result could not have been intended by the Legislature.

Baboo *Jasodanandan Paramanick* for the Respondent.—The only reported authority on the point is the case of *Sitanath Panda* v. *Pelaram Tripati* (I.L.R., 21 Cal., 869) which is clearly in my favour. The doctrine of merger—in the sense of total extinction of the right of occupancy—is unknown to the law of this country,—*Womesh Chunder Goopto* v. *Rajnarain Roy* (10 W. R., 15), *Mokoondy Lall Doobey* v. *Crowdy* (17 W. R., 274), *Savi* v. *Punchanun Roy* (25 W. R., 503). . What happens in the event of two rights existing [148] in the same person is, that the lesser right is in abeyance. A co-owner may hold land as a tenant under himself and the other co-owners,—*Lal Bahadoor Singh* v. *Solano* (I.L.R., 10 Cal., 45) ; *Gur Buksh Roy* v. *Jeolal Roy* (I.L.R , 16 Cal., 127). The question of merger was considered in *Jibanti Nath Khan* v. *Gokool Chunder Chowdry* (I. L. R., 19 Cal., 760), and the Court held that a *putni* interest did not merge in the larger estate when both fell into the same hands. In *Maseyk* v. *Bhagabati Baisnanya* (I.L.R., 18 Cal , 121) it was held that, although a raiyat may have acquired an *izara* of a portion of the estate, still he is entitled to compute in his favour the period during which he held the right of occupancy, and thereby complete the statutory period of twelve years and so acquire the right of occupancy. Lastly, nothing is more common than for one joint landlord to hold land under the general body of proprietors. If this Court decides that proprietors are forbidden to buy holdings, vested interests will be seriously prejudiced. (Two unreported cases,—Appeals from Appellate Decrees 1139 and 1140 of 1895 decided by HILL, J., on the 18th March 1895, and *Ram Mohun Chuckerbutty* v. *Huro Sundari Debya*, Appeal from Appellate Decree 37 of 1893 were also cited.)

The following **judgments** were delivered by the Court (MACPHERSON, TREVELYAN, GHOSE, HILL and GORDON, JJ.) :—

Macpherson, J.—In my opinion the decision of Mr. Justice BEVERLEY is right. There is no law in this country which prevents one of several co-proprietors holding the status of a tenant under the other co-proprietors of land which appertains to the common estate. In the reported cases many instances will be found in which lands have been so held and in which the possession of the co-proprietor as a tenant has been recognised. Sub-section 2 of section 22 of the present Tenancy Act does, however, provide that if an occupancy-right is transferred to a person jointly interested in the land as proprietor, the occupancy-right shall cease to exist. It is not said, and the sub-section cannot be understood to mean, that the holding shall cease to exist, but that the occupancy right, which is an incident to the holding, will cease to exist; and there is nothing in the sub-section inconsist- [149] ent with the continuance of the holding divested of this right of occupancy which attached to it. The saving clause in the sub-section "that nothing in it shall prejudicially affect the right of any third person," indicates also that the holding would, for some purposes at all events, continue to exist. This view of the construction of the section was taken in an unreported case, appeal from Appellate Decree No. 37, decided by Mr. Justice NORRIS and Mr. Justice BANERJEE on the 30th March 1894 ; and the same view was also taken in the case of *Sitanath Panda* v. *Pelaram Tripati* (I. L. R., 21 Cal., 869).

Although the facts of those cases are not precisely similar to the facts of the present case, the view taken of the provisions of sub-section 2, section 22 of the Bengal Tenancy Act was the same as that which I have expressed. I, therefore, think that the appeal must be dismissed with costs.

Trevelyan, J.—I entirely agree with Mr. Justice MACPHERSON.

Ghose, J.—I am of the same opinion.

Hill, J.—I am also of the same opinion.

Gordon, J.—I also agree.

H. W.

NOTES.

[This was followed in (1896) 24 Cal., 521, and approved by a Full Bench in (1905) 32 Cal., 386 : 9 C.W.N., 219 : 1 C. L. J., 1. See also (1909) 13 C. W. N., 912. This case was distinguished in (1899) 26 Cal., 937 ; (1899) 27 Cal. 473 ; (1911) 12 I.C., 67 ; (1911) 13 I.C., 336, which were cases of *non-transferable occupancy holdings*. See also (1907) 11 C.W.N., 397 : 5 C. L. J., 307 ; (1908) 7 C.L.J., 512, which deal also with separate collection of rent. By the purchase of the superior tenure by the occupancy-raiyat, the occupancy-right ceases to exist, but not the holding itself—(1913) 20 I. C., 698.

By Bengal Act I of 1907, sec. 22 was amended, and sub-section 2 as amended enacts : "If the occupancy-right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them ; and if such transferee sublets the land to a third person, such third person shall be deemed to be a tenure-holder or a raiyat as the case may be, in respect of the land." And there is an *illustration*.]

[24 Cal 149]

The 25th August, 1896.

PRESENT :

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Laloo Singh.................Defendant

versus

Purna Chander Banerjee and others............Plaintiffs.

Limitation Act (XV of 1877), schedule II, Article 14—Estates Partition Act (Bengal Act VIII of 1876), sections 116, 150—Right of Suit—Suit for possession.

A suit for possession of lands of which the owners have been dispossessed in pursuance of an order of the Collector under section 116 of the Estates Partition Act (Bengal Act VIII of 1876) will lie, even though no suit is brought to set aside the Collector's order under section 150.

Article 14 † of Schedule II of the Limitation Act (XV of 1877) does not bar such a suit.

* Appeal from Appellate Decree No. 1872 of 1894, against the decree of Babu Jaggaddurlabh Mozumdar, Additional Subordinate Judge of Tirhoot, dated the 27th of June 1894, affirming the decree of Moulvie Ali Ahmed, Munsif of Samastipur, dated the 18th of May 1893.

† [Art. 14 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for.	One year ...	The date of the act or order.]

THIS was one of seven cases tried together by consent of parties. The plaintiffs were proprietors of mouzas Nathudoar and [150] Para Ram Bhaddar, and the defendants were proprietors of mouza Parkotimpur Parmanand. Plaintiffs' case was that during the course of a partition under the Estates Partition Act (VIII of 1876), their lands were included within the defendants' mouza and plaintiffs' ryots were dispossessed from those lands in Baisakh 1286 (April 1879). The present suits were brought in 1890 for declaration of right and for recovery of possession of the lands. The defendants, among other objections, pleaded that the plaintiffs having failed to bring any suit to set aside the order passed by the Collector under section 116 of the Estates Partition Act, within one year as laid down in Article 14, Schedule II of the Limitation Act (XV of 1877), these suits were barred by limitation. The lower Courts decreed the plaintiffs' claims.

The defendants appealed to the High Court.

Babu *Umakali Mukerjee* for the Appellants.

Babu *Saroda Charan Mitra* for the Respondents.

The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ.**) was as follows:—

The only two points pressed before us in these appeals are:—

1. That the lower Appellate Court was wrong in holding by its judgment of 8th February 1892 that the suits were not barred by Article 14 of the Limitation Act and in remanding them for trial on the merits.

2. That the Courts below have not tried the question whether the plaintiffs' suits are barred by twelve years' adverse possession on the part of the defendants.

On the first point it is to be remarked that the present appellants did not appeal, as they might have done, against the order of remand. It is contended, however, that under the provisions of section 591 of the Code they are entitled to object to that order when appealing against the final decree. Assuming that to be so, we are not prepared to say that the order of the lower Appellate Court was wrong.

The question turns upon certain provisions of the Estates Partition Act (Bengal Act VIII of 1876). It is contended that under section 116 of that Act the lands now in dispute were treated by the Collector as part of the appellants' estate at the [151] time of partition, and that the plaintiffs cannot recover possession of them until the order of the Collector is set aside.

Section 150 of the Act provides that "any person who is aggrieved by any order of a Revenue Officer passed under section 116, may bring a suit in a Court of competent jurisdiction to modify or set aside such order of the Revenue Officer." But the law nowhere says that if no such suit is brought the order of the revenue officer shall be binding as between the proprietors of the estate under partition and third parties. So far from that being the case, section 117 contemplates the contingency of the proprietors of the estate under partition being "dispossessed by a decree of a Court of competent jurisdiction" of disputed lands which have been treated as part of the estate by the Collector's order under section 116, and makes provision as to what should be done in the event of such a contingency.

It seems clear, therefore, from a consideration of that section alone that a suit for the possession of lands of which the owners have been dispossessed in pursuance of an order of the Collector passed under section 116 will lie, even though no suit is brought to set aside the Collector's order under section 150. In fact, the dispossession might not actually take place till more than a year

after the Collector's order, and it seems to us that it would be unreasonable to hold that in such a case the aggrieved party would have no remedy if he had omitted to sue to have the Collector's order set aside. On the contrary, the Act appears to contemplate that the claimant of such lands "may" either sue to set aside the Collector's order, or wait till he is in fact dispossessed and then bring a suit to recover possession. We are of opinion, therefore, that the plaintiffs in these suits were not bound to sue to have the Collector's order set aside, and that the suits are not barred by Art. 14 of the Limitation Act. The first ground of appeal therefore fails.

As regards the second ground we do not find that any claim by 12 years' adverse possession was put forward in the written statements, in which limitation was only pleaded on the ground that the plaintiffs should have sued within one year to set aside the Collector's order of 12th June 1869. The issue framed was no doubt in general terms " whether these suits are barred by [152] limitation," but that issue was tried solely with reference to Art. 14 of the Act It is true that the lower Appellate Court before remand made certain remarks in its judgment regarding the 12 years' limitation, and advantage has been taken of those remarks to urge this point before us in second appeal. But it seems to us on a consideration of those remarks that the lower Appellate Court intended to find as a fact that the plaintiffs had been dispossessed within 12 years, and that the suits were not barred under Art. 144 And it is quite clear that after the remand this point was not pressed or argued in either Court. We think, therefore, that under these circumstances the appellants are not entitled to have the suits remanded again for the trial of this question.

The result is that the appeals fail and must be dismissed with costs.

S. C. C. *Appeals dismissed.*

NOTES.

[For cases similar to this, see also 32 Cal., 1107 ; (1912) 17 C. W. N., 55 ; (1900) 24 Bom., 435 ; (1905) 29 Bom., 480 ; (1909) 36 Cal., 726 : 10 C. L. J., 726.

In (1901) 29 Cal., 367 : 6 C W. N , 92, the party dispossessed was a party to the inquiry under the Estates Partition Act and Art. 14 was held to apply to him.]

[24 Cal. 152]

The 13th August, 1896.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Bansi Das *alias* Raghu Nath Das and another............Plaintiffs

versus

Jagdip Narain Chowdhry and others............Defendants.*

Bengal Tenancy Act (VIII of 1885), section 50—Presumption—Occupancy raiyats--Raiyats holding at fixed rates—Incidents of tenancy—Transferability of tenure—Alienation of part of a tenure—Suit for khas possession and for declaration that alienation was invalid—Form of decree.

In a suit brought in 1893 for declaration that a holding was not transferable and that the alienation of a portion thereof was invalid, and also for *khas* possession of the land on

* Appeal from Appellate Decree No. 844 of 1895 against the decree of A. Mackie, Esq., District Judge of Zillah Tirhoot, dated the 2nd of February 1895, affirming the decree of Babu Amrita Lal Chatterjee, Subordinate Judge of that district, dated the 31st of August 1894.

the ground of such alienation, it was found that the rate of rent payable for the holding had never been changed since 1831, and that there was nothing to rebut the presumption raised by section 50 of the Bengal Tenancy Act (VIII of 1885). ***Held*** **:—**

(1) That the alienation did not work a forfeiture, and the plaintiffs were not entitled to *khas* possession, but they were entitled to the declaration that the alienation was not binding upon them.

(2) That the presumption created by section 50 does not operate to convert an occupancy raiyat into a raiyat holding at fixed rates, nor does it render the tenancy subject to the incidents of a holding at fixed rates as prescribed by section 18 of the Act.

[153] IN this suit the plaintiffs, as landlords, prayed for a declaration that a certain holding was not transferable, and that the purchase made by the defendants of a portion of the holding was illegal and invalid; they also prayed for *khas* possession of the land. The lower Courts found that the rate of rent payable for the holding had never been changed from the year 1831, which was more than 20 years before the suit, and, applying the presumption provided by section 50 of the Bengal Tenancy Act, held that the holding was a permanent one with a rate of rent fixed in perpetuity, and was therefore transferable under the law. They also held that the sub-division of the tenure did not effect a forfeiture, and dismissed the suit *in toto*.

The plaintiffs appealed to the High Court.

The facts and arguments in the case sufficiently appear from the judgment of the High Court.

Babu *Umakali Mukerji* for the Appellants.

Babu *Lakshmi Narayan Singh* for the Respondents.

The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ.**) was as follows:—

In this case the plaintiffs alleged that the defendants had purchased 10 bighas out of a holding of 32 bighas odd, which was the *kasht* land of Achhey Lal Jha and Rati Lal Jha. They claimed that the holding could not be alienated or sub-divided without their consent as landlords, and they accordingly prayed for a declaration that the defendants' purchase was illegal and invalid, and that inasmuch as the 10 bighas had been abandoned by the original tenants, *khas* possession of this land might be given to the plaintiffs.

The Jha tenants were not made parties to the suit.

The suit has been dismissed by the lower Courts on two grounds: In the first place it is found that the holding in question was transferable by law, and in the second place that, although the sub-division of the tenancy, having been made without the landlord's written consent, was not binding upon him (section 88, Bengal Tenancy Act), still such alienation of a part of the tenure did not work a forfeiture: *Kabil Sardar* v. *Chander Nath Nag Chowdhry* (I. L. R., 20 Cal., 590).

[154] In this latter finding we think the lower Courts were right, and the plaintiffs were therefore not entitled to a decree for possession, but we think the suit should not have been dismissed *in toto*. The very finding to which we have referred entitled the plaintiffs to the declaration which they asked for, that the alienation to the defendant was not binding upon them. In this view it was immaterial whether or not the entire holding was transferable. Moreover, in coming to the conclusion that it was so transferable, we are of opinion that both the lower Courts have fallen into an error of law in applying the presumption created by section 50 of the Act to convert an occupancy raiyat into a raiyat holding at fixed rates. As we pointed out in a recent case, the class of "raiyats holding at fixed rates" is specially defined by section 4 of the Act as meaning "raiyats holding either at a rent fixed in perpetuity or at a rate of rent fixed in perpetuity;" in other words, the rent or

rate of rent must be fixed in perpetuity at the commencement of the tenancy. We entertain grave doubts whether this class of raiyat can be created by the operation of section 50. All that that section says is that a raiyat who has held at the same rent or rate of rent since the time of the Permanent Settlement shall not be liable to have his rent increased except on the ground of an alteration in the area of the holding. It does not say that such a raiyat is a raiyat holding at fixed rates, or that the tenancy shall be subject to the incidents of a holding at fixed rates as prescribed by section 18 of the Act. In this respect, therefore, we think that the judgments of the lower Courts are wrong.

On the findings we are of opinion that the plaintiffs are entitled to a declaration that the alienation to the defendant is not binding upon them, and we accordingly allow the appeal, set aside the decrees of the lower Courts, and substitute therefor a declaratory decree as stated above. And we think that the plaintiffs are entitled to their costs in all Courts.

S. C. C. *Appeal allowed.*

NOTES.

[In (1898) 25 Cal., 744 F. B., the Full Bench dissented from this decision as regards the presumption under sec. 50.

As regards the effect of alienation of a part, see also (1906) 33 Cal., 1219; (1905) 2 C. L. J., 369; (1897) 11 C. P. L. R., 122.]

[155] CRIMINAL REVISION.

The 2nd October, 1896.

PRESENT.

MR. JUSTICE O'KINEALY AND MR. JUSTICE JENKINS.

In the Matter of Jhojha Singh.........Petitioner
versus
Queen-Empress.........Opposite Party.*

Security for good behaviour—Criminal Procedure Code (Act X of 1882), sections 110 and 123—Power of Sessions Judge to remand—Taking further evidence—Conditions and limitations imposed upon persons required to give security.

Under section 123 of the Criminal Procedure Code a Sessions Judge is not competent to remand a case for further inquiry. Such evidence as he may require he must take himself.

No conditions and limitations can be imposed upon persons ordered to give security under section 118 † of the Code.

* Criminal Revision No. 542 of 1896 against the order of Mr. H. Holmwood, Sessions Judge of Gya, dated 16th April 1896.

† [Sec. 118:—If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly:

Order to give security.

Provided—

First—that no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under s. 112:

Secondly—that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive:

Thirdly—that when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.]

IN this case the petitioner was ordered by the Deputy Magistrate of gya to execute a bond with sureties for his good behaviour for a period of three years. By his order the Magistrate required the sureties to be persons of adequate means, position, and respectability residing in the neighbourhood of the petitioner and able to exercise a control over his behaviour. The records of the case were submitted to the Sessions Judge for confirmation of the above order under section 123 of the Criminal Procedure Code, and the Sessions Judge refused to confirm the order upon the materials on the record, and remanded the case to the Deputy Magistrate for further inquiry. The Deputy Magistrate having examined additional witnesses and otherwise carried out the directions of the Sessions Judge re-submitted the records of the case to him, and he thereupon confirmed the order of the Deputy Magistrate. The petitioner moved the High Court and obtained a rule upon the ground that under section 123 of the Criminal Procedure Code the Sessions Judge was not empowered to remand the case to the Deputy Magistrate to take additional evidence, and that the conditions and limitations imposed upon persons who might become sureties were not recognized by the law.

Babu *Dasarathi Sanyal* appeared on behalf of the Petitioner.

[156] The **judgment** of the High Court (**O'Kinealy** and **Jenkins, JJ.**) was as follows:—

This is a rule calling upon the Magistrate of the District of Gya to show cause why the order of the Sessions Judge of that district under section 123 of the Code of Criminal Procedure remanding a case under that section for further inquiry by the Deputy Magistrate should not be set aside, on the grounds, *first*, that under section 123 the Judge was not competent to remand the case to the Deputy Magistrate to take evidence; and, *secondly*, that the conditions and limitations imposed upon persons who may have to give security are not recognized by the law.

Under section 123 the Judge, if he thinks it proper, after examining the proceedings sent to him by the Magistrate, may require any futher evidence that he thinks necessary, before passing orders on the case. Ordinarily where a Court requires further evidence, that evidence must be taken by the Court itself. Under the Code where a higher Court has power to direct an inferior Court to take evidence, specific powers are given. This may be seen by comparing sections 123, 375 and 428 of the Code. In this case no such specific powers are given, and we think that the Judge has no power to remand such a case to the Deputy Magistrate.

The second point on which the rule was granted is answered by the Magistrate of Gya himself in the following words: The limitations imposed by the Deputy Magistrate with respect to sureties do not prevent the petitioner from offering any person as surety, but simply convey to him an intimation as to the class of persons, who in the opinion of the Deputy Magistrate should be offered as sureties.

We are not now deciding whether the applicant in this case was prevented by the order of the Deputy Magistrate from offering any person he thought fit as surety. What we are deciding is whether the order of the Deputy Magistrate is right or wrong; and we think that if the Magistrate had directed his attention to that part of the rule and not changed it into one regarding the powers of the applicant, he would have done well.

[157] We think that the order of the Sessions Judge is wrong on both points. We make the rule absolute, and direct that the case be taken up by

the Sessions Judge and re-tried. Such evidence as he may require he must take himself.

S. C. B.

NOTES.

[It is not necessary according to the Calcutta decisions that the surety be able to control the acts of the principal.—24 Cal., 155; 4 C. W. N., 797; 6 C. W. N., 593; 35 Cal., 400; 37 Cal., 91; 446. The Allahabad decisions are otherwise:—10 All., 106; 24 All., 471; 10 A. L. J., 351.]

[24 Cal. 157]

The 8th September, 1896.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE BANERJEE.

Gonesh Chunder Sikdar............Petitioner

versus

Queen-Empress on the prosecution of Kamini Mohun Sen, Sub-Inspector of Excise............Opposite Party.*

Bengal Excise Act (Bengal Act VII of 1878), section 53—Spirituous Liquor—Medicinal preparation containing alcohol.

The term "spirituous liquor" in section 53 of the Excise Act (Bengal Act VII of 187) is not intended to include a medicinal preparation merely because it is a liquid substance containing alcohol in its composition. The case would be different if alcohol were manufactured separately for the purpose of being used in the preparation of a medicine.

THE petitioner, who was a *kobiraj* by profession, was convicted by the Deputy Magistrate of Goalundo under section 53 of the Excise Act (Bengal Act VII of 1878) for manufacturing, by the process of fermentation, a medicinal preparation called *sanjivani sura*, without a license, and was sentenced to pay a fine of Rs. 15. He moved the High Court to set aside the conviction and sentence on the ground that his act did not constitute any offence under section 53 of the Excise Act.

Babu *Sarat Chundra Khan* for the petitioner argued that the object of the accused was to prepare a medicinal preparation, to be used for medicinal purposes, and not to be consumed as a spirituous liquor.

The *Deputy Legal Remembrancer* (Mr. *Gordon Leith*) for the Crown.—The object of the preparation is immaterial; the process resorted to by the accused was the usual process employed for extracting alcohol, and the result showed the presence of a considerable quantity of alcohol. A spirituous liquor has been manufactured, and that is sufficient to make out an offence under section 53 of the Excise Act.

* Criminal Revision No. 335 of 1896 against the order of Babu Rajoni Nath Chatterjee, Deputy Magistrate of Goalundo, dated the 8th May 1896.

[158] The **judgment** of the High Court (**Macpherson and Banerjee, JJ.**) was as follows :—

The petitioner, who has been convicted by the Deputy Magistrate of Goalundo under section 53 [*] of the Excise Act (Bengal Act VII of 1878), for manufacturing a liquor called *sanjivani sura* without a license, and has been sentenced to pay a fine of Rs. 15, asks us to set aside the conviction and sentence on the ground that the act of the petitioner does not constitute any offence under section 53 of the Act.

The facts of the case are thus set out by the learned Deputy Magistrate in the brief statement of reasons under section 263, Criminal Procedure Code: "The accused was found manufacturing a kind of liquor which he calls *sanjivani sura*, or life-reviving liquor. He has no license from the Collector to manufacture any liquor. The liquor was made by fermentation of *gur* and different spices. The strength of the liquor is 36 degrees below London proof. Accused's act falls under the purview of section 53 of Bengal Act VII of 1878. There is no doubt that he was making it for medicinal purposes, but the law makes no exception in his favour. The accused admits having made the liquor. He is a *kobiraj* by profession."

These being the facts of the case, the question is, whether any offence under section 53 of the Excise Act is established against the accused.

Section 53 of the Excise Act provides that "whoever manufactures or sells any excisable article without a license shall be liable to a fine not exceeding Rs. 500 for every such manufacture or sale" Now excisable article, as defined in section 1 of the Act, "includes spirituous and fermented liquors and intoxicating drugs as defined by the Act; " and 'spirituous liquor,' 'fermented liquor' and 'intoxicating drug' are by the same section defined thus :—

"Spirituous liquor includes any spirituous liquor imported into India or manufactured in India by any process of distillation."

"Fermented liquor includes malt liquor of all kinds, *tari* fresh or fermented, *pachwai* diluted, or undiluted, or any other intoxicating liquor which the local Government may from time to time declare to be included in this definition."

[159] "Intoxicating drugs include *ganja*, *bhang*, *charas*, every preparation and admixture of any of the above, or any other intoxicating drug which the local Government may from time to time declare to be included in this definition."

So that the only description of excisable article under which the liquor in question can possibly come is "spirituous liquor."

If it comes under that description the conviction is right, if not, it must be held to be wrong.

The term "spirituous liquor" is not however defined in the Act. What is given as the definition of the term is, strictly speaking, no definition at all. It merely says "spirituous liquor includes any spirituous liquor imported into

For unlicensed manufacture or sale of excisable articles. *[Sec. 53 :—Whoever manufactures or sells any excisable article without a license shall be liable to a fine not exceeding five hundred rupees for every such manufacture or sale.

Nothing contained in the first clause of this section or in section 11 applies to the arrangements under which tari is supplied to licensed retail vendors, or to the sale of tari, or of any preparation of the same, when supplied or used for the manufacture of gur or molasses ;†

or to the sale of any imported spirituous or fermented liquors purchased by any person for his private use, and so disposed of upon such person quitting a station or after his decease.]

† This paragraph has been substituted by Ben. Act I of 1883, s. 10, for the two paragraphs originally enacted.

India or manufactured in India by any process of distillation." So that it assumes that the term has a recognized meaning, though it does not say what that meaning is. Now whatever the exact meaning of the term may be, we do not think that it is intended to include a medicinal preparation merely because it is a liquid substance containing alcohol in its composition. We observe that the liquor in the present case was manufactured from *gur* or treacle mixed with other ingredients, as to the nature of which we know nothing except this, that the preparation was made for medicinal purposes. The case would have been different if the accused had been found manufacturing alcohol or spirits separately for the purpose of being used in the preparation of a medicine. That, however, is not the case here. What he is found to have manufactured by the processes of fermentation and distillation is not alcohol or spirit separately, but the compound substance, the medicine, at once. That act does not in our opinion come within the purview of section 53.

The view we take receives support from the consideration that if it was an offence to manufacture this particular liquor, it would equally be an offence under section 53 to sell it; but we do not think that on the facts found in this case a conviction for selling it without license could be maintained.

The conviction and sentence in this case must therefore be set aside, and the fine if realised must be refunded.

S. C. B. *Conviction set aside.*

NOTES

[This decision was in (1912) 16 C.W.N., 785. 15 I.C., 961 regarded as good law, even after the passing of the Bengal Excise Act, V of 1909.]

[160] APPELLATE CIVIL.

The 28th July, 1896.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Soman Gope............Defendant

versus

Raghubir Ojha and others............Plaintiffs.*

Limitation Act (XV of 1877), Schedule II, Article 32 Bengal Tenancy Act (VIII of 1885), sections 25, clause (a) and 155--Suit for ejectment and removal of trees—Limitation Act (XV of 1877), Schedule II, Article 120.

Article 32† of Schedule II of the Limitation Act (XV of 1877) applies to a suit brought under clause (*a*) of section 25 and section 155 of the Bengal Tenancy Act (VIII of 1885) for the

* Appeal from Appellate Decree No 2066 of 1894, against the decree of Babu Jagaddurlabh Mozumdar, Subordinate Judge of Tirhoot, dated the 10th of September 1894, reversing the decree of Babu Behari Lal Mullick, Munsif of Sitamarhi, dated the 2nd of March 1894.

† [Art. 32: –

Description of suit	Period of limitation.	Time from which period begins to run.
Against one who, having a right to use property for specific purposes, perverts it to other purposes.	Two years ...	When the perversion first becomes known to the person injured thereby.]

ejectment of a tenant and removal of trees planted by him on land leased out for agricultural purposes. Article 120 does not apply to such a case.

***Kedarnath Nag* v. *Khettur Paul Srittrutno* (I.L.R., 6 Cal., 34) and *Gunesh Dass* v. *Gondour Koormi* (I.L.R., 9 Cal., 147) distinguished.**

THIS suit was brought on the 15th July 1893. It was alleged in the plaint that 15 cottahs of *bhit* land were leased out to the defendant for agricultural purposes, but that the defendant in Kartic, 1298 F. S. (October and November 1890), planted bamboos and mango trees upon 10 cottahs of the land without the plaintiffs' permission; that the land was thereby rendered unfit for the purpose for which it was let, and the plaintiffs served a notice of ejectment as prescribed by section 155 of the Bengal Tenancy Act (VIII of 1885). The defendant having failed to remove the bamboos and mango trees as required by the notice, the plaintiffs in this action prayed for an order for removal of the trees and for ejectment of the defendant.

The defendant pleaded limitation, and the Munsif held that the suit was barred under article 32, schedule II of the Limitation Act (XV of 1877). On appeal, the Subordinate Judge held that the suit was governed by article 120 of the said schedule, and that the suit was not barred by limitation.

The defendant appealed to the High Court.

[161] Babu *Lakshmi Narayan Singh* for the appellant contended that section 25 of the Tenancy Act referred only to acts injurious to the tenure, and not to improvements thereof as in the present case, and there was really no ground for ejectment. But even if the ground mentioned in clause (*a*) of that section was made out, the present case would come under article 32 and not under article 120 of schedule II of the Limitation Act. The Subordinate Judge refers to the case of *Gunesh Dass* v. *Gondour Koormi* (I.L.R., 9 Cal., 147), which followed an earlier ruling, *Kedarnath Nag* v. *Khettur Paul Srittrutno* (I.L.R., 6 Cal., 34). No reasons are given in the judgments in those cases, and the Allahabad High Court in *Gangadhar* v. *Zahurriya* (I.L.R., 8 All., 446) dissented from the earlier of them. Those cases moreover were not decisions on the Bengal Tenancy Act, and were somewhat different in their scope. The distinction between the two articles (32 and 120) is pointed out in *Musharuf Ali* v. *Iftkhar Hosain* (I.L.R., 10 All., 634).

Babu *Sarada Charan Mitra* for the respondents. The suit is under section 25 of the Tenancy Act, and the question is not one of *conversion* or *perversion*, but simply whether there was unfitness for the purpose of the tenancy. Such a case was not contemplated by article 32. That article is applicable to suits for compensation and not to suits for ejectment, which is a special remedy provided for in the Tenancy Act. Of the cases cited one was a case in which the claim was based on custom, and the other was a case of compensation under a special contract. Reading sections 23, 25 and 155 of the Bengal Tenancy Act together, there seems to be a wholly different remedy prescribed in cases under the Tenancy Act. All the cases cited, however, are in favour of the contention that article 32 is inapplicable to the present case.

Babu *Lakshmi Narayan Singh* in reply.

The **judgment** of the High Court (**Trevelyan** and **Beverely, JJ.**) was as follows:—

This suit was brought to evict a tenant on the ground of his having used the land in a manner which rendered it unfit for the purposes of the tenancy. The land was admittedly let for agricultural purposes, but the tenant turned it into an orchard.

[162] The lower Appellate Court has held that the land has been rendered unfit for the purposes of the tenancy, and even if we were inclined to do so, we are unable to interfere with this finding in second appeal.

The only question of law in the appeal is whether the suit was barred by limitation. The Munsif held that it was barred by article 32 of the 2nd schedule of the Limitation Act. The Subordinate Judge has held that it was not barred, and that article 120 applied.

It is argued before us that article 32 applies, and we think that it does apply. There can be no doubt but that this case is within the letter of that article, and there is nothing in the article to limit it to a suit for compensation. The article is independent of the nature of the remedy, and apparently applies equally to all classes of suits brought upon the cause of action referred to in the article. We think that this suit is clearly of the kind which the article is intended to provide for. It asks for removal of the trees on the land and for ejectment

We notice that the Legislature in enacting the Bengal Tenancy Act provided one year's limitation for a suit to eject a raiyat on account of a breach of condition in respect of which there is a contract expressly providing that ejectment shall be the penalty of such breach ; that is to say, for a suit under clause (*b*) of section 25 of the Act They omitted to provide in that Act any limitation for a suit under clause (*a*) of that section, and they may possibly have considered that the general law which provides two years' limitation sufficiently dealt with that case. If it were otherwise, there would be an extraordinary difference between the periods provided in the one case for a suit where there is a written contract, and in the other for a suit of a similar nature where there is no written contract. Moreover, apart from the words of the section, it is obvious that in a case of this kind one would expect to find the Legislature fixing a comparatively short period of limitation, as great hardships might be done to a tenant if his landlord were to stand by and take no steps until close upon the expiration of a long period of limitation.

We have been to some extent pressed by two decisions by Division Benches of this Court. The first is the decision in the **[163]** case of *Kedarnath Nag* v. *Khettur Paul Sritirutno* (I. L. R., 6 Cal. 34), and the second that of *Gunesh Dass* v. *Gondour Kootmi* (I. L. R., 9 Cal., 117). In neither of those cases is any reason given for the conclusion at which the Court arrived that article 32 was inapplicable. Moreover those cases are not cases under the Bengal Tenancy Act, or cases exactly of the class to which the present case belongs. If we found that they were identical with the present case, we should have been bound to refer the matter to a Full Bench, but we think it unnecessary to do so here. This suit was brought under section 25, clause (*a*) and section 155 of the Bengal Tenancy Act, and the question is whether a suit of that kind comes within article 32 of the Limitation Act. That question has never yet, as far as we know, been decided. We think that it does come under article 32.

In the result we set aside the decision of the Subordinate Judge and restore that of the Munsif. The appellants are entitled to their costs in this Court and in the lower Appellate Court.

S. C. C. *Appeal allowed.*

NOTES.

[As regards Limitation this was approved in (1899) 26 Cal., 561 F.B. and distinguished in (1908) 4 M.L.T., 278. 18 M.L.J., 602.]

[24 Cal. 163]
The 18th August, 1896.

PRESENT:
MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Dewan Roy............Plaintiff
versus
Sundar Tewary and others...........Defendants.

Second Appeal—Civil Procedure Code (1882), section 586—Suit for money paid and damages incurred by distraint of crops—Provincial Small Cause Court Act (IX of 1887), Schedule II, Article 35, clause (j).

A suit to recover money paid to redeem crops which had been distrained by the defendants for rents due from persons other than the plaintiffs, and also for damages sustained on account of the distraint, is, so far as the claim relates to damages, a suit coming under clause (j), art. 35 of the Provincial Small Cause Court Act (IX of 1887), and is therefore not entirely a suit of the nature of a Small Cause Court suit.

Section 586 † of the Civil Procedure Code (1882) does not bar a second appeal in such a suit.

THE facts of the case, so far as they are necessary for the [164] purposes of this report, were as follows: One Sundar Tewary made an application under section 122 of the Bengal Tenancy Act for the purpose of distraining certain crops, alleging that they were grown by his tenants Katik and Nabob Roy. Dewan Roy and others made an application under section 137 of the Bengal Tenancy Act to have the distrained crops released, on the ground that they, and not the alleged tenants, were the owners of the distrained property; they deposited the amount of arrears due and the distraint was withdrawn; they then instituted this suit for recovery of the money so paid and for compensation. The first Court decreed the suit, ordering a refund of the money deposited, but allowed no damages other than interest The defendants appealed to the District Judge, who dismissed the suit. The plaintiffs preferred this special appeal to the High Court. The amount claimed in the suit was less than five hundred rupees.

Babu *Mohini Mohun Roy* and Dr. *Asutosh Mookerjee* for the Appellant.

Dr. *Rashbehari Ghose* and Babu *Satis Chandra Ghose* for the Respondents.

Dr. *Rashbehari Ghose* for the respondents took a preliminary objection that under section 586 of the Civil Procedure Code no second appeal lay to the High Court. [TREVELYAN, J.—The suit is not cognisable in the Court of Small Causes under art. 35, clause (j), of the second schedule of Act IX of 1887.] The words "illegal, improper or excessive distress" used in that clause do not cover the present case; "illegal distress" is used in the same sense as in the English law. See Woodfall on Landlord and Tenant, Chapter XII,

* Appeal from Appellate Decree No. 163 of 1895, against the decree of G. G. Day, Esq., District Judge of Shahabad, dated the 17th of December 1894, reversing the decree of Babu Tara Podo Chatterjee, Munsif of Arrah, dated the 30th of June 1894.

† [Sec. 586:—No second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.]

No second appeal in certain suits.

section 2, sub-sec. (c) 13th Edition, pages 522—524. The present action is clearly one for recovery of money wrongfully received, and is within the cognizance of the Small Cause Court.

Babu *Mohini Mohun Roy* for the Appellant.—The present action is not one solely for the recovery of money wrongfully received but also for compensation; it is in fact a suit under section 140 of the Bengal Tenancy Act. Sections 121 and 122 show that if distress is had against the goods of one who is not a tenant, such distress is *illegal*, and its *legality* may be questioned under section 136, clause 4. The word "illegal" in art. 35, [165] clause (j), of the Small Cause Courts Act clearly refers to section 136, clause 4 of the Bengal Tenancy Act. Section 586 of the Civil Procedure Code therefore does not apply.

Dr. *Rashbehari Ghose* replied.

The case was then argued on the merits. There were fifteen other appeals, Nos. 171 to 185 of 1895, which were tried together with this appeal, the same judgment governing all the cases.

The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ.**) was as follows: –

These are appeals from decrees passed in a series of suits brought by different plaintiffs against the same defendants. The suits were all tried together in the first Court, and the appeals were tried together in the Lower Appellate Court.

The plaintiffs claimed to recover money paid by them to get back their crops which had been distrained by the defendants for rents alleged to be due by persons other than the plaintiffs. The plaintiffs also claimed damages on account of the distraint.

It has been contended before us that no second appeal lies, as the suits are of a nature cognizable by Courts of Small Causes, and the value of the subject-matter of the suits does not in any case exceed Rs. 500. There can be no doubt, we think, that so far as the suits were for the purpose of recovering the monies which the plaintiffs paid under decrees, the suits were cognizable by a Court of Small Causes.

Article 35 (j) of the second schedule of Act IX of 1887 is intended, in our opinion, to apply only to suits for damages for illegal, improper, or excessive distress, and not to apply to these suits so far as they seek to recover back the money paid.

A suit for money paid to redeem a distress is not on a different footing from a suit for other money which can be recovered as being paid under distress of person or of goods or by abuse of legal process. It is on the same footing as any other suits where the defendant has received money, which in justice and equity belongs to the plaintiff, and there is nothing to exclude the jurisdiction of the Small Cause Court with regard to it. The claim to damages is, however, on a different footing. The learned Vakil for the respondents contends that it does not come [166] under article 35 (j) because there was no relationship of landlord and tenant between the plaintiffs and defendants, and that the suit is really a suit for damages for trespass of property. We are unable to agree with that contention. The article, we think, applies generally to acts done under colour of distress. The relationship between the parties, whether it was in question or not, could not alter the jurisdiction of the Court. The suit as constituted was therefore not entirely of the nature of a Small Cause Court suit. In the first Court the claim to damages was disallowed. The claim was one of substance and not inserted for the purpose of giving the Court jurisdiction. In our opinion a second appeal lies.

We think, however, that the findings of fact by the lower Appellate Court preclude the plaintiffs' success in the appeals. Before the plaintiffs can succeed they must show that the crops distrained upon, or at any rate a portion of such crops, belong to them. We read the finding of the Lower Appellate Court to be that the plaintiffs have not made out their case. The Judge says: "There is nothing in the evidence as to title which renders it improbable that the disputed crops should have been sown by the defendants." He points out that the witnesses could answer no questions as to details, and that the plaintiffs could have given definite evidence about their own fields separately if those fields really were sown by them, but they have chosen not to take that course. He says the plaintiffs have chosen to rest their cases "on general assertions of possession to the whole disputed land, and as those assertions are in all probability false as regards part, and not certainly true as regards any other part of the area in dispute, I see no alternative but to reject their claims for compensation."

It may be that the trial of the suits together was the cause of the plaintiffs giving their evidence in this way, but we must take the evidence as it has been given. The finding of the lower Appellate Court compels us to dismiss these appeals with costs.

S. C. C. *Appeals dismissed.*

NOTES.

[See also (1897) 21 Mad, 239; (1908) 4 N L R, 49.]

[167] CRIMINAL REFERENCE.

The 30th October, 1896.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

In the Matter of Ananda Chunder Singh...........Accused

versus

Basu Mudh........ Complainant.*

Magistrate, Jurisdiction of—Disqualification of Magistrate to try case—Criminal Procedure Code (Act X of 1882), ss. 202, 540, 555—Summons case

Where a Magistrate before whom a complaint was made held an enquiry under section 202† of the Criminal Procedure Code for the purpose of ascertaining the truth or falsehood of the complaint before issuing process, and, after holding such enquiry, summoned the

* Criminal Reference No 258 of 1896 made by Mr. F. E. Pargiter, Esq., Sessions Judge of Cuttack, dated 10th November 1896

† [Sec. 202:—If the Chief Presidency Magistrate, or any other Presidency Magistrate whom the Local Government may from time to time authorize in this behalf, or any Magistrate of the first or second class, sees reason to distrust the truth of a complaint of an offence of which he is authorized to take cognizance, he may, when the complainant has been examined, record his reasons for distrusting the truth of the complaint, and may then postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or direct a previous local investigation to be made by any officer subordinate to such Magistrate, or by a Police-officer, or by such other person, not being a Magistrate or Police-officer, as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint.

Postponement of issue of process.

If such investigation is made by some person not being a Magistrate or a Police-officer shall exercise all the powers conferred by this Code on an officer in charge of a Police-station except that he shall not have power to arrest without warrant.

This section applies to the Police in the towns of Calcutta and Bombay.]

accused, examined witnesses on both sides, and, after a short adjournment, examined a witness called by himself, and found the accused guilty under section 341 of the Penal Code.

Held, that there is nothing in the Criminal Procedure Code which disqualifies a Magistrate who holds a preliminary enquiry under section 202, from trying the case himself, and that the provisions of section 555 * have no application, inasmuch as the Magistrate had not initiated or directed the proceedings against the accused person, nor taken an active part in the arrest or collection of evidence against such person.

Held, also, that the Magistrate was strictly within his rights under section 540 † of the Criminal Procedure Code in receiving fresh evidence after evidence on both sides had been taken and the case adjourned for judgment, inasmuch as the case was still a pending case when such evidence was taken.

THIS was a reference to the High Court under section 438 of the Criminal Procedure Code.

The facts appear from the following letter of reference :—

" The applicant, who is a Police constable, has been convicted by Mr. J. N. Gupta, Officiating Joint Magistrate of Khurdah, of having wrongfully confined two boys in the Police station under section 341, Indian Penal Code. The intention alleged was to have unnatural intercourse with the boys, but this was disbelieved, and the intention found by the Magistrate appears to be *zulm*.

"The trial appears to have been vitiated by several faults. In the first place the Magistrate held a preliminary enquiry into the truth of the complaint and examined witnesses, and afterwards tried the case himself, instead of making it over to another Magistrate for trial. Several rulings have been cited, and it seems the principle of the rulings in *Girish Chunder* **[168]** *Ghose* v. *Queen-Empress* (I. L. R., 20 Cal., 857) and *Sudhama Upadhya* v. *Queen-Empress* (I. L. R., 23 Cal., 328) apply to this case.

" In the next place the Magistrate after examining the witnesses for the defence on 17th August adjourned the case to the next day for judgment ; but on that day he examined a witness, Bhabani Behara, father of one of the two boys who were the subjects of the offence, and then delivered judgment. This man is called a witness cited by the Court, but he ought to have been a witness for the prosecution, because he professed to have witnessed the occurrence, and his testimony is as important as that of any other person. I may also note here that the complainant Basu was recalled and further examined, but it does not appear on what day, as no date is given.

" The Magistrate has submitted an explanation. After holding a preliminary enquiry and coming to a conclusion adverse to the accused, he undertook the trial himself, and after taking all the evidence on both sides and adjourning the case for judgment, as if the evidence was closed, he suddenly supplemented the evidence by calling a witness, who is really one of the most important prosecution witnesses, and then delivered judgment. It cannot be said on these facts that the accused has had an impartial trial, and on this ground alone the trial should in my opinion be set aside."

No one appeared for the parties on the reference.

* [Sec. 555 :—No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.

Case in which Judge or Magistrate is personally interested.

Explanation.—A Judge or Magistrate shall not be deemed to be a party or personally interested, within the meaning of this section, to or in any case, merely because he is a Municipal Commissioner.]

† [Sec. 540 :—Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or, recall and re-examine any person already examined ; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.]

Power to summon material witness, or examine person present.

The **judgment** of the High Court (**Ghose** and **Gordon, JJ.**) was as follows:—

We are unable to agree with the Sessions Judge in the views he has expressed. The offence, with which the accused was charged, was one which fell under section 341 or 342 of the Penal Code. It was a summons case; and the Joint Magistrate, before whom the complaint was made, held, under section 202 of the Criminal Procedure Code, an enquiry for the purpose of ascertaining the truth or falsehood of the complaint before issuing process against the accused. After holding such enquiry, he summoned the accused, and then after examining such witnesses as either party adduced, and a witness called by himself, found the accused guilty under section 341 of the Penal Code. We do not think that there is anything in the Code of Criminal Procedure which disqualifies a Magistrate, who holds a preliminary enquiry under section 202 of the Criminal Procedure Code from trying the case himself; and the provisions of section 555 have, we think, no application to the circumstances of this case. The two cases quoted by the Sessions Judge, *Girish Chunder Ghose* v. *Queen-Empress* (I. L. R., 20 Cal., 857) and **[169]** *Sudhama Upadhya* v. *Queen-Empress* (I. L. R., 23 Cal., 328) proceed upon the principle that when a Magistrate initiates or directs the proceedings against an accused person and takes an active part in the arrest of or collection of evidence against such person, he is disqualified by reason of the provisions of section 555 of the Criminal Procedure Code from trying the case himself, and that a disqualifying interest as contemplated by that section may result from a purely official connection with the initiation of criminal proceedings. In the present case that principle is not applicable. Here, the complaint was in the ordinary course made before the Sub-Divisional Officer; he held an enquiry as authorized by section 202 of the Code, and eventually, upon the evidence recorded in the presence of the accused, found him guilty. There is nothing to indicate that he initiated or directed the proceedings or took any personal interest in the matter of the complaint instituted before him, and we do not think that he was disqualified in any way from trying the case.

It was perhaps irregular on the part of Mr. Gupta, the Joint Magistrate, in calling for and examining a witness after the evidence on both sides had been taken and the case adjourned for judgment; but it does not appear to us that the accused was in any way prejudiced by the action of the Magistrate, and indeed it may well be said that he (the Magistrate) was strictly within his rights under section 540 of the Code, for the case was still a pending case, when the fresh evidence was taken.

Upon these grounds we decline to interfere in this matter.

C. E. G.

NOTES.

[See also 4 C.W.N., 604; 8 Bom. L.R., 947; 36 All., 450 and the explanation to Sec. 556 Cr. P.C., 1898.]

[24 Cal. 169]

APPELLATE CIVIL.

The 4th December, 1896.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Gopinath Chakravarti and others............Plaintiffs

versus

Umakanta Das Roy and others.........Defendants.*

Bengal Tenancy Act (VIII of 1885), sections 56, clause (4), 187, clause (3) and 188—Joint landlords Authorized Agent—Receipt given by Agent—Presumption under section 56 clause (4) of Ac VIII of 1885.

[170] In a case where there are several joint landlords it is necessary for the Court, before giving effect to the presumption under section 56, clause (4) of the Bengal Tenancy Act, to find affirmatively that the agent was authorised by them all either verbally or in writing.

THE plaintiffs sued the defendants for the *dur-ijara* rents of the years 1297 1298 and 1299. The plaintiffs alleged that certain lands were held in *dur-ijara* under them by the first defendant, and the father of the other two defendants who were minors. The defendants pleaded payment, and produced a receipt dated 14th Falgun and signed by the plaintiff Gopinath Chakravarti. Gopinath alleged that this receipt was granted for payments made on account of collections of 1295 and 1296, during which years the defendants or their predecessors in interest acted as collection agents for the plaintiffs. The Court of first instance found that the receipt was one for rent paid by the *dur-ijaradars*, and that the receipt, "being informal and not containing the particulars required to be specified by section 56, Bengal Tenancy Act, is presumably an acquittance in full for all demands of the plaintiffs up to the 14th Falgun 1299.

The plaintiffs appealed to the Officiating Judge of Mymensingh who dismissed the appeal, and whose judgment contained the following passage: "It is urged before me that the rent receipt is invalid, as it was not signed by all the landlords, and as Gopinath was not an agent to sign receipts for the other landlords. Such an authority need not be in writing, and there is nothing to show that he was not verbally authorized; at any rate, his conduct might well have led defendants to believe him to be so authorised."

Babu *Grish Chunder Chowdhry* for the Appellants.

Mr. *Abdul Majid* for the Respondents.

The **judgment** of the Court (**Banerjee** and **Rampini, JJ.**) was as follows:—

The only question raised in this appeal, which arises out of a suit for arrears of rent, is whether the lower Appellate Court was right in giving effect to the statutory presumption under section 56, clause 4, of the Bengal Tenancy Act, in favour of the defendants, respondents. The learned Vakil for the appellants contends that the lower Appellate Court was wrong in giving [171] effect to that presumption for two reasons: first 'because the receipt

* Appeal from Appellate Decree No. 1451 of 1895, against the decree of E. Geaki, Esq., District Judge of Mymensingh, dated the 9th of May 1895, affirming the decree of Babu Krishna Chandra Chatterjee, Subordinate Judge of that District, dated the 27th of August 1894.

(Ex. A), which is made the basis of the presumption, was not signed by all the landlords, and the party by whom it was signed was not authorised in writing to sign it on behalf of all the landlords; and, secondly, because, even if verbal authority was sufficient, the lower Appellate Court has not affirmatively found that Gopinath was verbally authorised to sign the receipt for all the landlords.

We are of opinion that the first ground upon which the learned Vakil for the appellant bases his contention is not tenable. The case comes under section 188, which does not require an agent to be authorised in writing to act on behalf of all the landlords. All that that section requires is that the agent should be authorized, and such authority may be given, in our opinion, verbally or in writing. It is true that sub-section (3) of section 187 enacts that "every document required by this Act to be signed or certified by a landlord, except an instrument appointing or authorising an agent, may be signed or certified by an agent of the landlord authorised in writing in that behalf;" but the case in our opinion comes more properly under section 188, as this is a case of several joint landlords and the receipt is signed by one of them.

The second ground urged on behalf of the appellants is, however, in our opinion, entitled to succeed. The receipt (Ex. A), before it can form the basis of any presumption under clause (4), section 56, must be shown to be a receipt granted by or on behalf of all the landlords; in other words, in a case like this, where there are several joint landlords, it must be shown that the person by whom the receipt was signed was authorised by them all, either verbally or in writing. Upon this question of authority, all that the learned Judge says is this: "Such an authority need not be in writing, and there is nothing to show that he was not verbally authorised; at any rate, his conduct might well have led defendants to believe him to be so authorised." We do not think that that is sufficient. It is not enough to say that it is not shown that Gobinath was not verbally authorized, or that the defendants had reason to believe that he was so authorised. It was necessary for the Court below, before giving effect to the presumption under section 56, affirmatively to find that Gobinath was verbally authorised; and as it has not [172] come to any such finding, we must hold that it was wrong in giving effect to the presumption in question. The learned Counsel for the respondents contended that, though there might not have been sufficient ground for raising the statutory presumption, there was here a presumption of fact raised by the lower Appellate Court upon the finding arrived at by it, that the amount that was due from the defendants had been paid off. No doubt, if there had been any such finding, or if the lower Appellate Court had said that upon the whole of the evidence adduced in the case it drew the inference as an inference of fact, that all that was due from the defendants had been paid off, that would have been a perfectly correct decision. But though the learned Judge below does refer to the evidence upon certain points, the presumption upon which he relies is not any presumption of fact, but clearly the presumption of law under section 56.

The case must, therefore, go back to the lower Appellate Court, in order that it may determine the two following points: The first is, whether Gopinath was verbally authorised to sign the receipt (Ex. A) for all the landlords. If this question is answered in the affirmative, the decree will be in favour of the defendants, as it has been made by the lower Appellate Court. If, on the other hand, this question is answered in the negative, then the lower Appellate Court will have to determine the second of the two points for which we remand the case, *viz.*, whether upon the evidence on the record, and bearing in mind that the burden of proof upon this question of payment is on the

defendants, any presumption of fact arises in favour of their defence that all that was due from them had been paid off. With these directions we send the case back to the lower Appellate Court for final disposal. The costs will abide the result.

F. K. D *Appeal allowed and case remanded.*

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[173] *The 7th December, 1896.*

PRESENT:

MR. JUSTICE BEVERLEY AND MR. JUSTICE AMEER ALI.

Kewal Kishan Singh............Judgment-debtor

versus

Sookhari............Decree-holder.*

Court Fees Act (VII of 1870), section 11—Suit for possession and mesne profits—Code of Civil Procedure (Act XIV of 1882), section 212—Assessment of mesne profits -Dismissal of suit—Application for execution.

Where, upon the application of the decree-holder, the Court executing the decree has assessed the amount of mesne profits, but the necessary Court fees have not been deposited within the time fixed by the Court as provided by section 11† of the Court Fees Act (VII of 1870), the suit, that is, the claim in respect of those mesne profits, must be dismissed; after such dismissal, no application for execution of the decree for the mesne profits can be entertained, as no such decree is in existence.

The word "suit" in the last part of para. 2 of section 11 of the Court Fees Act does not mean the entire suit; it means the claim in respect of the mesne profits.

The facts of the case, so far as they are necessary for the purposes of this report, are fully set out in the judgment of the High Court.

* Appeal from Appellate Order No. 101 of 1896, against the order of J. Tweedie, Esq., District Judge of Patna, dated the 4th of December 1895, affirming the order of Babu Gobind Chander Basack, Munsif of Patna, dated the 9th of September 1895.

† [Sec. 11:—In suits for mesne profits or for immoveable property and mesne profits, or for an account, if the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer.

Procedure in suits for mesne profits or account when amount decreed exceeds amount claimed.

Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed.]

Dr. *Asutosh Mookerjee* for the Appellant.

Babu *Karuna Sindhu Mookerjee* for the Respondent.

Dr. *Asutosh Mookerjee.*—An application for the assessment of mesne profits is not an application for the execution of the decree, but an application in the original suit for the purposes of obtaining a final decree ; see *Puran Chand* v. *Roy Radha Kishen* (I. L. R., 19 Cal., 132). If, after assessment of mesne profits, the Court fees are not paid, the suit, so far as it relates to mesne profits, must be dismissed under section 11, para. 2 of the Court Fees Act. After such dismissal, no fresh application for execution can be entertained, as there is no decree in existence capable of execution ; the decree-holder is not entitled to apply for leave to put in additional Court fees, as after such dismissal there is no pending suit before the [174] Court. The decree-holder's remedy is either by an application for review of the order of dismissal under section 623 of the Civil Procedure Code, or by a fresh suit for mesne profits under section 56 of the Civil Procedure Code, subject to the law of limitation. The observations of EDGE, C.J., in *Balkaran* v. *Gobind* [I. L. R., 12 All., 129, (148)] support this contention.

Babu *Karuna Sindhu Mookerjee* for the respondent.—The word "suit" in the last clause of para. 2, section 11 of the Court Fees Act means the execution proceeding, that is, the application for the assessment of mesne profits. Sections 9 and 10 show that this is the meaning. If so, one such application being rejected, there is no bar to a fresh application. The word "suit" in section 11 cannot possibly mean the whole suit.

Dr. *Asutosh Mookerjee* replied.

The **judgment** of the High Court (BEVERLEY and AMEER ALI, JJ.) was delivered by

Beverley, J.—This second appeal is on behalf of the judgment-debtor, and it raises an important question as to the construction of section 11 of the Court Fees Act. The respondent had obtained a decree for possession of immoveable property with mesne profits, which were to be assessed in the course of executing the decree. In March 1893 the decree-holder presented an application to execute the decree as to the possession of the property and to ascertain the mesne profits. The application for execution as regards possession was separately registered, and, as we understand, that portion of the decree has been executed and possession has been delivered to the decree-holders. On the 22nd March 1895, a further application as regards the mesne profits appears to have been filed, and on the 27th of the same month the mesne profits were assessed at a certain sum, and an order was made upon the decree-holder to deposit the necessary Court fees under section 11 of the Court Fees Act on the following day. On that day, namely, the 28th of March 1895, the decree-holder having taken no steps, the case was dismissed. Then, on the 17th August, a fresh application was made by the decree-holder to execute the decree in respect of the mesne profits which had been ascertained [175] in the previous March, and on the 27th August the judgment-debtor objected that the suit having been dismissed there was no decree in existence of which the applicant could take out execution. On the 9th September the Munsif held that all that was done on the 28th March 1895 was to strike off the application for executing the decree in respect of mesne profits, and he accordingly allowed the execution to proceed, and this order has been upheld in appeal.

Now, section 11 of the Court Fees Act provides that in suits for immoveable property and mesne profits, if the profits decreed are in excess of the profits claimed, the decree shall not be executed until the difference between the

fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so decreed shall have been paid to the proper officer, and the second clause, which is the important clause in this case, is as follows: "Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed." The question before us is as to what meaning is to be attached to the words "the suit shall be dismissed." It seems clear that these words are intended to have a different signification from the words used in the former part of the section to the effect that the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable is paid. But it is contended on the other side that inasmuch as the suit had been already decreed, certainly so far as the possession of the property is concerned, and it may fairly be argued also as regards mesne profits, it cannot have been intended that the words "the suit shall be dismissed" should mean that the entire suit shall be dismissed; and it is argued that the proper meaning to be put on these words is merely that the application for execution shall be dismissed, leaving it open to the decree-holder to make a fresh application. We are of opinion that *that* is not the correct con-[176] struction, having regard to the wording of the previous section, section 10 of the Act. According to that section, when an insufficient Court fee has been paid upon a plaint, the Court shall require the plaintiff to pay so much additional fee as would have been payable, and the suit shall be stayed until the additional fee is paid. "If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed," and by analogy we are of opinion that the meaning of section 11 is that in case the additional fee required in respect of the excess mesne profits is not paid, execution of the decree shall be stayed until it is paid, and if it is not paid within the time fixed by the Court then the suit, that is to say, the claim in respect of those mesne profits, shall be dismissed. We think it is unnecessary to hold that the word "suit" in this clause means the entire suit, including the claim for possession which had been decreed and the decree for which had been executed, but we think it can fairly be construed as the suit or claim in respect of the mesne profits in respect of which the Court fee payable has not been paid within the time fixed by the Court. If this construction be correct, it follows that no decree in respect of these mesne profits was any longer in existence and it could not be executed. It might of course be open to the decree-holder to obtain a revival of the suit by applying for a review of judgment, or in some other way, but not having done this, we are unable to hold with the lower Courts that he was entitled to make a fresh application for execution of the decree.

Under these circumstances this appeal must be allowed, the orders of the lower Courts reversed, and the application of the 17th August 1895 rejected.

The appellant is entitled to his costs in both the Appellate Courts.

S. C. C. ——— *Appeal allowed.*

NOTES.

[This was followed in (1906) 33 Cal., 1232; (1907) 6 C. L. J., 462; (1904) 6 Bom., L. R, 1102.

It was held in (1900) 28 Cal., 242 that there may be fresh applications to ascertain mesne profits upon the striking off of a previous one.

An application to assess mesne profits is an application in the suit: (1912) 15 I.C., 709 (Cal.). See also (1899) 21 All., 323.] ———

[177] ORIGINAL CIVIL.

The 25th November, 1896.
PRESENT:
MR. JUSTICE SALE.

Clive Jute Mills Co., Ld.
versus
Ebrahim Arab.*

Contract—Appropriation by vendor—Passing of property—Power of resale—Contract Act (IX of 1872), section 107, and sections 77, 78, 79, 82 and 83—Measure of Damages—Changing shape of claim—Evidence.

The plaintiff under several contracts with the defendant produced by manufacture goods answering to the description of the contracts and appropriated them to the several contracts. On notice of the production of the goods being given to the defendant he directed the goods so appropriated to be marked and despatched for shipment according to certain instructions. The plaintiffs carried out these instructions, but the goods could not be shipped, as the vessels in which they were to be shipped were not available at their usual place.

Held: the ownership in the goods was transferred to the defendant and the plaintiffs became entitled, under section 107 † of the Contract Act, after due notice to resell them on the defendant's refusal to take delivery, and to recover as damages the difference between the contract price of the goods and the price to which they were resold.

Semble.—The proper course to be adopted, when it is sought to shape a claim for damages differently from what appears in the plaint, is to amend the plaint and add a claim for damages on the basis of that amendment. Then at the trial evidence may be given in support of the amended statement. But that course ought not to be allowed to be adopted after the plaintiffs have once closed their case and the defendants have been called on to meet the claim as originally framed in the plaint.

Yule & Co. v. *Mahomed Hossain* (*ante p.* 121) followed.

THE plaintiffs produced by manufacture certain jute goods, and on giving notice of their production to the defendant received instructions for marking and shipping them. The goods were marked as required by the defendant, and were brought down in boats to the place where the vessels named by the defendant were ordinarily moored, but the shipment was not effected because the vessels were not there to receive the goods. The defendant thereupon cancelled the contract and declined to take delivery of the goods. The plaintiffs, after notice to the defendant, [178] resold the goods and brought this suit, claiming by way of damages the difference in the prices of the goods calculated at the contract rates and at the rates at which they were resold. In the course of the opening of the defendant's case it was suggested by the Court that a question might arise as to the right of the plaintiffs to resell the goods and as to whether the plaintiffs ought not to have claimed

* Original Civil Suit No. 313 of 1896.

† [Sec. 107:—Where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him, or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may, after giving notice to the buyer of his intention to do so, resell them, after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit, which may occur on such re-sale.]

Re-sale on buyer's failure to perform.

as damages an amount respresented by the difference between the contract price and the price calculated at the market rate at the date of breach. Thereupon, while the hearing of the defendants' evidence was proceeding, an application was made by the Counsel for the plaintiffs to be allowed to call evidence to show what the market rate was at the date of breach. This application was refused.

Mr. *Garth* and Mr. *Caspersz* for the Plaintiffs.

Mr. *Dunne* and Mr. *Knight* for the Defendant.

Sale, J. (after stating the facts as above, continued).—The next question is as to the damages recoverable by the plaintiff company. It seems that on the defendant cancelling his contracts and declining to take delivery of the goods, which in accordance with his directions had been marked and loaded in boats and despatched from the mill, the plaintiffs after notice to the defendant proceeded to resell the goods, and they claim by way of damages the difference in the prices of the goods calculated at the contract rates and at the rates at which they were resold.

The question is whether the plaintiffs have adopted the true measure of damages, or whether, on the other hand, the plaintiffs ought not to have claimed an amount represented by the difference between the contract prices of the goods and the prices calculated at the market rates at the date of breach.

It is fair to say that this question is not one which is raised in the written statement of the defendant, and indeed the question as to the right of the plaintiffs to resell the goods did not arise until it was suggested by myself in the course of the opening of the defendant's case. Subsequently, while the hearing of the defendant's evidence was proceeding, an application was made by Mr. *Caspersz* on behalf of the plaintiffs to be allowed to call evidence to show what the market rates for the goods were at the date of breach, that is to say, at the end of February. It seemed to me, [179] having regard to the observations of the Appeal Court in the case of *Yule & Co.* v. *Mahomed Hossain* (*ante* p. 124) that it would not be proper to allow the plaintiffs at that stage to call evidence for the purpose of proving the market rate. The view of the Appeal Court as to the proper course to be adopted when it is sought to shape a claim for damages differently from what appears in the plaint, is thus expressed :—

"The proper course in this case would have been to amend the plaint by adding an averment that the market price at the time of the breach was less than the contract price and by adding a claim for damages on that basis. Then at the trial evidence might have been given of what the market price was at the time when the goods were refused, and the judgment should have been for the difference, if any was shown to have existed."

Accordingly, before the plaintiffs can be permitted to give the evidence which they now desire to do, it would be necessary in the first place to amend the plaint and to re-start the case on a new basis I ought not, I think, to allow that course to be adopted after the plaintiffs have once closed their case and the defendant has been called on to meet the claim as framed in the plaint and supported by the evidence adduced at the hearing.

However, this matter is not of much consequence in this case, because the conclusion I have arrived at is that the plaintiffs were entitled to resell the goods which had been marked and despatched from the mill at the defendant's request. The right of resale is given by section 107 of the Contract Act. That section runs as follows :—

"Where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him or by not paying for them, the

seller, having a lien on the goods, or having stopped them in transit, may after giving notice to the buyer of his intention to do so, resell them after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit, which may occur on such resale."

The words of the section seem to imply that the right of resale only arises when the property in the goods has passed to the purchaser.

[180] It is obvious if the property in the goods is in the seller no such power as that contemplated by the section would be required by him to sell the goods.

This view of the section was taken by the Appeal Court in the case of *Yule & Co.* v. *Mahomed Hossain* (*ante p.* 124), to which I have just referred. That case was one where the plaintiff purported to resell certain goods which the defendant had declined to accept, and then claimed the difference between the price at the contract rate and the price at which the goods were resold. The learned Judges held that the plaintiffs had no right to resell, as nothing had been done to pass the property in the goods from the seller to the purchaser. The observations of the learned Judges to which I refer are these:—

"The contract was for the sale of 15 bales of grey shirtings, and would have been satisfied by the delivery of any 15 bales which answered the description in the contract. It is found by the Judge that the 15 bales which were tendered by the plaintiffs did answer the description, but as they were at once refused by the defendants and were never taken by them into their possession the property in the goods never passed to the purchasers, but remained in the vendors in the same way that it was vested in them before the tender. The case is the simple one of a breach of a contract to accept and pay for goods sold by description at an agreed price in which the measure of the damage is the difference between the contract price and the market price at the time of the breach. As the property in the goods remained in the vendors that which took place at the sale had no effect whatever, as the plaintiffs were merely offering their own goods for sale, and when they were knocked down to their bid they only bought in their own goods. To such a case as this neither section 107 of the Contract Act, nor the proviso for resale in the contract itself, can have any application, as no such power is required to enable a man to sell his own goods. Such powers are required when the property in the goods has passed to the purchaser subject to the lien of the vendor for the unpaid purchase money, and it is to that class of cases that both the proviso and the section apply."

The question which next arises for determination is whether **[181]** under the facts as I have stated them it can be said that the property in any portion of the goods had passed from the plaintiffs who were the sellers to the defendant who was the purchaser.

The sections of the Contract Act which bear on the question are these: Section 77 defines what a sale is—"Sale" is the exchange of property for a price. It involves "the transfer of the ownership of the thing sold from the seller to the buyer." The next section 78 refers to ascertained goods, and shows that postponement of delivery does not necessarily prevent the property in the goods from passing to the purchaser.

Section 78 says:—

"Sale is effected by offer and acceptance of ascertained goods for a price; or of a price for ascertained goods, together with payment of the price of delivery of the goods; or with tender, part payment, earnest or part deliveries or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed. Where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of

the price or when the earnest is paid, or when the whole or part of the goods is delivered. If the parties agree, expressly or by implication, that the payment or delivery, or both shall be postponed, the property passes as soon as the proposal for sale is accepted."

Section 79 refers to the articles not ascertained at the date of the contract and provides as follows: " Where there is a contract for the sale of a thing which has yet to be ascertained, made, or finished, the ownership of the thing is not transferred to the buyer, until it is ascertained, made, or finished."

Sections 82 and 83 are important. Section 82 provides :—

" Where the goods are not ascertained at the time of making the contract of sale, it is necessary to the completion of the sale that the goods shall be ascertained."

Section 83 shews under what circumstances the goods may be said to become ascertained :—

" Where the goods are not ascertained at the time of making the argeement for sale, but goods answering the descripiton in the agreement are subsequently appropriated by one party for [182] the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete "

Can it be said on the facts of this case that any portion of these goods became ascertained goods, that is to say, was any portion of the goods appropriated to the contracts with the assent of the purchaser; because, if that be so, it follows that the sale as to that portion was complete, and, if complete, it involves the transfer of the ownership in the thing sold from the seller to the buyer.

Here what we have is that the goods answering to the description of the contracts have been produced by manufacture by the plaintiffs, and have been appropriated by them to the several contracts; that on notice of the production of the goods being given to the defendant the defendant directed the goods so appropriated by the plaintiffs to the contracts to be marked and to be despatched for shipment according to certain instructions. It is said that the defendant never inspected the goods, and that it might be that they did not answer to the description contracted for.

But the right to inspection may be waived by a purchaser, and if without inspection he either takes possession of the goods, or exercises proprietary rights over them, it seems to me he thereby gives his implied assent to the appropriation effected by the seller.

Now, here the plaintiffs were directed to mark the goods appropriated by them to the contracts in a particular way, and to despatch them from the mill in accordance with certain shipping instructions. The act of despatching the goods from the mill was, it appears to me, the act of the defendant through his agents, the plaintiffs, and this act of the defendant constituted an implied assent to the appropriation by the plaintiffs which then became no longer revocable. So far therefore as the goods actually despatched from the mill are concerned the ownership was transferred to the defendant, and the plaintiffs became entitled under section 107 after due notice to resell them on the defendant's refusal to take delivery.

It follows that the plaintiffs are entitled to recover as damages, [183] the difference between the contract price of the goods despatched from the mill and

the price at which they were resold; the plaintiffs are also entitled to demurrage claimed and proved in respect of those goods.

Attorneys for the Plaintiffs: Messrs. *Morgan & Co.*

Attorneys for the Defendant: Messrs. *Watkins & Co.*

S. C. B.

NOTES.

[See also (1906) 33 Cal., 547.]

[24 Cal. 183]

The 17th January, 1896.

PRESENT:

MR. JUSTICE AMEER ALI.

Harendra Lall Roy

versus

Sarvamangala Dabee and others.*

Transfer of Civil Case—Letters Patent, High Court, 1865, clause 13—Grounds for transfer—Practice.

In a suit for immoveable property instituted in the Dinagepur Court, the defendant applied for its transfer to the High Court under clause 13 of the Letters Patent, the grounds upon which the transfer was asked for being, that questions of difficulty arose in the suit; that the defendants' witnesses lived in Calcutta; that it would be impossible for her to go to Dinagepur and take her witnesses there owing to the expense; that an agreement upon which the suit was brought was executed in Calcutta; that the plaintiff resided and carried on business in Calcutta; and that all the persons who knew of the transactions in suit were residents of Calcutta or its neighbourhood. *Held*, under the circumstances, that the case was a proper one to be transferred to the High Court.

THE facts of this case are fully stated in the judgment.

The *Advocate-General* (Sir *Charles Paul*) who appeared with Mr. *O'Kinealy* to show cause against the rule, cited the following cases: *Mokham Singh* v. *Rup Singh* (I. L. R., 15 All., 352: L. R., 20 I. A., 127), *Khatija Bibi* v. *Taruk Chunder Dutt* (I. L. R., 9 Cal., 980), *Ojooderam Khan* v *Nobinmoney Dossee* (1 Ind. Jur. N. S., 396), *Doucett* v. *Wise* (1 Ind. Jur. N. S., 94, 227), and *Courjon* v. *Courjon* (9 B. L. R., Ap 10).

Mr. *Garth* in support of the rule cited the following cases: *Jotindro Nath Mitter* v. *Raj Kristo Mitter* (I. L. R., 16 Cal, 771), *In the matter of Kapil Nauth Sahai Deo* v. *Government* (10 B. L. R., 168), *Ram Coomar* [184] *Coondoo* v. *Chunder Canto Mookerjee* [I. L. R., 7 Cal., 233 (256): L. R., 4 I. A., 23 (47)], *Poolin Chunder Chowdhri* v. *Satish Chunder Shaw* (unreported: Minute Book, 5 Sept. 1895, SALE, J.), and *Jogendro Nauth Chatterji* v. *Anundo Chunder Banerjee* (unreported: Minute Book, 23 April 1894, SALE, J.).

Ameer Ali, J.—This rule was obtained by Sreemutty Sarvamangala Dabee, one of the defendants in a suit No. 957 of 1895 in the Court of the

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* Rule calling upon the plaintiff in suit No. 957 of 1895 in the Court of the Subordinate Judge of Dinagepur to show cause why the said suit should not be removed to the High Court.

Subordinate Judge of Dinagepur, under clause 13 of the Letters Patent, calling upon the plaintiff Harendra Lall Roy to show cause why the said suit should not be removed to this Court, to be tried and determined in this Court in the exercise of its extraordinary original civil jurisdiction. The circumstances under which the suit in question was instituted are shortly these :—

One Sreenath Sanyal died on the 20th May 1892, leaving considerable property, both moveable and immoveable. The immoveable property is situated partly in the District of Dinagepur and partly in the District of Burdwan, the bulk being in Dinagepur. The moveable property consists of a sum of Rs. 3,00,000 in the hands of the Accountant General of this Court, and the accumulated rents of the zemindaries at Dinagepur, amounting to a large sum in the hands of the Collector of Dinagepur.

Upon the death of Sreenath Sanyal three claimants appeared on the scene, each claiming to be solely entitled to the estate, one of them being Woodoy Churn Sanyal, who claimed as the adopted son of Sitanath Sanyal, one of Sreenath Sanyal's brothers. The second claimed to be the adopted son of another brother, and the third as next-of-kin.

A suit was instituted in the Burdwan Court, and proceedings were taken in this Court for Letters of Administration to the estate of Sreenath Sanyal. Woodoy Churn Sanyal seems to have been a man of no means, and after some ineffectual attempts to obtain money from other sources he entered into an agreement with Harendra Lall Roy, the plaintiff, under which, in consideration of the plaintiff advancing funds for the prosecution of his claim to the estate of Sreenath Sanyal, Woodoy purported to assign half his interest to Harendra Lall Roy.

[185] That agreement, or as it is called deed of assignment, bears date the 27th of September 1892. On the 6th of September 1894 a compromise took place between the three claimants, by which Woodoy Churn Sanyal obtained five annas, Rajendra Nath Sanyal eight annas, and Eshan Chunder Sanyal three annas, and a decree was made by consent in those terms in the Burdwan Court; and upon the basis of that compromise I am informed an order was made in this Court declaring the rights of Rajendra Nath Sanyal, Woodoy Churn Sanyal, and Eshan Chunder Sanyal, according to the shares mentioned, and directing that Letters of Administration should issue jointly to them. But from the proceedings before me it appears that Letters of Administration have not yet been issued.

Woodoy Churn Sanyal died on the 2nd April 1895. The defendant Sreemutty Sarvamangala Dabee is his daughter, and it is said that for two or three months she received the allowance which Harendra Lall Roy was making to her father under the deed of assignment. That is a question, however, with which I am not concerned in the present matter.

Some time after his death the defendant Sarvamangala Dabee raised questions regarding the validity of the deed of assignment executed by her father in favour of Harendra Lall Roy. There appears to have been the usual correspondence between the attorneys on both sides, and on the 27th of August 1895, the plaintiff instituted this suit in the Dinagepur Subordinate Judge's Court, praying, among other things, for a declaration that under the conveyance of the 27th of September 1892, and another agreement referred to in the plaint, he was entitled to a moiety of the share of Woodoy Churn Sanyal in the estate of Sreenath Sanyal. He asked further that possession might be given to him of that moiety, and also that the defendants other than the Collector of Dinagepur be restrained from handing over to the defendant Sreemutty Sarvamangala Dabee any portion of the said share of Woodoy

Churn Sanyal in the estate of Sreenath Sanyal, and that she might be restrained from receiving, getting in, or dealing with the same. The plaintiff prayed also for the appointment of a Receiver, and other reliefs to which I do not consider it necessary to refer. It appears that on the same day the plaintiff **[186]** obtained a rule calling upon the defendant to show cause why a Receiver should not be appointed in respect of the moneys in the hands of the Accountant General of this Court, and also of the zemindaries in the district of Dinagepur which were in the hands of the Collector, and obtained in the meantime an interim injunction. On the 22nd November the defendant Sreemutty Sarvamangala Dabee applied for and obtained this rule, the purport of which I have already given.

The *Advocate-General* and Mr. *O'Kinealy* have shown cause. The plaintiff himself has filed no affidavit of his own. Two affidavits have been used on his behalf, one made by his attorney Kamini Kumar Guha jointly with Horo Koomar Chuckerbutty, Kamini Kumar's clerk, the other by Raj Chunder Bose, a gomastha of the plaintiff.

Now, clause 13 of the Letters Patent runs thus: "And we do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have power to remove and to try and determine, as a Court of Extraordinary Original Jurisdiction, any suit being or falling within the jurisdiction of any Court whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court."

A number of cases dealt with under the clause were cited in the course of argument. I have also referred to a case decided in 1866—*Ojooderam Khan* v. *Nobinmoney Dossee* (1 Ind. Jur. N. S. 396).

There can be no doubt that this Court has ample power to remove cases from any Court subject to its superintendence for trial, in the exercise of its extraordinary jurisdiction, whenever it thinks fit to do so for purposes of justice; that purpose is to be determined on various considerations, most of which are discussed in the cases to which reference has been made. For example, the desirability or necessity to exercise the jurisdiction may arise in consequence of the importance or difficulty of the questions involved, or it may arise in consequence of the balance of convenience **[187]** or cheapness of the trial. I do not mean to say that these considerations are exhaustive for the exercise of the jurisdiction under clause 13, but these are circumstances under which undoubtedly this Court has exercised the power. In the matter of *Kapil Nath Sahai Deo* v. *The Government* (10 B.L.R., 168), the conduct of the Judge was taken into consideration in directing a transfer.

The grounds which the defendant puts forward in asking for a transfer may be stated shortly to be as follows:—

1. She contends that the questions involved in the suit are of a difficult and important character.

2. She suggests that the witnesses whom she intends to cite live in Calcutta, and that it would be an extreme hardship to her either to go herself or take her witnesses to Dinagepur to be examined at the trial.

I am giving very briefly the grounds which were discussed before me, as they are set out fully in the affidavit of the defendant. It is quite clear that the agreement upon which the suit is brought was executed in Calcutta. It is also evident that the plaintiff resides and carries on business in Calcutta.

In the 32nd paragraph of the defendant's verified petition it is stated that the said Harendra Lall Roy is a rich money-lender of Hatkhola, having extensive business connections in the mofussil. There is no contradiction of that statement in the affidavits which have been filed on his behalf. Then in the 34th paragraph it is said: "All the persons who know of the transactions between the said Woodoy Churn Sanyal and Harendra Lall Roy, and who will be likely to be called as witnesses by your petitioner, are residents of Calcutta or Bally and work in Calcutta." Again, there is no contradiction. The joint affidavit of Kamini Kumar Guha and Horo Coomar Chuckerbutty, so far as it goes, contradicts the defendant's statements regarding the circumstances under which the deed was executed, the capacity of Woodoy Churn Sanyal, and the knowledge of the defendant concerning the document, but I do not find any contradiction of the allegation that all the witnesses who are able to speak to the agreement are in Calcutta or in its neighbourhood. Nor is there any contradiction in Raj Chunder Bose's affidavit. The defendant says her evidence would be material, **[188]** and that it would be impossible for her to go to Dinagepur and take her witnesses there, as the expense would be very heavy, and further that she would be unable to secure the attendance of many of them even if she could afford the expense.

There is no contradiction of the statement that she has not the means to afford the costs of a commission, nor any suggestion that she can conveniently go to Dinagepur to give her evidence. Considering the fact that the defendant is a *purdahnashin*, I can understand the difficulty of her going to Dinagepur for the purposes of giving her evidence. There is not the faintest allegation on the part of the plaintiff that there are any witnesses at Dinagepur whom he will be obliged to bring down to Calcutta if the case were tried here.

Kamini Kumar Guha suggests in a weak sort of way that the defendant has the means of taking up Counsel from here to Dinagepur. On this point he says as follows: "With reference to the statements contained in the 33rd paragraph of the said petition we say that we do not believe that the said petitioner is without means to take down Counsel from Calcutta to Dinagepur in case it were necessary to do so, which we do not believe it to be, etc."

The denial is of a weak character. I do not mean to say that inability on the part of the defendant to take Counsel up to Dinagepur would be any ground for a transfer; what I find is that though her inability to take up Counsel is denied in the way I have shown, her statement as to her want of means to go to Dinagepur or to take her witnesses there, is not denied.

Raj Chunder Bose says in substance that if the case be removed to this Court it would entail great hardship and loss on Harendra Lall Roy, who has already paid and incurred liabilities for stamps and pleader's fees to the amount of Rs. 4,500.

Beyond the matter of expense there is nothing to show what the hardship would be. I have nothing to do with the expense which the plaintiff has already incurred. If he wins—he will in all probability recover the costs of the stamps. It is said that the suit was brought in the Dinagepur Court, inasmuch as the Collector of that District has been made a defendant. But the Collector is merely a formal party; his presence in the suit is owing to the fact that he holds in his hands the rents of the estate. The **[189]** suit could have been brought in the Burdwan Court, where the former suit in respect of these very properties was instituted and which would have been more convenient to the parties and the witnesses in the case. I think there is a good deal of force in Mr. *Garth's* contention that the plaintiff has brought the suit in the most distant place he could in order to throw every

difficulty in the way of the defendant to defend the action. I was surprised at the statement that the expense here will be greater than in the mofussil. This is obviously contrary to ordinary experience.

The matter therefore substantially comes back to this: This is a suit for the enforcement of a contract between Harendra Lall Roy and Woodoy Churn Sanyal, by which the latter purported to assign a moiety of his share in the estate of Sreenath Sanyal to the plaintiff in consideration of being placed in funds for the prosecution of his claim. Having regard to the statements which the defendant makes various questions arise for determination, one of which is whether it was an extortionate or unconscionable bargain, assuming that it was entered into with full apprehension of its effect and purport. I do not wish to say more on this particular question than is absolutely necessary, but bearing in mind the decisions in the cases of *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (I. L. R., 2 Cal., 233; L. R., 4 I. A., 47), *Raghunath* v. *Nil Kanth* (I. L. R, 20 Cal., 843; L. R., 20 I. A., 112), and *Mokham Singh* v. *Rup Singh* (I. L. R., 15 All, 352; L. R., 20 I. A., 127), it is clear that the question is important and difficult. Had that ground stood alone, I am not prepared to say the Court of the Subordinate Judge would not be quite competent to deal with it. But there are other circumstances which I must take into consideration. All the parties really interested in the suit reside either in Calcutta or in its immediate neighbourhood. So, upon the affidavits, do the witnesses who are likely to attend to give their testimony. It is not suggested that any of the witnesses for the plaintiff are at Dinagepur. Again, if the agreement cannot be supported in its entirety the plaintiff may only be entitled to so much as he has spent, and an account would be necessary. It is not suggested that [190] his accounts are at Dinagepur. The money was advanced here and the books are here.

The defendant states it would be extremely difficult for her to go to Dinagepur. She states she has no means to go herself or to take her witnesses. Again, the prayers for an injunction and receiver render the case one eminently fit to be tried in this Court. The balance of convenience is manifestly in favour of its being heard in Calcutta. To insist upon its being tried in Dinagepur would, in my opinion, place insuperable difficulties in the way of the defendant to defend the suit.

The other defendants leave the matter in the hands of the Court. For all the reasons I have given I think I ought to make the rule absolute, which I accordingly do. I reserve the costs of all parties.

Attorneys for the Plaintiff: Messrs. *Sen and Co.*

Attorney for the Defendant Sarvamangala Dabee Babu *Bhupendra Nath Bose.*

Attorney for the Defendant Eshan Chunder Sanyal. Babu *Mohini Mohan Chatterji.*

Attorney for the Defendant Rajendro Nath Sanyal: Mr. *A. H. Gillanders.*

F. K. D. *Rule absolute.*

[24 Cal. 190]
The 4th January, 1897.

PRESENT:
MR. JUSTICE SALE.

Kissory Mohun Roy
versus
Kali Churn Ghose and others.*

Execution of decree—Mode of execution—Mortgage—Subsequent mortgagee—Execution against properties outside the local jurisdiction of the High Court--Leave to sue--Letters Patent, High Court, 1865, clause 12—Application of restrictive words of that clause.

Properties within Calcutta were mortgaged to the plaintiff, and those properties together with other properties out of Calcutta were mortgaged to a second mortgagee. In a suit against the mortgagor and the second mortgagee it was *held* that after the usual mortgage decree was made the second mortgagee had the right to proceed against the properties out of Calcutta for the realization of any balance of the mortgage money that might remain due to him.

[191] The restrictive words of clause 12 of the Letters Patent, 1865, apply to the case of a plaintiff; but there is no similar restraining provision applicable to a case where the person seeking the exercise of the Court's jurisdiction is the defendant.

THIS was an application on notice to the parties to the suit, but no one appeared at the hearing to oppose the application.

The facts of the case for the purpose of this report appear sufficiently from the judgment.

Mr. *R. Mittra* for the Applicant.—The second mortgagee was properly made a party to the suit under section 85 of the Transfer of Property Act. By the decree an account was ordered to be taken in respect of his mortgage. He has received a portion of his mortgage money out of the surplus of the sale-proceeds of the properties within Calcutta, and now he applies, under the liberty reserved by the decree, for the sale of properties out of Calcutta for the realization of the balance due to him. The Court has exercised jurisdiction in respect of his mortgage. It is quite proper and desirable that he should obtain full relief in this suit. He has no other remedy. Clause 12 of the Letters Patent 1865 is no bar to his obtaining the relief he seeks for. The restrictive words of that clause have no application when a defendant asks the Court to exercise jurisdiction in respect of properties out of Calcutta.

Sale, J.— This suit was brought by the plaintiff on his mortgages, dated respectively the 19th of August 1888 and the 14th of December 1888. The properties, the subject of suit, are all in Calcutta within the local limits of the jurisdiction of this Court. Those comprised in the first mortgage were also comprised in the second mortgage with other properties. These other properties were subsequently mortgaged to the defendant Pran Gobindo Shaw with further properties out of Calcutta.

By the decree it was referred to the Registrar to take an account in respect of each of the three mortgages, and failing redemption it was ordered that the properties comprised in the first and second mortgages should be sold, and the proceeds marshalled and applied so that the third mortgagee should have

* Original Civil Suit No. 596 of 1893.

the full benefit of any surplus of the sale-proceeds of such of the properties comprised in his mortgage as were also comprised in the second mortgage, such properties being all in Calcutta. **[192]** The Registrar made his report. Then after the time allowed for redemption, the properties comprised in the first and second mortgages were sold under a final order for sale and the proceeds applied as directed by the decree, with the result that the first and second mortgages were satisfied, and a substantial payment was made towards satisfaction of the third mortgage. For realization of the balance due to the third mortgagee he now applies for sale of the unsold properties comprised in his mortgage—being properties out of Calcutta. He claims the right to proceed against these properties in this suit under the liberty reserved by the decree as follows: "And this Court doth hereby reserve the consideration of all further directions until the Registrar shall have made his report, and doth also reserve liberty to the defendant Pran Gobindo Shaw to proceed against the properties situated outside the town of Calcutta."

It is on every account desirable that the third mortgagee should also obtain full relief in this suit. He was, under section 85 of the Transfer of Property Act, made a defendant because some of the properties comprised in his mortgage were also comprised in a former mortgage in favour of the plaintiff. His mortgage was thus included in the subject of suit, and a decree was made in respect of all the mortgages. The Court therefore had, and has exercised, jurisdiction with respect to the third mortgage. The only question is whether it is restrained from dealing with the remaining properties comprised therein and which are situated outside the local limits of the jurisdiction of this Court, because prior leave to sue in respect thereof has not been obtained under clause 12 of the Letters Patent.

This clause vests the Court with jurisdiction to deal with suits for land where the land is situate either wholly or partly within and partly without the local limits of its Ordinary Original Civil Jurisdiction, but in the latter case the exercise of its jurisdiction is made dependent upon prior leave to sue having been obtained; see *Kellie* v. *Fraser* (I. L. R., 2 Cal., 445). But words restrictive of the *exercise* by the Court of its jurisdiction must be construed strictly.

The restrictive words of the Charter apply to the case of a **[193]** plaintiff, but there is no similar restraining provision applicable to a case where the person seeking the exercise of the Court's jurisdiction is the defendant.

In the absence of any such restriction, I think I ought to make the order as prayed.

Attorneys for the second mortgagee: Messrs. *N. N. Sen & Co.*

S. C. B.

NOTES.

[See also (1909) 11 C.L.J., 563.

In (1910) 37 Cal., 907, it was held that the new provisions in the Civil Procedure Code, 1908, O. 34 had the effect of overriding the previous practice on the Original Side.

This case was distinguished in (1901) 29 Cal., 370 : 6 C.W.N., 365 : (1909) 10 C.L.J., 150; (1904) 1 C.L.J., 31.]

[24 Cal. 193]

ORIGINAL CRIMINAL.

The 26th February, 1896.

PRESENT:

MR. JUSTICE HILL.

Queen-Empress on the prosecution of Coverjee Hari Dass
versus
Pursotam Dass Morarjee.

Charge—Form of Charge—Criminal breach of trust—Penal Code (Act XLV of 1860), section 408—Form of Indictment—Practice.

Where the first two counts of an indictment charged the prisoner under section 408* of the Penal Code with criminal breach of trust in respect of two sums of money, viz., Rs. 23-7-0 and Rs. 850, respectively, and the third and last count charged him with criminal breach of trust in respect of a sum of Rs. 9,168-6-0, which last-mentioned sum, as appeared from the depositions, represented a general deficiency in the prisoner's account, *held*, the third count must be struck out.

THE prisoner Pursotam Dass Morarjee, who was a gomastah of the firm of Coverjee Hari Dass, was charged with criminal breach of trust. The first two counts of the indictment charged him with criminal breach of trust in respect of two sums of money, viz., Rs. 23-7-0 and Rs. 850, respectively. The third count was in the following words: "That he the said Pursotam Dass Morarjee on or about the 22nd day of April in the year aforesaid in Calcutta aforesaid being entrusted in such capacity as aforesaid, being employed as a servant, to wit, gomastah of one Coverjee and others trading under the name or style of Coverjee Hari Dass with the sum of rupees ten thousand two hundred and seventy-four, fifteen annas and three pies, committed criminal breach of trust in respect of a portion thereof, to wit, the sum of rupees nine thousand one hundred and sixty-eight and annas six, and thereby he the said Pursotam Dass Morarjee committed an offence punishable under section 408 of the Indian Penal Code."

[194] The *Standing Counsel* (Mr. *P. O' Kinealy*) for the prosecution.

Mr. *J. G. Woodroffe* for the prisoner.

On the case being called on for hearing Mr. *J. G. Woodroffe*, who appeared for the prisoner, stated that he wished before the prisoner was called on to plead to the indictment to take objection to the third count thereof.

HILL, J., suggested that as it would be inconvenient to keep the jurors in attendance during the argument the prisoner might be called on to plead to all the counts, stating that if after hearing Counsel he should hold the objection good, he would order the third count to be struck out.

A jury was accordingly empanelled, the prisoner pleading not guilty to all counts of the indictment.

* [Sec. 408:—Whoever, being a clerk or servant, or employed as a clerk or servant, and being in any manner entrusted in such capacity with property or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.]

Criminal breach of trust by a clerk or servant.

Mr. *J. G. Woodroffe*.—The third count, though apparently in form, is in reality unsustainable. It is only sufficient if it deals with a single transaction. But it appears from the depositions that the sum alleged in that count to have been embezzled represents a general deficiency in the prisoner's account. A general deficiency may be constituted by a number of distinct embezzlements. The misappropriation of each separate item is a separate offence. *Chetter* v. *The Queen* (15 W. R. Cr., 5). When a number of sums are separately embezzled they cannot be added all together and treated as one embezzlement of the whole; *Rex* v. *Williams* (6 C. & P., 626). In *The Queen* v. *Balls* (L. R., 1 C. C. R., 328) there was to be a weekly accounting; moreover the account was one-sided. As two offences have been already charged in the first two counts, the third is bad. Under section 234 of the Criminal Procedure Code only three offences of the same kind can be charged. In this case more than three offences have in effect been charged. If an embezzlement takes place on two dates, and consists of two separate transactions, there must be two charges, and a trial held contrary to the provisions of section 234 is wholly inoperative; *In the matter of Luchminaram* (I.L R., 14 Cal., 128), *Queen-Empress* v. *Juala Prasad* [I.L.R., 7 All., 174 (177).] I refer to the unreported decision of WILSON, J., in *The Queen* v. *Counsel* cited in *The Queen-Empress* v *Shama Churn* [195] *Sen* tried in 1890 before PRINSEP, J. * and a special jury; also to the decision of FARAN, J., in the Bombay case of *The Queen-Empress* v. *De Silva* 1894 *. They are directly in point as to the unsustainability of the third count. *The Queen-Empress* v. *Kellie* (I. L. R., 17 All., 153) is against me; but it is submitted that this Court will follow its own previous rulings and that of the Bombay High Court. As the law now stands some specific sum must be proved to have been embezzled; it will not suffice to prove a general deficiency in the prisoner's account: *Reg.* v. *Jones* (8 C. & P., 288), *Reg v. Chapman* (1 C. & K., 119), *Reg.* v. *Moah* (Dear, C C, 626), *Reg.* v. *Wolstenholme* (11 Cox. C. C., 313), 2 Russell on Crimes, 376, 377, 380, Roscoe's Cr. Ev., 450. The decision in *Rex* v. *Grove* (7 C. & P., 635) proceeded merely on the facts of that particular case as is pointed out in *Reg.* v. *Jones* (8 C. & P., 288). Moreover seven out of the fifteen Judges dissented from that decision; 2 Russell on Crimes, 377. The case of *The Queen* v. *Lambert* (2 Cox. C. C., 309) is not opposed to this general rule, as is explained in 2 Russell on Crimes, 377 note, which is further supported by the decisions of the Indian Courts already cited, with the exception of the *The Queen-Empress* v. *Kellie* (I. L. R., 17 All., 153). The amendment of the Penal Code by section 4 of Act III of 1895 deals only with the offence of falsification of accounts, which though an offence of a kindred, is yet of a different, nature. It reproduces the provisions of 38 and 39 Vic., Cap., 24. see Statement of Objects and Reasons, *Gazette of India*, March 24, 1894; *Reg.* v. *Butt* (15 Cox. C. C., 564). The proviso applies to charges under section 477A of the Penal Code only. This is not a charge under that section. Had the Legislature intended to make the proviso of general application, it would have so enacted. If it will not be sufficient to prove a general deficiency in order to make out the commission of the offence, the Court will not permit evidence to be given, which will only have the effect of prejudicing the prisoner. On this ground as on the first it is submitted the third count should be struck out.

The *Standing Counsel* (Mr. *P. O'Kinealy*).— Unless evidence [196] be admitted of a general deficiency, it would be extremely difficult, if not impossible, to prove the commission of the offence in these cases. See remarks of ERLE, J.,

* Counsel was allowed to refer to the Reports of these cases in the *Statesman* and the *Times of India* respectively—*Ed. note.*

in *The Queen* v. *Lambert* (2 Cox. C. C., 309). We are within this case, as also those of *The Queen* v. *Balls* (L. R., 1 C. C. R., 328), and *Rex* v. *Grove* (7 C. & P., 635), the facts of which latter case are on all fours with those of the present prosecution. *The Queen-Empress* v. *Kellie* (I.L.R., 17 All., 153) is directly in point. Moreover we say that the offence did constitute one transaction, and that the prisoner committed criminal breach of trust in respect of a specific sum. The case for the prosecution is that he took away a sum of money which represents the deficiency at one time and on a particular day, namely, on the day on which he is said to have absconded. [HILL, J.—The evidence by which you propose to prove this is mere speculation; it is not evidence to go to the jury.] The evidence I have opened to the jury is all we are prepared to give, and if the prisoner took the money before the day on which he absconded there is no evidence to support the third count.

The Court here adjourned.

On the re-assembling of the Court after the midday adjournment, **judgment** on the point argued was delivered by

Hill, J.—Since the adjournment I have had the advantage of consulting the learned Chief Justice, and, though my own opinion is that expressed by ERLE, J., in *The Queen* v. *Lambert* (2 Cox C C., 309), I must hold that the third count is in form opposed to the practice of this Court in charges of this nature, and that it must be struck out of the indictment.

Verdict—Guilty.

Attorney for the Prosecution: The *Government Prosecutor*, Mr. *J. T. Hume*.

Attorneys for the Prisoner: Messrs. *Wilson, Chatterjee & Mitra*.

F. K. D.

NOTES.

[See also 2 C.W.N., 341 There was a conflict of decisions between those of the Calcutta High Court on the one hand and of the Allahabad and the Bombay High Courts on the other:—17 All., 153; 18 All., 116; 19 Bom., 749.

The Legislature in the Criminal Procedure Code, 1898, sec. 222, added clause (2), to set at rest this conflict.]

[197] APPELLATE CIVIL.

The 7th September, 1896.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Dijendra Nath Roy Chowdhry and another............Plaintiffs

versus

Soylendra Nath Roy Chowdhry and others............Defendants.*

Bengal Tenancy Act (VIII of 1885), section 158—Tenure, Incidents of—Application against same tenant holding two or more tenancies—Form of petition.

Held [by PETHERAM, C.J., and BANERJEE J. (RAMPINI, J., dissenting)], that under section 158 of the Bengal Tenancy Act, the landlord is authorized to include in one

* Appeal from Original Decree No 258 of 1895, against the decree of Babu Shyam Chand Dhur, Subordinate Judge, Second Court of Zillah 24-Pergannahs, dated the 29th of June 1895.

application two or more tenancies held by the same tenant. *Golap Chand Nowlakha* v. *Ashutosh Chatterjee* (I. L. R., 21 Cal., 602), referred to.

THE plaintiffs, who were the owners of sixteen annas of the zemindari No. 650, Pergannah Serperajpore, applied on the 18th December 1894, in the Court of the Subordinate Judge of 24-Pergannahs, under section 158 of the Bengal Tenancy Act, to ascertain the real areas of the different pieces of land appertaining to the *jammas*, held by the defendants, and also to ascertain of what description of tenants the defendants were. The plaintiffs alleged that one *jamma*, standing in the name of Chiranjib Khan, and another, standing in the name of Goluck Chunder Bose, both situate in the same village, and appertaining to *taluq* No. 650, used to be recorded, in the zemindari *seristha* of their predecessor; that one Bepin Chunder Roy, deceased, father of the defendants, was in possession of the said two *jammas*, and that since his death the defendants were in possession. The defendants contended that the two *jammas* being separate and the lands also being separate, a joint application could not be made in accordance with law. They also contended that, if a separate application were made, in respect of each of these *jammas*, the Court would have no jurisdiction to try it. The matter came on for hearing before the Subordinate Judge on the [198] 10th May 1895, and he made an order to the effect that the contention of the defendants should prevail, and in that view the question of jurisdiction would have to be decided, having regard to the nature of the tenancies. On the 29th June 1895, the matter came before him again, and he passed the following order :—

"The applicant not having expressed his willingness to elect, though ordered to do so, I dismiss his application with costs."

From this order the plaintiffs appealed to the High Court.

Babu *Hem Chunder Banerjee*, Babu *Ram Churn Mitter*, Babu *Umakali Mookerjee*, Babu *Srish Chunder Chowdhry* and Babu *Sarat Chunder Roy Chowdhry* for the Appellants.

Babu *Jogesh Chunder Roy*, for the Respondents.

The appeal was originally heard by a Bench consisting of PETHERAM, C.J., and RAMPINI, J., and the following **judgments** were delivered.

Petheram, C.J. (after stating the facts, continued).—The zemindars have appealed, and as I have the misfortune to differ from Mr. Justice RAMPINI as to the meaning of section 158, I proceed to state my own view of it, so far as it affects the present question.

The question is whether under section 158 the owner of a zemindari can include all the land held by the same tenant within his zemindari, though it is held under more than one tenure, or whether he must make a separate application in respect of the land held under each tenure. The question is entirely one of the construction of the section, and no question of discretion or convenience or inconvenience can, in my opinion, be properly considered in answering it.

The Court to which the application is to be made would, undoubtedly, have jurisdiction to determine a suit for the possession of the land between the zemindar and the tenant, and to determine in one suit questions relating to lands which might be held under more than one tenure ; and, as the same word "land" is used in the section with reference to a suit and an application, I can only come to the conclusion that the framers of the section meant the same land in each case. Had they intended that the word when used with reference

to an application should not mean [199] land, but something else, I cannot think that they would not have said so.

The only word in the section upon which an argument for the respondent can be founded is the word "class" in sub-section (*c*), as it may, no doubt, be argued that if the Legislature had intended that the lands of several tenures might be dealt with in one application, they would have used the plural instead of the singular, as, if several tenures were dealt with, the same person *might* be found to fall into several classes of tenants. A little consideration will, however, show that this argument is not well founded, as it is equally possible that the tenant may belong to the same class in respect of all the tenures, and then the word in the sub-section be sufficient to meet the case; and it would follow that if this is to be treated as the test word, a zemindar might include the land of several tenures in the same application when the tenant fell in the same class in respect of all of them, but could not do so when he would fall into different classes: a result which would be very unfortunate, as it would make the jurisdiction of the Court dependent on the decision of the case.

In my opinion there is nothing in the context to show any different intention, and the ordinary rule applies that the singular word "class" in the sub-section includes the plural "classes." I think the order of the Subordinate Judge is wrong, and that the case should be remanded to him to re-instate it on his file and dispose of it according to law; but as Mr. Justice RAMPINI is of a different opinion, the papers must be laid before a third Judge.

Rampini, J.—This is a proceeding instituted under section 158 of the Bengal Tenancy Act in the Court of the Subordinate Judge of the 24-Pergannahs. The plaintiffs, who are landlords, applied to have determined the incidents of two tenancies, now in the occupation of the three defendants. One of these tenancies is described as a *jamma*, standing in the name of Chiranjib Khan, and bearing a rental of Rs. 169-13-6, and the other as a *jamma*, standing in the name of Goluck Chunder Bose, bearing a rental of Rs. 69-11-15. The plaintiffs applied to have determined the areas, positions and boundaries of the different plots of land appertaining to these *jammas*, and the classes of tenants to which the defendants belonged; also whether the rents of the tenancies [200] were liable to enhancement or not. They valued their application as a suit at a total value of Rs 5,100, the value of one of the tenancies being, according to them, Rs. 3,731, and that of the other Rs. 1,369.

The defendants *inter alia* pleaded that the values of the tenancies were Rs. 1,000 and Rs. 300, respectively; that a separate proceeding should have been instituted with regard to each tenancy; and that, accordingly, the proceedings should have been instituted in the Court of the Munsif of Basirhat.

The Subordinate Judge held that a separate application should have been presented with regard to each tenancy: he gave the plaintiffs an opportunity of electing with respect to which tenancy their present application should be regarded as applying, and, as they made no election within the time allowed them for the purpose, he dismissed the application.

An appeal has been preferred against this order, and it has been contended (1) that there is nothing in section 158 to prevent one application being presented for the determination of the incidents of any number of tenancies, provided they are in the occupation of the same person, or, as in this case, in that of the same set of persons; and (2) that, under the provisions of sections 45 and 647 of the Civil Procedure Code, the Subordinate Judge was bound to determine the incidents of the two tenancies in one application, and that, if he found it

inconvenient to do so, all he could do was to order separate trials with regard to each tenancy.

I am of opinion that the order of the Subordinate Judge is right, and that the Legislature, in framing section 158 of the Tenancy Act, did not contemplate that in one proceeding under this section the incidents of more than one tenancy should be determined. This appears to me to have been held by the learned Judges who decided the case of *Golap Chand Nowlakha* v. *Ashutosh Chatterjee* (I. L. R., 21 Cal., 602). They said in their judgment in that case: "In this case Ashutosh Chatterjee applied to the Court under section 158 of the Rent Act to have the nature of a large number of tenancies determined in one suit. In other words, he asked the Civil Court to do what the law declares in **[201]** section 103 to be the peculiar duty of the Revenue authorities. The Subordinate Judge was of opinion that section 158 only applied to particular cases, and did not justify such an application. The District Judge, however, was of opinion that the section should be literally construed, and that the proceeding should be allowed. We think the Legislature did not contemplate that the several causes of action should be lumped up together. There is no procedure known to our law that recognizes the right to bring batches of suits in one claim. We direct that the decree of the lower Court be set aside, and that of the first Court affirmed with costs."

Now, the plaintiffs in this case appear to me to be doing exactly what the learned Judges in the above cited judgment held could not, and should not, be done. They are bringing one application with regard to more than one tenancy. They are lumping up different causes of action They are instituting two suits, or rather two proceedings, by one and the same application. They are trying to make the settlement procedure applicable to proceedings of the Civil Court under section 158.

No doubt a distinction can be drawn between the present case and the case of *Golap Chand Nowlakha* v. *Ashutosh Chatterjee* (I L.R., 21 Cal., 602), inasmuch as in this case, one set of defendants hold both tenancies, while in the case of *Golap Chand Nowlakha* v. *Ashutosh Chatterjee* (I.L R., 21 Cal., 602), there were about twenty tenants in occupation of the different tenancies. The learned Judges, who decided that case, however, did not base their judgment on that fact. They based it on the ground that the Legislature in section 158 contemplated that one tenancy only should be dealt with in one proceeding under that section, whatever might be the literal interpretation of its terms, and I am of the same opinion. I may add that the word "class" in clause (*c*) of the section clearly points to this conclusion. The "class" to which the tenant belongs is to be determined. The Legislature did not contemplate that the "classes" to which he belonged should be determined, as might be necessary if more than one tenancy could be the subject of one application under section 158, for one tenant could, undoubtedly, belong to more than one class of tenants, if he were in occupation of more than one tenancy.

[202] Then, I am of opinion that sections 45 and 647 of the Civil Procedure Code are not applicable to *proceedings* under section 158. Section 143, clause (2) of the Tenancy Act makes the Civil Procedure Code applicable to all *suits*; but not to "miscellaneous proceedings" initiated by an application. From section 144, clauses (1) and (2), it is clear that the Tenancy Act makes a distinction between "suits" and "proceedings" initiated by application. The order on an application under section 158 has, by clause (3) of that section, the force of, and is subject to, the like appeal as a decree; but this does not make it a suit, [see the case of *Upadhya Thakur* v. *Persidh Singh* (I. L R., 23 Cal., 723), in which it has been ruled that proceedings in a case under

section 104 (2) of the Tenancy Act, which are initiated by an application, are not a suit; though the final order on them may have the force of a decree and be subject to appeal|. That being so, the Subordinate Judge was not bound to apply the provisions of sections 45 and 647 of the Civil Procedure Code to the proceedings in this case, and he had a discretion to pass such order as he thought fit to pass in the circumstances. I consider the order he did pass was a very proper one. He required the plaintiffs to elect to which tenancy their application should be regarded as applying, leaving them free to present another application for a determination of the incidents of the other tenancy. As the plaintiffs advisedly refused to make an election, he rejected the application.

This order seems to me to be right, both because, as already pointed out, the plaintiffs' application was not one such as the Legislature, in framing section 158, contemplated should be presented under it, and as a perfectly proper one under the circumstances. It would be manifestly exceedingly inconvenient to a Court to have to determine the incidents of more than one tenancy in one proceeding The lands of each tenancy may consist of different plots. They may be situated in different villages. Each plot may be held at a different rent and at a different rate of rent. The situation, quantity and boundaries of each plot in each village and the rent, and rate of rent, at which each was held, would have to be ascertained and described. Then, if one application is good for more than one tenancy, why should it not be good for twenty? [203] as in the case of *Golap Chand Nowlakha* v. *Ashutosh Chatterjee* (I.L.R., 21 Cal., 602), or for even more. It would in that case be a most complicated matter to determine the names of all the tenants (for there might be joint tenants, as in this case), and the different classes to which they belong in respect of each tenancy. The decree in such a proceeding would be a most portentous document, full of most numerous and complicated details, having no connection with each other. It is, therefore, in my opinion, most desirable for the sake of clearness, simplicity, order and method, that each application under section 158 should have relation to only one tenancy and no more.

It has been said that all confusion could be avoided by the Judge ordering separate trials with regard to each tenancy, though a joint application may have been presented for the determination of the incidents of all of them. But this would be an inconvenient course to pursue. The record of one trial only would be complete. In the course of the other trials reference would constantly have to be made to the application in the first trial, or else a copy would have to be put up with the record of each trial. But the simplest way of all would be to require, as the Subordinate Judge has done, that an application should be presented in each case, and that, as I have observed, would seem to me to be what the Legislature contemplated.

I would, therefore, dismiss this appeal with costs.

In consequence of the difference of opinion between their Lordships, the case was, under section 575 of the Civil Procedure Code, referred to Mr. Justice BANERJEE for his decision. The parties were represented at this hearing by the same pleaders as at the hearing before the Division Court. The arguments appear sufficiently from the judgment delivered by

Banerjee, J.—In this appeal, which arises out of an application under section 158 of the Bengal Tenancy Act, and which has been referred to me under section 575 of the Code of Civil Procedure, owing to a difference of opinion between the Chief Justice and Mr. Justice RAMPINI, who first heard the appeal, the sole question for determination is whether, under section 158 of the Bengal Tenancy Act, the landlord is authorized to include [204] in one application two or more tenancies held by the same tenant, or whether he is bound to make a separate application in respect of each separate tenancy.

The Court below has held that he is bound to make a separate application in respect of each tenancy, and it has, accordingly, dismissed the application of the appellants who had made an application in respect of two tenancies held under them by the respondents.

It is contended, on behalf of the appellants, that section 158 contains no provision, either express or implied, against the making of an application like the one in this case; and that, in the absence of any such provision, their application ought to have been entertained, and any practical difficulty in the determination of the incidents of the two tenancies in question in one proceeding might have been obviated by following the course provided for in section 45 of the Code of Civil Procedure, which applies to proceedings under section 158. On the other hand, it has been argued for the respondents that section 158 only contemplates an application in respect of a single tenancy; that the Code of Civil Procedure has no application to proceedings under that section; and that it was competent to the Court below to disallow an application of this sort, as it has done, on the ground of practical inconvenience.

After giving the matter my best consideration, the conclusion I arrive at is that the contention on behalf of the appellants is well founded.

It is true that section 158 of the Bengal Tenancy Act, in speaking of "the landlord," "the tenant," "the land," "the class" to which the tenant belongs, and "the rent payable" by him, uses words in the singular number only; but by section 2, clause (2) of the General Clauses Act I of 1868, words in the singular include the plural, unless there is something repugnant in the subject or context. Some of these terms, such as "the landlord," "the tenant" and "the land" must obviously, in many cases, have to be taken as including the plural; for there may, very often, be more landlords than one forming a body of joint landlords, more tenants than one forming a body of joint tenants, and more plots of land than one of various descriptions in respect of one and the same tenancy; nor [206] is the class to which the tenant belongs, the particular mentioned in clause (c) of the section, always one and the same in respect of one and the same tenancy, as it is not unusual to have a tenancy created by one and the same document in respect of alluvial or jungle lands, with a fixed rate of rent for one part of the land, and a progressively varying rate for another. Thus some of the words used in this section in the singular number have often to be taken also in the plural. Is there anything repugnant in the subject or context, then, to say that the land of the tenant, the class to which he belongs, and the rent payable by him, may relate to more tenancies than one, all held by the same tenant or tenants under the same landlord? I do not think there is any. If the tenants are different in respect of different tenancies, then, no doubt, the case would not come within the scope of the section, it being a case already provided for by chapter X, section 103 and the following sections; and this is what has been decided in the case of *Golap Chand Nowlakha* v. *Ashutosh Chatterjee* (I. L. R., 21 Cal., 602).

That case, however, is no authority for the contention that a single application by the landlord or joint landlords in respect of two or more tenancies held under him or them by the same tenant or tenants cannot be entertained under section 158. Special stress was laid in the argument on behalf of the respondents upon the language of clause (c) of the section which uses the term "class" to which the tenant belongs in the singular number, as indicating that it is only an application in regard to a single tenancy that the section contemplates; but, as I have shown above, no such inference can arise, seeing that even in regard to a tenancy, created by one and the same document, the tenant may belong to one class in respect of a portion of the land demised, and

to a different class in respect of another part, being a raiyat holding at fixed rates as to a part, and merely an occupancy raiyat as to the rest. It was argued that, if one application in regard to two or more tenancies, though held by the same tenant, was entertained, the proceedings would become complicated, and that the course suggested in the argument on behalf of the appellants, namely, that section 45 of the Code of Civil Procedure might be followed, would be inapplicable, because the Code of [206] Civil Procedure did not apply to proceedings under section 158; and in support of this contention, sub-section 2 of section 143 of the Bengal Tenancy Act was referred to as showing that the Code of Civil Procedure, subject to certain qualifications, applied only to suits, whereas proceedings under section 158 were not suits.

I am of opinion that this argument is not sound. Section 647 of the Civil Procedure Code makes the procedure prescribed in the Code applicable, as far as it can be, to all proceedings in any Court of civil jurisdiction, other than suits and appeals. It is true that that section is subject to the provision of section 4 of the Code which provides that, "save as provided in the second paragraph of section 3," nothing contained in the Code shall affect any law "prescribing a special procedure for suits between landholders and their tenants." But if a proceeding under section 158 of the Tenancy Act is a suit, the Civil Procedure Code applies to it by virtue of section 143, clause (2) of the Tenancy Act. If it is not a suit the saving clause in section 4 of the Code of Civil Procedure does not apply to it, and, therefore, section 647 of the Code applies. In any view, then, the provisions of the Code of Civil Procedure may be applied to the proceedings in question, so far as they can be made applicable, and the inconvenience resulting from the proceedings becoming complicated by the inclusion of more tenancies than one in an application under section 158, may be obviated by following the course prescribed by section 45 of the Code of Civil Procedure.

I should notice here a contention raised, on behalf of the respondents, that section 647 of the Code of Civil Procedure is limited in its application to incidental proceedings arising out of suits and execution of decrees, such as proceedings for setting aside sales and the like. This contention is sufficiently met by the case of *Thakur Pershad* v. *Fakirullah* (I. L. R., 17 All., 106 : L. R., 22 I. A., 44) in which their Lordships of the Privy Council make this observation : "Their Lordships think that the proceedings spoken of in section 647 include original matters in the nature of suits, such as proceedings in probates, guardianships, and so forth, and do not include executions."

For the foregoing reasons I agree in the view taken by the [207] learned Chief Justice in this case, and I think that this appeal ought to be allowed with costs, the order of the Court below set aside, and the case sent back in order that it may be heard and determined on the merits.

S. C. G. *Appeal allowed and case remanded.*

[24 Cal. 207]

The 11th December, 1896.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Karim Chowkidar and another............Defendants

versus

Sundar Bewa and others............Plaintiffs.*

Bengal Tenancy Act, sections 20, clause (3), 79, 82, 85, 160, sub-sections (c) and (e)—Right of Non-Occupancy raiyat —Death of raiyat having right of non-occupancy Heirs—Re-entry by landlord.

The right of a non-occupancy raiyat (who does not hold under any express engagement) in his holding is not heritable.

THE plaintiffs brought this suit to recover possession of certain land as heirs of one Nilu Nasya, who held a *jote* under the second defendant, the zemindar of the village. The plaintiffs asserted that, on the death of Nilu Nasya, the zemindar unlawfully put the first defendant into possession of the land and dispossessed them. The Court of First Instance held that the *jote* in question, being a non-occupancy holding, was not heritable, and dismissed the suit. The Lower Appellate Court reversed this decree. The defendants brought this appeal to the High Court on the ground that the Court below had "erred in holding that the rights of a non-occupancy raiyat are heritable."

Babu *Mukund Nath Roy* for the Appellants.

Babu *Surendra Chunder Sen* for the Respondents.

Babu *Mukund Nath Roy.*—Prior to Act VIII of 1885 non-occupancy holdings were not heritable, and it was even questioned whether a right of occupancy was a transferable tenure,—see *Ajoodhia Persad* v. *Emam Bandee Begum* (B. L. R., Sup Vol., 725: 7 W R., 528), and *Jatee Ram Surmah* v. *Mungloo Surmah* (8 W R., 60). There is nothing in the Act to show that the right of a non-occupancy raiyat is heritable.

[208] Babu *Surendra Chunder Sen* for the respondents.--Section 20, sub-section (3) of Act VIII of 1885 shows that a non-occupancy holding is heritable. The right of a non-occupancy raiyat to compensation for improvements can be claimed by his heir under section 82.

The following **judgments** were delivered by the Court (BANERJEE and RAMPINI, JJ.)

Banerjee, J.—The suit, out of which this appeal arises, was brought by the plaintiffs-respondents to recover possession of some land on the allegation that it constituted the *jote* of one Nilu Nasya; that the plaintiffs as his heirs are entitled to the same, and that the second defendant, their zemindar, has wrongfully dispossessed them and settled the land with defendant No. 1. The defence was a denial of the plaintiffs' right.

The first Court found that Nilu held the land as a non-occupancy raiyat, that he relinquished the holding in his life-time, and that a non-occupancy holding was not heritable; and it accordingly dismissed the suit.

On appeal, the Lower Appellate Court has reversed that decision and given the plaintiffs a decree on the ground that the land was not shewn to have been

* Appeal from Appellate Decree No. 1442 of 1895, against the decree of R. R. Pope, Esq., District Judge of Zillah Dinajpur, dated the 6th of May 1895, reversing the decree of Babu Hari Das Basu, Munsif of Phulbari, dated the 25th of February 1895.

relinquished by Nilu, and that a non-occupancy holding is heritable under the law.

In second appeal the only question raised is, whether the right of a non-occupancy raiyat (who does not hold under any express engagement) in his holding is heritable, and the holding passes to his heirs so as to entitle them to claim it as against the landlord who has re-entered upon the land on his death.

The learned Vakil for the defendants-appellants contends that the question ought to be answered in the negative; that the absence of any provision in the chapter of the Bengal Tenancy Act relating to non-occupancy raiyats similar to section 26, which enacts that the right of occupancy is heritable, clearly shows that it is not the intention of that Act to make non-occupancy holdings heritable; and that under the law as it stood before that enactment, not only were such holdings not heritable, but the heritability of the right of occupancy itself was open to question, as will appear from the cases of *Ajoodhia Persad* v *Emam Bandee* **[209]** *Begum* (B. L. R., Sup. Vol., 725: 7 W. R., 528) and *Jatee Ram Surmah* v. *Mangloo Surmah* (8 W. R., 60). On the other hand, it is argued for the respondents that section 20, sub-section (3) of the Bengal Tenancy Act indicates that a non-occupancy holding is heritable, and that sections 79, 82 and 160, clauses (c) and (e) of the Act, go to support the same view.

After considering the arguments on both sides, we are of opinion that the appellants' contention should prevail. Sub-section (3) of section 20 of the Bengal Tenancy Act only shows that where the heir of a non-occupancy raiyat is allowed to hold on, he may add the period of his own occupation to that of his predecessor to make up the period of twelve years necessary for the acquisition of the right of occupancy; but the provision is expressly said to be limited to the purposes of section 20, and it does not show that he can compel the landlord to give up possession after re-entry on the late tenant's death. And the utmost that can be inferred from the other provisions of the Act relied upon is that some of the rights possessed by a non-occupancy raiyat, such as his right to claim compensation for improvements, or to remain in occupation in certain cases notwithstanding a sale of the superior tenure for rent, may be claimable by his heir. But, on the other hand, the absence of any provision relating to non-occupancy holdings similar to that embodied in section 26 of the Act with reference to the right of occupancy, affords in our opinion the strongest indication that the Legislature did not intend to make non-occupancy holdings heritable Under the law as it stood before the Bengal Tenancy Act was passed, non-occupancy raiyats not holding under any express engagements were treated as tenants at will, or as tenants from year to year. See Act X of 1859, section 25; see also the observations of Mr. Justice FIELD in his Introduction to the Bengal Regulations, p. 40, and those of Mr. Justice TREVOR in *Thakooranee Dossee* v. *Bisheshur Mookerjee*, [3 W. R., 29 (38): B. L. R., Sup. Vol., 202 (220)].

Under the old law, non-occupancy raiyats were the lowest class of raiyats, and if the respondent's contention be correct, it would follow that all raiyati holdings were heritable. But this would be **[210]** somewhat inconsistent with certain provisions of law, such as Regulation VIII of 1819, section 11, clause 3, which speak of hereditary raiyats as a distinct class.

For the foregoing reasons we think this appeal must be decreed, the decree of the Lower Appellate Court reversed, and that of the first Court restored with costs in this Court and the Court below.

Rampini, J.—I concur in the judgment of my learned brother. There is no doubt a very general impression in Bengal that there is now no great

difference between occupancy and non-occupancy rights, and that both are heritable. There would seem to be some justification for the former view, for a non-occupancy raiyat admitted to occupation of land otherwise than under a registered lease can apparently not be ejected except on one of the grounds specified in section 44; so that as long as he does not come within the provisions of that section, he is as secure in the occupation of his land as if he had been an occupancy raiyat. Then, from the provisions of section 20, clause 3, of the Bengal Tenancy Act, it would at first sight appear as if the rights of a non-occupancy raiyat were heritable in the same way as are those of an occupancy raiyat, for its terms apply to all raiyats; but on closer consideration it is clear that the terms of this clause are limited by the words "for the purposes of this section;" so that, after all, the clause only comes to this, that a person whose father or predecessor in interest had an occupancy right becomes on the death of his father or predecessor in interest a settled raiyat, and that an heir to a raiyat, if allowed by the landlord to occupy the land of his predecessor, can add to the period of his occupation that of his predecessor's occupation for the purpose of the acquisition of the status of a settled raiyat. The old law would seem to have gone no further; for the words "the holding of the father or other person from whom a raiyat inherits shall be deemed to be the holding of the raiyat within the meaning of this section," which occur in section 6 of both Act X of 1859 and Bengal Act VIII of 1869, are also limited by the concluding words of the clause, and would seem to mean merely that when the heir of a raiyat is allowed, or in any way manages, to occupy his predecessor's land as a raiyat, the time of his occupation as such shall be added to that of his predecessor, when computing [211] the period of twelve years necessary for the accrual of an occupancy right.

This interpretation of the law, apparently the only one that can be put upon the strict terms of the Bengal Tenancy Act, may in some cases cause hardship. Thus, if a non-occupancy raiyat dies while his crop is on the ground, then, unless the rule of English law as to emblements [see Woodfall's Law of Landlord and Tenant, chapter XX, section 3 (*a*)] applies to Bengal, and I know of no instance of its having been held applicable, the crop will be lost to his heirs; for death determines the tenancy of the raiyat if his interest is not a heritable one, and his heirs cannot enter on the land and reap the crop after the tenancy has been determined. Again, section 79 of the Bengal Tenancy Act actually encourages a non-occupancy raiyat to erect a suitable dwelling house on his land for the occupation of himself and his family,—also to sink wells and effect other improvements on his land even against his landlord's will. If ejected during his life-time he can recover compensation from his landlord (section 82), but the moment he dies, if his rights be not heritable, the benefit of, and the money sunk in, these improvements are lost to his heirs, who would seem to be liable to ejectment from the land and dwelling-house at the pleasure of the landlord.

Then, the law may also work hardly in the case of under-raiyats. The provisions of section 85 are certainly not clear. They provide that a sub-lease shall not be valid against a raiyat's landlord unless registered, and that a sub-lease shall not be admitted to registration if it purports to create a term exceeding nine years. This would seem to imply, though it is nowhere expressly provided, that a sub-lease, if registered and for a term not exceeding nine years, will be valid against the raiyat's landlord, whether he consents to it or not. But if the sub-lease is executed by a non-occupancy raiyat, whose rights are not heritable, it will certainly be rendered void by his death; for a person cannot assign an interest in land exceeding that which he himself possesses, and if his rights are determined by his death, then so must also be the rights

of his sub-lessee, though apparently protected by a lease executed and registered with the sanction of the law.

The non-heritability of non-occupancy raiyats' rights may [212] cause loss to the landlord, as well as to the non-occupancy raiyats' heirs; for it has been held that occupancy rights being heritable the heirs of an occupancy raiyat are liable for the rent of their predecessor's land, whether they occupy it or not [*Peary Mohun Mookerjee* v. *Kumaris Chunder Sirkar* (I. L. R., 19 Cal., 790)]. But if non-occupancy raiyat's rights are not heritable, their heirs who do not enter on occupation cannot be held liable by the landlords for the rent of the lands, and the landlords may consequently lose money.

F. K. D. *Appeal decreed.*

NOTES.

[I. This was finally **overruled** in **(1914) 18 C.W.N., 828** where the Full Bench held that the non-occupancy raiyat's holding was heritable under the Bengal Tenancy Act 1885. Divergent views had been held in (1907) 34 Cal., 516 : 11 C.W.N., 626 : 5 C.L.J., 457 F.B. and doubts had been expressed in (1909) 13 C.W.N., 937 : 10 C.L.J., 608; (1904) 31 Cal., 757 F.B.

II. In (1904) 31 Cal., 757 F.B. . 8 C.W.N., 179, it was held that the heir of an under-raiyat under an annual holding was entitled on the death of the under-raiyat to remain in possession of the land until the end of the then agricultural year for the purpose, if the land has been sub-let, of realising the rent which might accrue during the year; or if not sub-let, for the purpose of tending and gathering in the crops.

III. As regards the scope of s. 231, Indian Contract Act, 1872, see also (1904) 32 Bom., 356 : 6 Bom. L.R., 731.]

[24 Cal. 212]

APPELLATE CIVIL.

The 30th November, 1896.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Kallinath Chakravarti and others............Defendants

versus

Upendra Chunder Chowdhry (Plaintiff) and others............Defendants.*

Landlord and Tenant -Transfer by Tenant without consent of Landlord—Original Tenant remaining in possession as sub-tenant of the transferee—Abandonment of tenure- -Liability to ejectment—Pleading—Parties.

Where the defendants had purchased the rights of the original tenants of certain *jote* lands, without obtaining the consent of the landlord to the transfer of the tenures, and the original tenants had remained in possession as sub-tenants of the transferees, *Held*, that the principle laid down in *Kabil Sardar* v. *Chunder Nath Nag Chowdhry* (I. L. R., 20 Cal., 590) was not applicable, and that the landlord was entitled to a decree for ejectment against the transferees.

THE plaintiff brought this suit as the proprietor of a share of a village (the remaining share of which belonged to defendants Nos. 4 and 5 who did not appear) to eject the first three defendants from certain *jote* lands which had been purchased by them, on the ground that these lands were ordinary raiyati *jotes* and could not, according to the custom prevailing in the district, be transferred, and that the defendants had transferred them without his permission and without entering into any settlement with him. The suit was defended

* Appeal from Appellate Decree No. 1051 of 1895 against the decree of F. H. Harding, Esq., District Judge of Mymensingh, dated the 25th of March 1895, affirming the decree of Babu Radha Kissen Sen, Subordinate Judge of that District, dated the 18th of April 1894.

on the ground among others that the heirs of the raiyats whose *jotes* had been purchased were still in possession and had not surrendered their holdings. It was found by both the [213] lower Courts that the former tenants having abandoned their holdings under the plaintiff and having become tenants of the defendants their *jotes* were not subsisting at time of suit, and that the ruling in the case of *Kabil Sardar* v. *Chunder Nath Nag Chowdhry* (I. L. R., 20 Cal., 590) was not applicable.

Babu *Sreenath Dass* and Dr. *Asutosh Mukerji* for the Appellants.

Dr. *Rashbehari Ghose* and Babu *Grish Chunder Chowdhry* for the Respondent.

Babu *Sreenath Dass.*—The plaintiff as a co-sharer was not entitled to maintain the suit without joining the other co-sharers as co-plaintiffs or establishing satisfactory grounds for not so joining them. The original tenants did not abandon their holdings. They remained in possession, though as sub-tenants of the transferees, and hence the plaintiff was not entitled to succeed—See *Kabil Sardar* v. *Chunder Nath Nag Chowdhry* (I. L. R , 20 Cal., 590), and *Shrishteedhur Biswas* v. *Madan Sirdar* (I. L. R., 9 Cal., 648).

Dr. *Rashbehari Ghose* for the Respondent. —It was found by the Court of first instance that the lands were not transferable by custom. The purchaser is bound to communicate with the zemindar and obtain his consent to the transfer of the tenure. *Bhojuhuree Buniek* v. *Aka Golam Ali* (16 W. R., 97). The original tenants are the sub-tenants of the defendants and pay no rent to the landlord. They must be taken to have surrendered their holdings, and the case of *Kabil Sirdar* v. *Chunder Nath Nag Chowdhry* (I. L. R., 20 Cal., 590) is not applicable.

The **judgment** of the Court (**Banerjee** and **Rampini**, **JJ**.) was as follows:—

This appeal arises out of a suit brought by the plaintiff, respondent, to recover *khas* possession of his share in certain lands on the allegation that the principal defendants, who alleged that they were in possession of the same as purchasers of the *jote* rights of the former tenants thereof, had no right to remain on the land, the alleged *jotes* not being transferable, and that as the plaintiff's co-sharers have not joined with them in the suit, they are made defendants.

[214] The co-sharer defendants did not enter appearance, but the principal defendants defended the action on various allegations of which it is necessary now to notice only one, namely, that the plaintiff was not entitled to recover *khas* possession, as the original tenants were still in possession. This objection led to an issue being raised in the first Court, which was the seventh issue in the case. Both the Courts below have found for the plaintiff upon that issue, and they have accordingly given him a decree for so much of the land as was found to be in the possession of the principal defendants.

In second appeal two objections have been raised against the judgment of the lower Appellate Court, *first*, that it was wrong in giving the plaintiff any decree at all when he was only a fractional co-sharer in the zemindari and the other co-sharers did not join as plaintiffs, and, *second*, that upon the facts found, the lower Appellate Court was wrong in giving the plaintiff any decree for *khas* possession when it ought to have held that the original tenants, being still in possession of the holdings though as sub-tenants under the defendants, a suit for *khas* possession was not maintainable.

The first objection was never raised in either of the Courts below, and we do not think it right and proper to allow it to be raised at this last stage of the case. It is an objection which, if raised in time, might have been met. Moreover, upon the facts found by the lower Appellate Court, the defendants are mere trespassers upon the land, and as against them there could be no objection to a fractional co-sharer in the zemindari maintaining a suit for *khas* possession.

In support of the second contention, two cases have been relied upon. One of these, the case of *Kabil Sardar* v *Chunder Nath Nag Chowdhry* (I. L. R., 20 Cal., 590), has been considered by the Courts below, and they have both found that the facts of this case are very different from those of the case cited. In our opinion the Courts below are quite right in holding that that case has no application to the present. There a share of the holding was sold by the original tenants to certain members of their family and, after the sale, the entire holding remained jointly in the possession of the [215] original tenants and the transferees, and the rent of the holding continued to be paid in its entirety in the names of the original tenants and the transferees In that state of things, the lower Appellate Court having given the plaintiff, the landlord, a decree for *khas* possession, all the defendants in the suit, that is, the original tenants and the transferees, appealed to this Court, and this Court reversed the decree appealed against and dismissed the suit of the plaintiff, holding that, as there had been no abandonment of the holding by the original tenants, the landlord had acquired no right to re-enter. In the present case on the contrary the facts found are, that the rights of the original tenants have been entirely transferred to other persons, that some of these transferees are in possession of portions of the tenures upon payment of rent to the landlord or his *ijaradars*, that in regard to the remaining lands of the tenures, though the original tenants may be still in possession, they are in possession as sub-tenants of the transferees and have paid no rent to the landlord for the last ten or eleven years The original tenants were not made parties to the suit nor was any objection taken to the suit proceeding in their absence, and the present appeal is only on behalf of the purchasers. Upon a review of these facts, the lower Appellate Court has distinctly come to the conclusion that the former owners of the tenures which the defendants have purchased have abandoned their holdings under the plaintiff. That being so, we think that the facts of this case are so essentially different from those of the case of *Kabil Sardar* v. *Chunder Nath Nag Chowdhry* (I. L. R., 20 Cal., 590) that the principle of that decision can have no application to the present case.

The other case relied upon is that of *Srishteedhur Biswas* v. *Madan Sirdar* (I. L. R, 9 Cal., 618). There also the whole of the tenure after the transfer continued in the possession of the original tenants under a sub-lease from the transferees, and the party who before the lower Appellate Court contested the correctness of the decree for ejectment given by the first Court, was one of the original tenants, the lower Appellate Court held that as there had not been any abandonment of the holding of the original tenants, the suit for ejectment was not maintainable; and that decision was affirmed on second appeal by the plaintiff to this Court That [216] considerable importance was attached to the fact of the original tenant having been the party who contested the decree for ejectment, would appear from the observations contained in the last but one paragraph of the judgment of Mr. Justice WILSON, in which he distinguished that case from the case of *Dwarkanath Misser* v. *Hurrish Chunder* (I. L. R., 4 Cal, 925).

We are of opinion, therefore, that the two cases relied upon are both distinguishable from the one now before us; and that we must here follow the general rule laid down by the Full Bench in the case of *Narendra Narain Roy* v *Ishan Chunder Sen* (13 B. L. R., 274 : 22 W. R, 22) and hold upon the facts found by the lower Appellate Court that the landlord was entitled to the decree for ejectment that has been made in his favour. The appeal, therefore, fails and must be dismissed with costs.

F. K. D. ——— *Appeal dismissed.*

NOTES.

[In *Dayamayi* v. *Ananda Mohan Roy Chowdhury* (1914) 42 Cal , 172 a Full Bench settled the law relating to transfers for value of occupancy holdings apart from *Custom or local usage*. See also (1897) 2 C.W.N., 63; (1904) 9 C W.N., 379; (1905) 2 C.L.J., 369; (1906) 33 Cal., 531; (1907) 34 Cal., 689 · 11 C.W.N., 811 : 7 C.L.J., 78; (1912) 17 I.C., 654 (Cal.)]

[24 Cal. 216]

ORIGINAL CIVIL.

The 8th June, 1896

PRESENT

MR JUSTICE AMEER ALI.

Nicholas .

versus

Asphar and another *

English law—How far English law is applicable in Calcutta—Law relating to personalty—Term of years—Armenians—Construction of power—Deed to invest—Res judicata—*Consent decree.*

The English law relating to personalty applies to personalty in India held by British subjects and others to whom the English law is applicable A term of years is therefore personalty in India as it is in England

Armenians in India are subject to the English law

A power contained in a trust deed to invest Rs 20,000 " in or upon any real or Government securities, or in or upon any public funds at interest " is of an optional character and not imperative, and does not alter the character of the original property so as to convert it from personalty into realty.

In 1839, in contemplation of a marriage between *M* and *G*, a deed of settlement was executed which provided that, during the life-time of *M's* father, half of the rents and profits of two houses in Calcutta, held for a term of years, should be taken by him and half by G; that, after the death of *M's* father, the rents and profits should go to *G* and *M*, and upon the death of either of them to the survivor, and after the death of the survivor to the use [217] absolutely of the issue of the marriage if any The father of *M* died in 1841, and *G* on the 23rd of November in the same year *M*, on 21st December 1841, shortly after the death of her husband, married *A S*, and on the 8th of April 1842 gave birth to a child who was named *E* and afterwards married to *T* *M* died in 1850 By *A S* she had two children, the plaintiff and a son *G S* On the 7th November 1859 *E* and her husband filed a bill of complaint in the Supreme Court, Calcutta, against the trustees of the settlement of 1839, and against *AS* and *GS*, who was then an infant, in which she claimed to be entitled to the properties absolutely. On the 21st of June 1860 a decree was made dismissing the suit against *GS*, and declaring that the properties covered by the deed of settlement were personalty. In the present suit it was objected that the decree of the Supreme Court could not bind *GS*, as he was dismissed from the suit and because the decree was a decree by consent. *Held*, that the decree was binding upon *GS* and persons claiming to derive their title from him. A consent decree is as binding on the parties to the proceedings in which it is made as a decree made after a contentious trial

In re South American and Mexican Co. [L. R., (1895), 1 Ch., 37 (45)], *The Bellcairn*

* Original Civil Suit No. 775 of 1894.

(L. R., 10 P. D., 161), *Nilakandhen* v. *Padmanabha* [I. L. R., 18 Mad., 1 (7)] and *Gajapathi Radhika* v. *Gajapathi Nilamani* (13 Moo. I. A, 497 : 6 B. L. R, 202) referred to.

THE facts of this case are fully stated in the judgment.

Mr. *R. N. Mitter* and Mr. *Avetoom* for the Plaintiff.

Mr. *Henderson* and Mr. *Zorab* for the First Defendant.

Mr. *Dunne* and Mr. *J. G. Woodroffe* for the Second Defendant.

The following cases were cited in argument: —

Doe d. Savage v. *Bancharam Tagore* [Morton (Montriou), 105], *Gasper* v. *Paddalochun Dass* [Morton (Montriou), 110], *Joseph* v. *Ronald* [Morton (Montriou), 111], *Jebb* v. *Lefevre* [Morton (Montriou), 152], *Freeman* v. *Fairlie* (1 Moore I. A., 305), *Mayor of Lyons* v. *East India Company* (1 Moore I A., 175), *Sarkies* v. *Prosonomoyee Dossee* (I.L.R., 6 Cal., 794), *Lopez* v. *Lopez* (I. L. R, 12 Cal., 706), *De Beauvoir* v. *De Beauvoir* (3 H. L. C., 524), *Pitman* v. *Pitman* [L R. (1892), 1 Ch. 279], *In re South American and Mexican Company* [L. R. (1895), 1 Ch., 37 (45).] *The Bellcairn* (L. R., 10 P. D., 161), *Nilakandhen* v. *Padmanabha* [I. L. R., 18 Mad, 1 (7)], *Gajapathi Radhika* v. *Gajapathi Nilamani* (13 Moo. I. A., 497 : 6 B. L. R., 202).

[218] Ameer Ali, J. —The plaintiff seeks in this suit to recover possession of two houses situated in Calcutta, being No. 97, Canning Street, and No. 2, Portuguese Church Street. Originally she had also included in her claim No. 96, Canning Street, but when the case came on for trial that portion of the claim was abandoned.

The circumstances which have given rise to this suit are shortly these.

On the 9th of February 1816 a deed of settlement in contemplation of a marriage was executed by a gentleman named Moradkhan, belonging to the Armenian community. The lady whom he was going to marry, together with the trustees of the settlement, were parties to the deed.

By that deed Moradkhan assigned a sum of Rs. 25,000, which he had lent out to some people, to the aforesaid trustees, named Manuk and Gasper, upon certain trusts, to which I shall refer more particularly later on, with a power to them to invest the money when realised in "real or Government securities." In pursuance of or acting under that power the trustees on the 7th of May 1817 acquired the two houses which form the subject-matter of the present suit. Varvar Kalloos, the lady who had married Moradkhan, died on the 9th of August 1837, leaving her surviving her husband and a daughter named Mariam. On the 5th of January 1839 there was a deed executed between Gasper Vardon Gasper, who was going to marry Mariam Moradkhan, of the first part, Mariam Moradkhan, of the second part, her father Moradkhan of the third part, and the surviving trustee of the old settlement of 1816 of the fourth part, and two persons named Peter Jacob Paul and Carapiet Jacob of the fifth part, by which the properties in question were given to the trustees under the new deed upon certain trusts which require particular attention.

It was provided by this new deed that, during the life-time of Moradkhan, half of the rents and profits of these two houses should be taken by him and half by Gasper, the intended husband of Mariam; that after the death of Moradkhan the rents and profits should go to Gasper and Mariam, and upon the death of either of them to the survivor; and after the death of the survivor to the use absolutely of the issue of marriage, if any.

The marriage between Gasper and Mariam took place on the [219] 10th of January 1839, and on the 8th of January 1839 two persons, Shircore and Bristow Judge, were appointed trustees of this new settlement.

Moradkhan died in 1841; the date does not appear, nor is it of any importance. Gasper, the husband of Mariam, died on the 23rd of November 1841, and Mariam, who, shortly after the death of her husband Gasper, married a man named Aratoon Sarkies, gave birth on the 8th of April 1842 to a female child, who was named Elizabeth.

It should be stated that Mariam Gasper's marriage with Sarkies took place on the 21st of December 1841. Mariam died in 1850. By Aratoon Sarkies she had children, one of whom is the plaintiff Varvar Nicholas, and the other was a son Gregory Sarkies, who died on the 18th of March 1892.

Elizabeth appears to have been brought up in the house of Sarkies, and to have lived there till her marriage with Thorose. After the marriage of Elizabeth with Thorose disputes seem to have arisen between Sarkies on the one side and Elizabeth and her husband on the other.

There is very little question in the case that Sarkies had practically the possession of these houses at that time, and had been appropriating to himself the rents and profits thereof. On the 7th of November 1859 a bill of complaint was filed in the Supreme Court by Elizabeth Thorose, in conjunction with her husband, against the trustees of the settlement of the 5th of January 1839, and against Aratoon Sarkies and Gregory Sarkies who was then an infant, for the purpose of obtaining (*inter alia*) certain declarations and accounts against Aratoon Sarkies. In that bill of complaint Elizabeth alleged that Aratoon Sarkies was disputing her legitimacy as also the validity of the deed of the 5th of January 1839. She claimed in that suit to be the legitimate child of the Gaspers, and she alleged that the deed of the 5th of January 1839 was valid, and that she was, under that deed, entitled to the properties absolutely.

On the 21st of June 1860 a decree was made dismissing the suit against Gregory Sarkies declaring that the properties covered by the deed of the 5th of January 1839 were personal property, and directing that those properties should be sold; that **[220]** half of the proceeds should go to the plaintiff Elizabeth Thorose; and that the balance, after deducting the costs of the plaintiff and of the infant against whom the suit was dismissed and whose costs were directed in the first instance to be paid by the plaintiff, should be paid to Aratoon Sarkies. In pursuance of that decree the trustees, in conjunction with Thorose, the husband of Elizabeth, and Aratoon Sarkies, assigned these houses to one Hadjee Jackariah Mahomed. The assignment is dated the 29th of September 1860. On the 12th of July 1870 Hadjee Jackariah Mahomed conveyed No. 29, Canning Street, to Asphar, one of the defendants in this suit, and in June 1893, after the death of Aratoon Sarkies, who died on the 5th of November 1891, the second defendant acquired No. 2, Portuguese Church Street, from Ayesha Bibee who had purchased it from Jackariah.

The plaintiff's case is that Elizabeth was illegitimate, and that the premises in suit are realty; that upon the death of Mariam the property came to her son Gregory Sarkies, subject to a tenancy for life by the courtesy of England in favour of her husband Aratoon Sarkies. Her case, as developed in the address of the learned Counsel, which, having regard to section 147 of the Civil Procedure Code, I took into consideration as supplementing the case made in the plaint, amounted to this: that, inasmuch as Aratoon Sarkies was entitled to a tenancy for life by courtesy in these properties, there was no limitation as against Gregory Sarkies until the death of Aratoon Sarkies in 1891. Further, that the decree of the Supreme Court cannot bind Gregory Sarkies, inasmuch as he was dismissed from the suit; and, secondly, because,

apparently, it was a decree by consent. Upon these contentions very important questions have arisen and been discussed.

I may, however, observe at the outset that, so far as the statements in the plaint are concerned, they disclosed, as the defendants contended, no cause of action; but; as I have already said, I think I was justified under section 147 in allowing the statements in the plaint to be supplemented by the statements made in Court by the Counsel for the plaintiff. It was upon that basis that the issues were framed.

As regards the contention that the properties were vested in fee simple in Gregory Sarkies on the death of his mother, but [221] that he had no immediate right to possession in his father's lifetime, as the latter had an estate by courtesy, that question is of importance only in case it is established that Elizabeth Thorose was illegitimate; for if Elizabeth was the legitimate child of Gasper, the question whether this property was realty or otherwise is, it seems to me, wholly immaterial.

As regards the deed of 1839 it is not suggested in the plaint, nor was it argued at the bar, that it was invalid, and I take it that it is accepted as a valid deed; and if treated as a valid deed, unless it can be established that Elizabeth was illegitimate, there is no question that, on the death of Mariam, she, Elizabeth, became absolutely entitled under that deed to the premises in question.

So far as the positive evidence relating to the illegitimacy of Elizabeth Thorose is concerned, I hold that it is wholly unworthy of credit. The only person who has attempted to speak on the subject is the plaintiff, and I regret to observe that her statements gave me the impression that she was giving expression to her imaginings rather than to facts. She says that when she was very young, about 8, 9 or 10 years old, Elizabeth and she and her brother used to quarrel. On these occasions Aratoon Sarkies used to tell them not to quarrel, because they were born of the same father and mother; but when the children of Sarkies, by his other wife, quarrelled, he used to tell them not to do so, because they were children by another mother. Surely, the plaintiff did not expect any sensible person to accept her statements as founded on fact. I certainly am not inclined to do so. She states further that, after Elizabeth had filed her suit in the Supreme Court, Aratoon Sarkies, whose character and conduct have been commented upon in no favourable terms by the plaintiff's own Counsel, often told her that her mother, who was dead, had disgraced herself by living with him before her former husband's death, and that Elizabeth was the fruit of that adulterous connection. Even assuming all that Mr. Avetoom said about Aratoon Sarkies to be true, I am not prepared to believe that he would tell his young daughter, who could have been only 14 or 15 years of age at the time, about the shame of her mother.

There is absolutely no other evidence on this point, or any data whatsoever, beyond certain suggestions based on the fact [222] that Elizabeth bore the name of Sarkies before she married. To my mind it is perfectly natural that this child, who had lost her father before she was born, should bear the name of her mother's husband, in whose house she was being brought up. The question which I have really to consider is whether, having regard to the fact that there was a valid subsisting marriage between Gasper and Mariam, and conception having taken place during the subsistence of that marriage, there is anything to rebut the presumption of legitimacy, assuming even that everything Mrs. Nicholas has said be true. There is no evidence of want of access,

and section 112* of the Evidence Act, in the absence of such evidence, regards the presumption of legitimacy arising from conception during a valid subsisting marriage as conclusive. Elizabeth died about 30 years ago. The purchasers, who are the defendants, are, of course, not in a position to adduce evidence to establish the relations between Gasper and his wife; but the onus was on the plaintiff, and it seems to me she has failed to discharge it. In 1859 Aratoon Sarkies attempted to question the legitimacy of Elizabeth, but, as I shall show later on, he wholly abandoned his position, and the case proceeded upon the accepted status of Elizabeth as the legitimate child of Gasper and his wife Mariam. It is extremely improbable that, had Aratoon Sarkies been able to adduce any evidence to question the legitimacy of Elizabeth Thorose, he would have refrained from so doing.

I, therefore, find as a fact on the evidence in this case and the presumption of law under section 112 of the Evidence Act, that Elizabeth Thorose was the legitimate child of Gasper and Mariam. That being so, whether the property be realty or personalty, it must, under the deed of 1839, come to her; the fact that in 1860 a decree was made by which the properties were directed to be sold, half of the proceeds going to her and half to Sarkies, does not make any difference in the matter, or give any right to the plaintiff. She claims through Gregory Sarkies, and if he had no title, this suit must fail.

But, as other questions have been raised, it is necessary that they should be considered.

It was contended that the houses in question were realty or partook of the nature of realty and descended as freehold; and [223] that Mariam, on the death of her husband, took an absolute estate which, upon her death, descended to her son Gregory, and that upon his death without issue it came to the plaintiff and the widow of Gregory. This proceeds on the assumption that Elizabeth was illegitimate. Learned Counsel for the plaintiff admitted that, apart from the question of legitimacy, if the property was found to be personalty, he would have no case.

In order to consider whether or not the property is realty, it is necessary to go back in the history of the two houses to a time when they were possessed by one D'Costa. In 1783 D'Costa became indebted in some way or other to the Wardens of the Portuguese Church in Calcutta. He was the owner of, amongst other properties, those two houses, and by an indenture of mortgage, dated the 16th of June 1783, made between D'Costa of the one part, and D'Conto and Rodrigues of the other part, D'Costa purported to create a mortgage for securing the repayment of the sums of money which were found due by him. The contention of the learned Counsel for the plaintiff is that what was mortgaged was the freehold estate, and that the term of 1,000 years set out in it referred to the redeemable period.

I cannot agree in that view. I have studied the document with some care, and I find that what was mortgaged was a term of years and nothing more. The document in question, after reciting the circumstances under which D'Costa had become indebted, and other facts, and setting out the premises, "grants bargains and sells the premises," which are described, "to Mathew Antonio D'Conto and Bonifacio Rodrigues to have and to hold the

* [Sec. 112:—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.]

Birth during marriage, conclusive proof of legitimacy.

same from the day before the date of these presents for and during and unto the full end and term of 1,000 years from thence next ensuing and fully to be completed and ended, yielding and paying therefor yearly during the said term one peppercorn if demanded."

This is followed by a provision as to the payment of interest on certain dates, a proviso as to cessor and a covenant for quiet enjoyment, and by the words "to hold the premises above granted, etc., for and during all the rest, residue and remainder of the said term of 1,000 years which shall be then to come and unexpired, etc.;" and lastly, there is the covenant for further assurance.

There is nothing to show that anything more was intended to [224] be mortgaged than the term of 1,000 years carved out of the freehold estate.

In 1789 default having been made in the payment of interest the mortgagees brought a suit for foreclosure or sale. The decree was for sale and also for foreclosure "of the said several mortgaged premises." There was no sale under that decree. The direction for foreclosure must therefore have come into effect with all its incidental results. The mortgaged premises in suit are nowhere referred to as freehold.

In 1806 the trustees of the Protuguese Church conveyed the houses in suit to one D'Abro, and here again it is perfectly clear that what was assigned was the residue of the term which had been carved out of the freehold by D'Costa. The witnessing part runs as follows: "That for and in consideration of the said sum of 9,450 sicca rupees to the said Joseph Barretto Lius, Barretto P. D'Cruz and John D'Abro in hand well and truly paid by the said John Lewis D'Abro at or before the sealing and delivery of these presents in full for the absolute purchase *of all the estate right, title, interest, term of years* and equity of redemption of them, etc." And the Habendum runs thus: "To have and to hold the said premises unto the said So-and-so *for and during all the rest, residue and remainder of the said term of 1,000 years* in and by the said indenture of demise granted."

Nor is there anything in the covenant to show that what was conveyed was the fee. It runs thus: "And that the said hereby assigned term of 1,000 years so granted of and during the said premises as aforesaid for so much thereof as is therein respectively to come and unexpired is a good valid and subsisting term in the law and not forfeited, surrendered or made void or voidable."

The covenant for further assurance is to the same effect.

On the 7th of May 1817 the trustees of the marriage settlement of Moradkhan and Varvar Kalloos acquired these two houses, and there again there is no vagueness in the interest which was assigned to or taken by the trustees. The deed of assignment first of all points out what was being assigned, and it goes on to say: "And all the estate, right, title, interest, term and terms for years now to come and unexpired, trust-property, possession, claim and demand whatsoever, [225] into out of or respecting the said premises hereinbefore mentioned to be hereby assigned and every part and parcel thereof *for the now residue of the said terms of 1,000 years.*" And, again, in the Habendum: "To have and to hold (the said premises) for and during all the residue and remainder of the said term of one thousand years in or by the said hereinbefore recited indenture of demise granted and demised and hereby assigned." And the covenants run in the same way. So far there is no vagueness or doubt as to the interest which was taken by the several persons who came in under the indenture of mortgage of 1783.

Learned Counsel for the plaintiff referred to particular terms used, especially in the later documents, to show that those expressions could only have been used in relation to real property. To my mind it is perfectly clear that, if the original interest was of a limited character, no words subsequently used, inadvertently or otherwise, could have the effect of enlarging such interest. No authority has been cited for such a proposition, and in fact there is none.

It is further contended that, after the year 1789, the term was kept alive for the benefit of the purchasers. I am afraid this contention proceeds upon some misapprehension. A term of years may be kept alive to attend on the inheritance for certain purposes, viz., to protect the purchaser of a freehold, subject to a term against any incumbrance that might have been created by the previous owner, and of which the purchaser is not aware. Of course, if the purchaser is aware of such incumbrance or charge he cannot have the benefit of the term, even if he chooses to keep it alive. But in order that he may have something to fall back upon, in case it is found that the inheritance is charged with an incumbrance which would practically reduce his interest to nothing, it was usual to take an assignment of the term in the names of trustees for the benefit of the purchaser and his heirs. In that way the term was protected from being merged in the freehold. I do not see how a term attending on the inheritance has any bearing on the present matter.

Next it is contended that, assuming that the mortgaged premises did not constitute a freehold estate of inheritance, and although under the English law a term of years would be **[226]** personalty, yet the English law should be applied only *sub modo* and not in its entirety. It is difficult to follow exactly the argument put forward, but I suppose the meaning is, though it was not fully expressed, that all lands and all interest in land, limited or otherwise, must be taken as realty, and must be subject to the laws of descent applicable to realty. This view seems to me to be opposed to the whole course of decisions in this Court or the late Supreme Court.

There were, so far as one can judge from the reported cases, two conflicting views propounded from the time the Charter of Justice was promulgated in 1774. On one side it was contended that everything was personalty in this country, and that British subjects did not hold any realty governed by the laws applicable to real property in England. On the other, it was urged that the whole real property law of England was introduced bodily into Calcutta. These two divergent views were discussed in a number of cases to which I shall briefly refer. In the case of *Doe d. Savage* v. *Bancharam Tagore* [Morton (Montriou), 105] (1785), the question arose as to whether lands in the possession of the personal representatives of the deceased were liable for his debts. The learned Judges there held that "the common law of England is generally introduced by Charter; but two provisions in the Charter are a material alteration of the common law as to land. The effect is to render land in Calcutta real property *sub modo* only; for the personal representative takes the land as a trustee, to pay debts in the first instance, and, secondly, for the heir."

In another case, which was decided in the year 1815 [*Gasper* v. *Paddolochun Doss* (Morton (Montriou), 110)], the *Advocate-General* contended that real property in Calcutta stood exactly on the same footing as personalty, and that, so far as the Armenians were concerned, this was especially so, and lands held by them were to be considered as personalty. The learned Judges overruled the contention, and held that lands, undoubtedly, were realty which were held in fee simple, but that they were subject to certain modifications, that is, they were liable to be taken in execution in the hands of the executor or personal representatives.

In *Joseph* v. *Ronald* [Morton (Montriou), 111] (1818) the question, whether there was [227] any real property in Calcutta, or whether everything, lands included, was to be regarded as personalty, was discussed at great length. A majority of the Judges held that the law relating to real property was applicable to lands held in absolute ownership in Calcutta, subject to the modifications contained in the Charter. MACNAGHTEN, J., held that there was no such thing as realty; that all was personalty.

That point was again discussed in 1826 in *Jebb* v. *Lefevre* [Morton (Montriou), 152] and Chief Justice GREY, dealing with the question which was attempted to be raised then, said: "It has been contended that in Calcutta and Bengal there is no distinction between land and goods, in respect of the succession to them; and inasmuch as it is admitted that goods and chattels are distributable according to the Statute of Distributions, this is an assertion that the British law in Bengal does not acknowledge any estate of inheritance, and that the term 'heir' has here no meaning." He then discussed the law on the point and traced the enactments to the Charter of 1774, and came to the conclusion that the English law, as to real property, was applicable in its entirety to lands in Calcutta. FRANKS and BULLER, JJ., held that no doubt an estate in inheritance could be held in lands, but subject to the modifications contained in the Charter.

So far as the Courts in this country were concerned, there the matter stood.

Then came *Freeman* v. *Fairlie* (1 Moo. I. A., 305) decided by the Judicial Committee. The divergent propositions, to which I have referred, are stated by the Master whose report contains a lucid exposition of the views heretofore held by the Judges in this country. At page 307 he gives exactly the contentions of the two sides who were seeking, one to reduce lands held by a British subject to chattels real, and the other to make the English law relating to realty applicable in its entirety to such property. At page 308 he gives the views of the Chief Justice and BULLER, J., on the one side, and MACNAGHTEN, J., on the other, and at pages 323, 324, 325 and 326 he states his own view on the subject: "It is true, as remarked by Sir ANTHONY BULLER, that if a new country is discovered and settled by British subjects, they [228] carry with them the English law, but with this modification unnoticed by the learned Judge, that is, so far only as that law is applicable to their local circumstances." And, referring to the Charter of 1774, he says: "It seems highly probable that the same general adherence to English law, and the same partial adoption of the existing laws and customs of the country, were applied to immoveable property when acquired by British subjects." Then he gives further reasons for the view why the British law should have been introduced subject to certain modifications, having reference to local circumstances. The report came before Lord LYNDHURST, and his Lordship, in discussing the subject, said as follows: "The next question is, what is the law, as far as British subjects are concerned, now existing in that settlement? Undoubtedly, at present it is the law of England." Then he gave his reasons for the opinion just expressed to which it is unnecessary to refer. But in page 344 there is a paragraph which is of importance: "Further than this, if we refer to the Charter of justice in the year 1774, granted by the Crown, we find in the language of it a distinction, expressly drawn and in terms, between personal and real property. It has, I think, been said, by one of the learned Judges to whom I have referred, or it has been glanced at that that may be satisfied by considering this property as a chattel real; but looking further into the Charter, it will be found that this explanation will not avail, because the Courts have jurisdiction expressly, and in terms, in all actions and pleas, real, personal and mixed; a recognition, therefore,

by the Crown (the highest authority), that real property exists in that country, according to the meaning of that term as used in the law of England."

The last case on the point decided in the Privy Council is that of the *Mayor of Lyons* v. *East India Company* (1 Moore I. A., 175). There it was taken for granted that, so far as British subjects were concerned, the English law was the law under which they held property in India. The only question was whether it had been so modified as to make it conformable to local exigencies and the circumstances of the country. Lord BROUGHAM, after describing the imperceptible manner in which [229] the British had acquired power in this country, and how from being subjects of the Moguls they had assumed independent authority, says as follows: "Can it then be contended that the general introduction of the English law draws after or with it that branch which relates to aliens." After pointing out various circumstances, which rendered it impossible to hold that the English law was introduced into India with its disqualification in respect of aliens, he expressed himself thus: "Upon the whole, their Lordships are of opinion that the law incapacitating aliens from holding real property to their own use, and transmitting it by descent or devise, has never been introduced into Calcutta"

Between 1836 and 1881 there was no case on the point in this Court.

But in *Sarkies* v. *Prosonomoyee Dossee* (I. L. R., 6 Cal., 794) the same question, viz., whether lands and houses held in Calcutta were or were not personalty, was again attempted to be raised. The Chief Justice, who delivered the judgment of the Full Court, put that aside as an argument which had been answered long ago, but dealing with the point whether the real property law was subject to any modification, he expressed certain views, which are to be found on page 804, and which have an important bearing on Mr. MITTER'S contention: "The learned Judge in the Court below has alluded to the judgment of the Privy Council in the case of the *Mayor of Lyons* v. *East India Company* (1 Moo. I. A., 175) as affording an authority, that the English law of inheritance was not introduced here in its entirety, but only so much of it as was applicable to the state of things in India. But that case, as I read it, does not mean to decide that the Courts of this country are justified in adopting just so much of the law of inheritance or of dower, or of any other law, as they consider equitable, and rejecting the rest. It only points out that there are certain portions of the English Statute law, which, from their very nature, were only passed for reasons connected with England, and which would not be applicable to India or any other colony of the British Crown, as, for instance, the Mortmain Acts, the law of aliens, and the like."

The question, as to the applicability of the English law in this [230] country, came up again, though on a different subject, in *Lopez* v. *Lopez* [I.L.R., 12 Cal., 706 (711)]. There CUNNINGHAM, J., said as follows: "The question of the extent to which the law of England was carried by the English into India has been frequently considered by high authority, as, for instance, *Freeman* v. *Fairlie* (1 Moo. I. A., 305). In the *Advocate-General of Bengal* v. *Surnomoyee Dossee* (9 Moo. I. A., 387) it was observed by PEACOCK, C.J., that in construing the Charter of George I., there can be no doubt that it was intended that the English law should be administered as nearly as the circumstances of the place or the inhabitants would admit."

I have referred to these cases in order to show that there was no question at any time that what was regarded as personalty in English law was to be treated as realty in this country. The consistent endeavour was to reduce realty into personalty, and the course of decisions has been to apply the real property law of England to lands held by British subjects in Bengal to the

same extent, and no more, but subject to certain modifications the nature of which are indicated by Lord BROUGHAM and Chief Justice GARTH. And in the case of *Savage* v. *Bancharam Tagore* [1 Morton (Montriou), 105]. Mr. Justice CHAMBERS pointed out a further modification, viz., that lands in the hands of executors were liable to be taken in execution. That was the "*sub modo*" referred to by him; and local circumstances and local exigencies and the policy of the country explain whatever other modifications have been introduced into the English law applicable to real property. There is no authority for saying that an interest of the character in question in this case, that is a term of years, has ever been regarded as otherwise than personalty.

The learned Counsel for the plaintiff contended that the English law relating to personalty should be applied *sub modo*. He has not referred to any principle on which the suggested modification should be based As Chief Justice GARTH pointed out, it is impossible for a Court to regulate the applicability of any law on the basis of any particular case; the application of the law must proceed on principle; I hold, therefore, that the English law relating to personalty applies to personalty **[231]** in this country held by British subjects, and others to whom the English law is applicable.

It is not necessary to refer to any modifications introduced by the Indian Succession Act, as they do not affect the question raised in the present case.

There is no question that Armenians, although Asiatics, are subject to the English law, and the reason for that is perfectly clear; the law of the country was retained for and guaranteed to the Hindus and Mahomedans, but for all others the English law was made applicable. In *Gaspe* v. *Paddolochun Doss*. [Morton (Montriou), 110] the law applicable to Armenians was taken to be the English law; so also in *Joseph* v. *Ronald* [Morton (Montriou), 111]. I need not refer to the other cases mentioned at the bar in which that was laid down. In *Sarkies* v. *Prosonomoyce Dossee* (I. L. R., 6 Cal., 791) the party claiming dower was an Armenian. I hold therefore that there is no authority in support of the proposition that this property, though personalty under the English law, was to be treated as realty for the purposes of descent in this particular case.

Then it was argued that even if personalty, it became realty by reason of the power in the trust deed of 1816. It becomes necessary, therefore, to refer to that deed.

In that document Moradkhan, after setting out the circumstances under which he makes the settlement, grants and assigns to the trustees, their executors, administrators or assigns, Rs. 25,000 secured by the bond of some people who were apparently in his debt, upon certain trusts which he sets out. First, to get in the money, and on receipt thereof to lay out and invest Rs. 20,000, part of the Rs. 25,000, "in or upon any *real* or *Government* securities, or in or upon any public funds at interest in their or either of their own name or names," and after the purchase of the said real or Government securities "to pay the balance to him, Moradkhan." Then there are other trusts to pay the interest, &c., arising therefrom to him for life, and after his death to his wife, and on her death to apply it for the maintenance and education of the children of the said marriage; and, finally, to pay the *corpus* to them absolutely on their attaining majority.

[232] It will be observed that the direction to invest is "upon *real* or *Government* securities." There is no direction to invest in real property. But, assuming that the words "real securities" mean real property, the power is of an optional character, and certainly not imperative; and it has been decided that, unless the direction is of an imperative character, it does not alter the character of the original property. The text on this point in Jarman is perfectly

clear, and the cases point to the same conclusion, and no authority has been adduced to the contrary. On page 586 of Jarman, Vol. I, will be found the following passage: "In order to work a constructive conversion, an actual sale or purchase either immediately or in future, and either absolutely or contingently at a specified time, must be directed expressly or impliedly. A direction that real estate shall not be sold, but shall be considered as personal, or *vice versâ*, is insufficient, since the law does not allow property to be retained in one shape, and yet to devolve as if it were in another. But when a sale is not expressly excluded, such a direction would generally amount to a trust for sale."

In *De Beauvoir* v. *De Beauvoir* [3 H. L. C., 524 (547)] the Lord Chancellor, dealing with a contention similar to that in this case, says as follows: "At the end of this will there is a power which has properly been commented on at your Lordship's Bar. It is the power to the trustees, 'with the consent of the person who may be in possession and entitled to the profit thereof,' to invest the residue and surplus of the personal estate in the purchase of freeholds in England, and to convey the same to such uses, &c., as has been declared concerning his manors devised by his will as should be 'then existing, undetermined or capable of taking effect, and for no other use or purpose whatsoever. Now, on the one side, it has been contended that this is an absolute power which must be exercised, and that the effect is at once to convert the personal property into real property, to impress that property with a real character, and to dedicate it to those uses to which the real property is dedicated, so that upon that alone the case must be decided—an argument which, if well founded, would put an end to the case of the appellant. That [233] is a view in which I do not concur. I think no authority has been cited and I am not aware of any authority which carries a power of this sort to that extent. *Cowley* v. *Hartstonge* (1 Dow, 361), and the other cases which have been alluded to, certainly do not authorize your Lordships to say that this was an absolute conversion. Take that very case which was before this House. There was, in point of fact, a power, or it may rather be called a trust, to invest the property either in real estate or upon personal security. The trust never was exercised. This House did not say that the trustees could not have exercised, but they never did exercise, the discretion thus reposed in them; and, therefore, it was held that this House, sitting as a Court of Equity, would exercise the discretion which they had failed to exercise; and that as the whole course of limitation showed that the property was intended to go in the way in which the real estate should go, the discretion must be considered as restricted, and the power must be exercised in directing the property to go according to that destination. So far that case is no doubt an important authority bearing upon this question; but I am not prepared to advise your Lordships to decide that the power here is an absolute conversion. But then it is said, on the other side, that even if that power had been exercised, considering it as a power which it was not absolutely imperative to exercise, the estates which had been purchased with the funded property would still have gone according to the construction of the will contended for by the appellant, namely, to the next-of-kin. The learned Counsel seems when addressing to your Lordships that argument, to have lost sight for a moment of the words of the power It is impossible to read this power without seeing that the uses which are referred to are the uses of the real estate, and not the uses of the funded property."

In the case of *Pitman* v *Pitman* [L.R. (1892), 1 Ch., 279 (282)] again there was a similar contention. Mr. Justice NORTH says: "It is quite clear that there was a mere power to sell the land, and it was entirely optional with

and not imperative upon the trustees to sell, and the distinction between a power and trust for sale is important. There was a power of *interim* investment, and also a trust for investment in [234] land of freehold, copyhold or leasehold tenure with the consent of the tenant for life ; no such consent was given, and for some reason, not explained, the property was allowed to remain in the *interim*, investment till the time when the life estate of Thomas Pitman, the elder, came to an end. Nothing has happened or could have happened since the death of Thomas the younger to change the nature of the property. What was the interest that he had at that time? In my opinion it was in the nature of an interest in real estate, and remains so still. The property was real estate in the first instance; all the limitations in the will respecting it were applicable to real estate, and real estate only; there was a power of sale, but the exercise of that power did not of itself amount to a conversion; the proceeds might be invested in real estate, or optionally in leasehold estate."

The question here is, what are the uses referred to in the trust deed of 1816? To use the language of the Lord Chancellor in the case in 3 House of Lords, adapted to suit the converse circumstances of the present case, all the uses in this deed refer to personal property; all the trusts relate to personal property; all the limitations have reference to personal property. How can it be contended then that there was a conversion into real property of what was undoubtedly originally personalty? The point is so perfectly clear that it is unnecessary to refer to the texts cited at the Bar. I may add that so far as the mortgage is concerned, it is personal property.

I think I have exhausted those two points, and I proceed now to deal very shortly with the decree of the Supreme Court of 1860.

Learned Counsel for the plaintiff contended that it was a consent decree obtained by the fraud and collusion of Aratoon Sarkies and therefore not binding on his client. Of course, a decree *inter partes* may be impugned on the ground of fraud and collusion, but there is a limitation of time for a suit in respect thereof.

First, let us consider the circumstances under which the decree came to be made. As I have already stated, Aratoon Sarkies had obtained possession of Elizabeth's or her mother's property. He was realizing the rents and profits, and as she stated in her bill of com-[235]plaint he was impugning her legitimacy. She brought her suit to establish her legitimacy as well as the validity of the deed of 1839.

In that suit the trustees, as well as Aratoon Sarkies and the plaintiff's brother Gregory, were parties. It was necessary that these two should be joined, because, if the property was personal, and Elizabeth legitimate, and the deed valid, the question at once would be solely between her and Aratoon. If she were illegitimate the property would go to him. If legitimate she took the whole. If the property was real and she was illegitimate the property would go to Gregory, subject to the tenancy-for-life of Aratoon. Therefore all the parties interested in the property and in the questions which were being litigated were joined as parties. In the bill of complaint it was alleged that the property was chattel real, but subsequently before the suit came on for hearing an application was made for amendment based on an affidavit of the attorney in the case, who stated he had been misled by what he had seen in the deed of 1839; but that from the documents since shown to him by the trustees he had come to know that the property was personalty, and therefore prayed for an order for leave to amend the bill. That was done. Aratoon Sarkies filed his answer, and Gregory, through his guardian *ad litem*, submitted his interests to the Court, and apparently the trustees also filed their answers.

On the 21st of June 1860 the case came on for hearing, and the decree recites that the case was heard or "debated;" and that the deposition of Shircore was taken *vivâ voce*; it then orders that the suit be dismissed as against the infant, and that his costs and those of the trustees be paid by the plaintiff in the first instance, and afterwards deducted from Aratoon's share. Then there is this declaration: "This Court doth declare that the said property is in the nature of personal property." This does not purport to be made by consent, and up to and including this declaration there is no mention of any consent; only the order as to the sale appears to have been made by consent. But Mr. *Avetoom*, in reply, referred to the minute book of that date in order to show that the declaration was made by consent. The evidence afforded by a note recorded in the Court Minute Book cannot be accepted in preference to the evidence afforded by the **[236]** decree itself, which was prepared and completed with reference to that note, and to the brief of Counsel, and was read and signed by the Judges, and never questioned by the parties to that suit.

But apart from this it is quite clear from the answers of Aratoon Sarkies, portions of which were read, that he had abandoned all question as to the legitimacy of Elizabeth and the validity of the deed of 1839. The portions, which were read, are set out and clearly indicated in the decree. The moment it was discovered what the real character of the property was, and that became apparent as soon as the amendment was made, the presence of Gregory became unnecessary, and thereupon the Court, treating him as an unnecessary party, dismissed the suit as against him with costs to be paid in the manner already stated; but, be it observed, to come ultimately out of the share of Aratoon Sarkies himself. The plaintiff then, that is, Elizabeth Thorose, waived all accounts as to the rents and profits which Aratoon Sarkies had appropriated or misappropriated. He alleged that he had spent a considerable sum of money on improvements, and I think I am justified in holding that the consent by which, after deduction of the costs, he was to take half of the proceeds of the sale, was founded on the fact that the plaintiff conceded he had spent money on the property. Mr. *Avetoom* says that there was no reference to see whether the arrangement (assuming there was one) was for the benefit of the infant. In the first place, it must be observed, that a reference is necessary only in cases where there are questions of fact which require an enquiry, and the only question here was whether the property was real or personal. Having regard to the provisions of section 114 of the Evidence Act, which only embodies the general principle that an act of Court must be presumed to be done validly, I must hold that everything was done which was required to be done in the interests of the infant.

On the whole, therefore, there is nothing to show that the decree was not binding upon Gregory Sarkies, or the persons who claim to derive their title from him. I say this, irrespective of the question whether the plaintiff is entitled to question the validity of the sale to Jackariah. Considering that the property was vested in the trustees, the legal estate was in them, and they conveyed under an order of the Court.

[237] Let us assume, however, that this was a consent decree of the character contended for by the plaintiff, then what is there to induce the Court to set it aside

A consent decree is just as binding on the parties to the proceeding as a decree after a contentious trial. The principle is enunciated in a number of cases.

In *In re South American and Mexican Company* [L. R. (1895), 1 Ch., 37 (45)], Mr. Justice VAUGHAN WILLIAMS, speaking on the very same point, says:

"Under these circumstances I have only to consider, with reference to the second question, Mr. *Moulton's* suggestion, that a judgment by consent upon which the Court has not exercised its mind, does not and cannot raise an estoppel *inter partes*. I can only say this is the first time I have ever heard such a proposition suggested. It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter."

Similarly in *The Bellcairn* (L. R., 10 P. D., 161). There the Master of the Rolls and Lord Justices COTTON and LINDLEY were of opinion that a provision by consent was binding on the parties: and in *Nilakandhen* v. *Padmanabha* [I L R, 18 Mad., 1 (7)], Mr. Justice MUTHUSAMI AIYAR and Mr. Justice BEST say: "It is sufficient to say that the right of joint management was brought into controversy in a Court of Justice, and that it was by way of compromise recognised as a subsisting right, and as being in accordance with the prior usage of the institution. It was held by the Privy Council in *Gajapathi Radhika* v. *Gajapathi Nilamani* (13 Moo. I. A., 497 : 6 B. L. R., 202) that, when a state of facts is accepted as the basis of a compromise, whereby a suit pending decision is amicably adjusted, and when the compromise is not vitiated by fraud, those who were parties to it and their privies should not afterwards be heard to say, for the purpose of reviving the controversy, that the real state of things was otherwise."

Nor has any case been made out for opening up the decree of the Supreme Court. A shadowy allusion is made to fraud and collusion, but no basis is made for it in the evidence. There is not **[238]** the least ground on the evidence of the plaintiff, or anywhere, to suggest fraud.

But even had a case of fraud been made, the plaintiff, it seems to me, would be barred under the statute of limitation. There is no doubt that this family knew of this sale for many years. The plaintiff admits in her evidence that they all knew that the houses belonging to Miriam were sold, and a portion of the proceeds taken by Elizabeth Thorose, but no attempt was made to question the sale. Gregory must have attained his majority nearly 20 years ago, as according to the plaintiff's evidence he was 41 when he died. The case seems to me hopelessly barred.

Then there is the question whether Aratoon Sarkies could have an estate by courtesy in these properties

In Coke on Littleton, Chapter 4, section 5, it is laid down that an estate by courtesy arises only in respect of an estate held in fee simple, or an estate in tail general. The same rule is given by Williams in his valuable work on Real Property, 11th edition, page 283 It has not been shown that in an interest of this character the husband is entitled to an estate by courtesy, and if he were not so entitled, limitation would run as against Gregory from the time he attained majority.

It is unnecessary to dwell on the question of estoppel by conduct, as what I have already said is sufficient to show that this is a hopeless and unfortunate attempt to set aside a decree made 36 years ago. The result is, the suit must be dismissed with costs, including the reserved costs.

Suit dismissed.

Attorney for the Plaintiff: Babu *N. D. Dey.*

Attorneys for the First Defendant: Messrs. *Sanderson & Co.*

Attorney for the Second Defendant: Babu *A. T. Dhur.*

F. K. D.

NOTES.

[In (1910) 38 Cal., 639 : 12 I.C., 464, there is a full discussion of the authorities by MOOKERJEE and CARNDUFF, JJ., and it is held that the consent decree binds only the parties to the agreement.]

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[239] APPELLATE CIVIL.

The 7th December, 1896.

PRESENT

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Patan Maria.........Defendant

versus

Bhabiram Dutt Barna............Plaintiff.

Assam Land and Revenue Regulation (I of 1886), sections 39, 41 and 154 - Right to obtain a settlement — Jurisdiction of Civil Court.

The question as to the right of a party to obtain a settlement from the Revenue authorities is not excluded from the jurisdiction of the Civil Court by the provisions of section 154 of the Assam Land and Revenue Regulation

THIS suit was brought by the plaintiff for a declaration of his right to, and for possession of, 5 bighas 15 lessas of land, and for mesne profits It was found by both the lower Courts that 2 bighas was part of the ancestral holding of the plaintiff, and that 3 bighas 15 lessas of it formerly belonged to one Mohmer, by whose death or abandonment of the land it became unoccupied and available for settlement some time before the Cadastral survey, that at the Cadastral survey both plaintiff and defendant tried to have it included in their respective holdings, that the Cadastral survey included it in the plaintiff's holding; that the defendant filed an objection in the Revenue Court, and after an enquiry the Revenue Court ordered the land to be transferred to the defendant's holding; that the plaintiff was in actual possession of the land the year before the Cadastral survey, that therefore the lands were properly settled with the plaintiff; and that the Revenue authorities had no right to order the land to be transferred to the defendant's holding. and that the plaintiff was entitled to a decree for possession.

Babu *Surendra Nath Roy* for the Appellant.

Babu *Harendra Narain Mitter* for the Respondent.

The **judgment** of the Court (BANERJEE and RAMPINI, JJ.) was delivered by

Rampini, J.—In this case the plaintiff sues for a declaration **[240]** of his right to 5 bighas and 15 lessas of land, for possession of the same, and for mesne profits, amounting to Rs. 50.

The lower Courts have found that the plaintiff is entitled to this land. They both hold that 2 bighas of the land was part of his ancestral holding, and that 3 bighas 15 lessas of it were formerly the land of one Mohmer, in

* Appeal from Appellate Decree No. 1186 of 1895, against the decree of F. J. Monahan, Esq., Deputy Commissioner and Subordinate Judge of Sibsagar, dated the 19th of April 1895, affirming the decree of C. F. More, Esq., Extra Assistant Commissioner and Munsif of Jorehat, dated the 30th of November 1894.

consequence of whose death or abandonment of them they became available for settlement before the time of the Cadastral survey, and as the plaintiff was found in possession of them at the time of the Cadastral survey, they were properly settled with the plaintiff, and the Revenue authorities had consequently no right to order the land to be transferred to the defendant's holding.

The defendant appeals, and on his behalf it has been urged that the suit is not maintainable under section 154 of the Assam Regulation I of 1886, according to which, except as otherwise provided in this Regulation, no Civil Court shall exercise jurisdiction in "questions relating to the validity or effect of any settlement, or as to whether the conditions of any settlement are still in force." But we find that, according to section 41, "entries in the record of rights made under section 40 shall be founded on the basis of actual possession," and according to section 39 "no person shall, merely on the ground that a settlement has been made with him or with some persons through whom he claims, be deemed to have acquired any right to or over any estate as against any other person claiming rights to or over that estate." "Estate" is defined in section 3 to include "any land subject to the payment of land revenue, for the discharge of which a separate engagement has been entered into:" so that the land in dispute in this case would seem to come within the definition of "Estate." That being so, the land seems to have been properly settled with the plaintiff by the Cadastral survey, who found the plaintiff in possession, and subsequent proceedings of the Revenue authorities conferred no right in the land on the defendant.

Then, it would seem to us that, so far as the plaintiff's right to the land in dispute is concerned, the question at issue between the parties in this case is not a question as to the validity or effect of any settlement. It is a question merely as to his right to obtain a settlement from the Revenue authorities, and such a **[241]** question does not seem to be excluded from the jurisdiction of the Civil Court by the provisions of section 154 of the Assam Land and Revenue Regulation. But in the case of *Madhub Nath Surma* v. *Myarani Medhi* (I. L. R., 17 Cal., 819) it is pointed out that when property has been settled with anyone by the Revenue authorities, a Civil Court can only give a plaintiff who objects to that settlement a declaration of his right to a settlement of the lands in question, and cannot give him a decree for possession. In these circumstances, we cannot in this case give the plaintiff more than a declaration of his right to obtain settlement, and must so far modify the decree of the Lower Appellate Court that we set aside the decree for possession. The plaintiff must go to the settlement authorities and get them to settle the land with him and put him in possession of it.

To this extent we modify the decree of the Lower Appellate Court; in other respects we affirm it. We make no order as to costs.

F. K. D. *Appeal allowed in part.*

NOTES.

[This was followed in (1907) 12 C.W.N., 40 *n*, ; (1912) 18 I.C. 745 ; (1912) 17 C.L.J., 118 ; 1911) 13 I.C., 377. See also (1910) 14 C.W.N., 990.]

[24 Cal. 241]
The 11th December, 1896.
PRESENT:
MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Kalihur Ghose and others............Plaintiffs
versus
Umae Patwari and others............Defendants.

Bengal Tenancy Act (VIII of 1885), section 16--Right of suit—Succession to permanent tenure--Omission to give notice of succession to Collector, Effect of—Non-payment of fees, Effect of on right to decree.

Section 16 of the Bengal Tenancy Act does not preclude a party from instituting a suit for rent notwithstanding that the Collector has not received the notice, and the fees referred to therein. But that section is a bar to the plaintiffs' obtaining a decree before the notice and the fees are received by the Collector.

THIS appeal arose out of a suit brought by the plaintiffs who were co-sharers in certain *patni taluks* for the recovery of arrears of rent due on account of the years 1297 to 1300 B. S. The father of one of the plaintiffs died at the end of Choitro 1299, [242] and the fathers of the other plaintiffs before that, and the plaintiffs thus became entitled to permanent tenures by succession. Notice of the succession was not given to the Collector as required by section 15 of the Bengal Tenancy Act, and the fees required by that section were not paid. Both the lower Courts held that the plaintiffs could not recover the rent due for the year 1300.

Babu *Harendra Narain Mitter* for the Appellants

Babu *Kritanta Kumar Bose* for the Respondents.

The **judgment** of the Court (**Banerjee** and **Rampini, JJ**) was as follows:--

In this appeal, which arises out of a suit for arrears of rent, the question raised on behalf of the plaintiffs-appellants is whether the Courts below are right in disallowing a part of the claim on the ground that the notice required by section 16 of the Bengal Tenancy Act has not been given to the Collector. The learned Vakil for the appellants contends that, upon a proper construction of that section, the Courts below ought to have held that the suit was maintainable, and that the plaintiffs were entitled to a decree in full, notwithstanding the absence of the notice in question; and that all that the section was intended to bar was the actual recovery of any rent by execution of the decree; and in support of this contention he relies upon the decision of the majority of the Full Bench in the case of *Ahmuddin Khan* v. *Hira Lall Sen* (I. L. R., 23 Cal., 87). Now section 16 runs in these words: "A person becoming entitled to a permanent tenure by succession shall not be entitled to recover by suit, distraint or other proceeding any rent payable to him as the holder of the tenure, until the Collector has received the notice and fees referred to in the last foregoing section." Having regard to the language of the section, and to the fact that it is in one sense a provision of a penal character, and should, therefore, receive a liberal and not a stringent construction, we are of opinion that the section does not preclude a party fron instituting a suit for rent, notwithstanding that the Collector has not received the notice and the fees

* Appeal from Appellate Decree No. 1831 of 1895, against the decree of Babu Durga Charan Bose, Subordinate Judge of Tipperah, dated the 29th of June 1895, modifying the decree of Babu Promotho Nath Chatterjee, Munsif of Chandpur, dated the 7th of December 1894.

referred to therein, although it is a bar to the plaintiffs obtaining a decree before the notice and the fees are received by the Collector. If the section had been intended [243] to bar the institution of a suit, it would have contained words, such as "shall not be entitled to maintain a suit." The distinction between incompetency to maintain a suit, until certain conditions are fulfilled, and incompetency to recover by a suit, is a well recognized distinction, and is one that is pointed out in the case of *Hassall* v. *Wright* (L. R., 10 Eq., 509), and is also noticed in the case of *Alimuddin Khan* v. *Hira Lall Sen* (I. L. R., 23 Cal., 87) cited on behalf of the appellants.

But though that is so, we do not think that even this liberal construction of the section can help the plaintiffs at all. They did not, upon the objection being raised, give notice to the Collector and deposit the necessary fees as required by section 16, but they insisted upon their right to proceed with the suit to final judgment without complying with the condition imposed upon them by the section. And the contention on their behalf now is that the words "recover by suit" should be construed to mean "realize by suit," and that the only thing that the section is intended to bar is the actual realisation of the money by the plaintiffs. We are not prepared to accept that contention as correct. To give effect to it would be to hold that the plaintiff is entitled to ask for a decree, of which on his own admission he is at the time incompetent to enforce actual satisfaction. Indeed, if the appellant's contention be correct, there would be nothing to prevent his proceeding, even with the execution by the sale of the defendant's holding or undertenure, provided only that he does not ask the Court to pay over to him the money realized. We do not think that that would be a reasonable construction of the section. The plaintiffs not having taken any steps during the pendency of this suit to comply with the conditions imposed upon them by section 16, we must hold that the Courts below have rightly disallowed the part of the claim now in question, and the appeal must consequently be dismissed with costs.

F. K. D. *Appeal dismissed.*

NOTES.

[See also (1903) 10 C.W.N. 12 . 2 C.L.J., 377.]

[244] *The 9th December, 1896.*

PRESENT:

MR. JUSTICE O'KINEALY AND MR. JUSTICE HILL.

Suja Hossein *alias* Rohamut Dowlah............Judgment-debtor

versus

Monohur Das............Decree-holder.*

Limitation Act (XV of 1877) Schedule II, Article 180—Execution of decree—Revivor—Civil Procedure Code (Act XIV of 1882), sections 223, 230, 248 (a)—Insolvent, Adverse possession of.

A creditor obtained a decree against his debtor on the Original Side of the High Court, on the 19th December 1881. On the 11th December 1893, the judgment-creditor applied to

* Appeal from Order No. 329 of 1894, against the decree of Baboo Purna Chundra Shome, Subordinate Judge of 24-Pergunnahs, dated the 4th of August 1894

the Court, under section 228 of the Code of Civil Procedure, for "transmission of a certified copy of the decree to the District Judge's Court of the 24-Pergunnahs, with a certificate that no portion of the decree has been satisfied by execution within the jurisdiction of the High Court," and alleging that the judgment-debtor had no property within its jurisdiction, but had property in the 24-Pergunnahs. The application was headed as an application for execution and was in a tabular form. Upon this a notice was issued under section 248 (a) of the Code, and the judgment-debtor not having shown any cause, on the 19th December 1893 a certified copy of the decree was ordered to be issued. The certified copy of the decree having been transmitted, the judgment-creditor on the 1st March 1894 applied for the execution of the decree to the District Judge. On the objections of the judgment-debtor that the execution was barred by limitation, and that he having been declared an insolvent, and the properties having vested in the Official Assignee, the attachment was contrary to law,

Held, that the execution was not barred by limitation, as the order of the 19th December of 1893 was an order for execution, and operated as a revivor of the decree within the meaning of Article 180, Schedule II of the Limitation Act.

Held, also, that the judgment-debtor having been in possession of the property for more than 12 years the Official Assignee not having taken possession of it, he had a title by adverse possession which was capable of being attached.

Ashootosh Dutt v. *Doorga Churn Chatterjee* (I. L. R., 6 Cal., 504), and *Futteh Narain Chowdhry* v. *Chandrabati Choudhrain* (I. L. R., 20 Cal., 551) followed.

THE facts of the case for the purposes of this report appear sufficiently from the judgment of the High Court.

Babu *Nil Madhub Bose* and Babu *Shib Chunder Palit* for the Appellant.

[245] Mr. *J. T. Woodroffe* and Babu *Baidyanath Dutt* for the Respondent.

Babu *Nil Madhub Bose*.– One of the questions in this case is whether the order for the issue of a certified copy of the decree is an order for execution. I submit not. That order has not the effect of reviving the decree. The correctness of the principle as laid down in the case of *Ashootosh Dutt* v. *Doorga Churn Chatterjee* (I. L. R., 6 Cal., 504) has been doubted by WILSON, J., in the case of *Tincowrie Dawn* v. *Debendro Nath Mookerjee* (I. L. R., 17 Cal., 191). In the former case, a regular application for execution of decree was made and a writ of attachment was issued; but in the present case there was no application for execution at all. Article 180, Schedule II, of the Limitation Act only protects a decree if there is a revivor; there being no revivor in this case, the execution is barred by limitation. An application for a certificate to allow execution to be taken out in another Court is not an application for the execution of the decree. See the cases of *Nilmoney Singh Deo* v. *Biressur Banerjee* (I. L. R., 16 Cal., 744). The next question is, whether the judgment-debtor having been adjudged an insolvent, and his property having vested in the Official Assignee, the decree-holder could take out execution. I submit not The Court below was wrong in holding that the insolvent acquired a title by adverse possession, the Official Assignee not having taken possession of his property. The property having vested in the Official Assignee, the insolvent has no attachable interest in it.

Mr *J. T. Woodroffe* for the Respondent.– The order of the 19th December, for the issue of a certified copy of the decree, was an order for execution, as it was made after such notice as is required by section 248 (a). The notice was in accordance with rule 371 of the High Court That order had the effect of reviving the decree within the meaning of Article 180. Schedule II of the Limitation Act. The decision in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (I.L R., 8 Cal., 51 : L. R., 8 I. A., 123) governs the present case. The certificate was issued after notice. Section 248 of the Code of Civil Procedure says that cause is to be shewn. No cause having been shown in this case, a certificate was

issued, and the order of [246] the 19th December 1893 is binding. Judgment by consent is binding by way of estoppel: See *In re South American and Mexican Company, Ex parte Bank of England* (L. R., Ch. Div. (1895) Vol. I., p 37). The decree having been transmitted the Court had full jurisdiction to deal with it. See *Leake* v. *Daniel* (B. L. R., Sup. Vol., 970).

The judgment-debtor only got a personal discharge and not a final discharge. He ought to have made over possession of the property to the Official Assignee, but instead of doing so, he retained possession of it. His possession was adverse, as he was holding with the knowledge of the Official Assignee. See section 106 of the Evidence Act, and the cases of *Kristocomul Mitter* v. *Suresh Chunder Deb* (I. L. R, 8 Cal, 556), *Lakshman* v. *Moru* (I. L. R., 16 Bom., 722), and *Anand Coomari* v. *Ali Jamin* (I. L. R., 11 Cal, 229).

Babu *Nil Madhub Bose* in reply.

The **judgment** of the High Court (**O'Kinealy** and **Hill, JJ.**) was as follows: -

This is an appeal from the decision of the Subordinate Judge of the 24-Pergunnahs, dated the 24th August 1894.

The facts out of which the litigation has arisen may be shortly stated as follows: On the 11th December 1893 an application was made purporting to be one in execution of a decree by transmitting a certified copy of the decree to the Court of the District Judge of the 24-Pergunnahs, with a certificate that no portion of the decree had been satisfied within the jurisdiction of the High Court on its Original Side. On that the following order was passed: "Leave granted to verify and let notice issue (returnable four days after service) under section 248 (*a*), Civil Procedure Code. This notice was issued under the Rules of Court. Section 248 (*a*) enacts that if more than one year elapses between the date of the decree and the application for its execution a notice shall issue to the party against whom execution is applied for, requiring him to show cause why the decree should not be executed against him. The form of the notice under that section is to be found in No. 135 in the fourth schedule to the Code and runs as follows: "Whereas . . . . made application to this Court [247] for execution of decree in Civil Suit No. . . . . of 18 . . . . this is to give you notice that you are to appear before this Court..........on the . . . day of . . . 18 . . . . either in person or by a pleader of this Court or agent duly authorized and instructed to show cause, if any, why execution should not be granted." That was the notice which was served on the appellant in this Court He showed no cause, and on the 19th December 1893 Mr. Justice SALE recorded the following order: "Let certified copy issue, no cause being shown."

We take it that the meaning of that order is that no cause was shown against the notice which had been served upon the appellants. Mr. Justice SALE then sent a certified copy of the decree with a certificate of non-satisfaction, to the District Judge of the 24-Pergunnahs. Looking, therefore, at the form of the notice, and looking at the fact that no cause was shown, we think that the question is, what is the effect of what was done before Mr. Justice SALE. It was contended by the pleader for the appellant that the order of the 19th December 1893, being an order which was passed on an application made under section 223 of the Code for transmission of the decree, was not an order for execution, and that it could not therefore be said that there was a revivor of the decree within the meaning of article 180. On the other hand it was contended by Mr. *Woodroffe* on behalf of the respondent that the order of the 19th December was an order for execution, inasmuch as it was made after such notice as is required by section 248 (*a*), and that it therefore had the

effect of reviving the decree within the meaning of that article. We think the order of the 19th December made after notice to show cause, was, according to the rule laid down in *Ashootosh Dutt* v. *Doorga Churn Chatterjee* (I.L.R., 6 Cal., 504), and the case of *Futteh Narain Chowdhry* v. *Chundrabati Chowdhrain* (I. L. R., 20 Cal., 551), such a revivor as prevented the decree from being barred by article 180.

There was another question raised before us, and that was in regard to adverse possession. When the appellant showed cause against execution in the Court of the Subordinate Judge of 24 Pergunnahs he did not say that he had no interest that could **[248]** be attached. What he said was that the "property that has been put under attachment having vested in the Official Assignee under the law, the order passed in the execution proceedings for the attachment of the said property is wrong, contrary to law, and cannot remain in force." In other words, he did not say that he had no attachable interest in the property, but he pleaded the right of the Official Assignee in the property. The appellant filed a schedule as an insolvent on the 21st February 1882 in which he stated in regard to this property: "On the 1st March 1880, the insolvent deposited with these creditors as security for the payment of any balance of account that might be due to them the title deeds of the house and premises at Garden Reach (purchased in the names of the insolvent and one Ali Hossein since deceased) situate on the lands belonging to the ex King of Oudh to which house and premises the insolvent and the heirs of the said Ali Hossein are entitled in equal shares or moieties." Again in the year 1893 we find him striving to perfect his title by a conveyance from the Officiating Agent of the Governor-General in Council in favour of Dabir-ud-Dowla and Ahmed Hossein, as to one-half of this property in his own favour, and as to the other half, it was admitted at the trial that he had been in possession of the land all along. We have therefore these facts to deal with, admitted possession, striving to perfect a bad title in 1893, and not raising the question when attachment issued, that he had no title that could be attached. On all these facts we think that the Subordinate Judge was justified in coming to the conclusion that he had a title by adverse possession which was capable of being attached.

We dismiss the appeal with costs.

S. C. G. *Appeal dismissed.*

NOTES.

[This subject is fully discussed in (1903) 30 Cal., 979 : 7 C.W.N. 793 ; (1904) 8 C.W.N., 575 ; **1909 36 Cal., 843** : 9 C.L.J., 271 ; (1904) 26 All., 361.]

[249] *The 21st December, 1896.*
PRESENT :
MR. JUSTICE O'KINEALY AND MR. JUSTICE HILL.

Priag Nath Sah Deo............Plaintiff
versus
Mura Munda and others ....Defendants.*

Appeal -The Chutia Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879), sections 37, clause (4), 39, 137, 139 and 144 —Rent, Suit for —Appeal in cases where the aggregate amount claimed is above Rs. 100.

An appeal lies to the Judicial Commissioner, and not to the Deputy Commissioner, from a decree passed by the Deputy Collector, in a suit for rent, where the aggregate amount of rent claimed under section 39, Bengal Act I of 1879, is above Rs. 100.

THIS appeal arose out of an action brought by the landlord, in the Court of the Deputy Collector of Ranchi, to recover rent against a number of *raiyats*. The aggregate amount of rent claimed was above Rs. 100, but the amount recoverable from each tenant was below Rs. 100. The learned Deputy Collector decreed the suit of the plaintiff. Some of the tenants appealed to the Judicial Commissioner, who set aside the decision of the lower Court, so far as the appellants before him were concerned. From this decision the plaintiff appealed to the High Court, on the ground that the appeal from the decree of the Deputy Collector lay to the Deputy Commissioner, and that the Judicial Commissioner had no jurisdiction to hear it.

Babu *Srinath Das* and Babu *Karuna Sindhu Mookerjee* for the Appellant.

Dr. *Asutosh Mookerjee* for the Respondents.

Babu *Srinath Das*.—Under sections 137 and 139 of Bengal Act I of 1879, the appeal lies to the Deputy Commissioner, if the amount sued for does not exceed Rs. 100. Although section 39 permits joinder of claims against different tenants for the purposes of determining the jurisdiction of the Appellate Court, the value of the suit ought to be determined by the amount claimed against each tenant.

Dr. *Asutosh Mookerjee* for the Respondents. -Where separate [250] claims against different tenants are joined under section 39, there is only one suit, and the amount sued for is clearly the aggregate amount claimed against the tenants collectively. If, as the appellant contends, the *forum* of appeal is determined by the amount claimed against a particular tenant, we may have the anomaly of an appeal by one tenant lying to the Deputy Collector, and that by another tenant from the same decree lying to the Judicial Commissioner. Under section 144†, which contemplates an appeal from a judgment,

* Appeal from Appellate Decree No. 1024 of 1895, against the decree of F. Cowley, Esq., Judicial Commissioner of Chutia Nagpur, dated the 7th of January 1895, reversing the decree of Babu Krishna Kali Mookerjee, Deputy Collector of Ranchi, dated the 7th of January 1893.

† [Sec. 144 —In all suits other than those in which, when tried and decided by a Deputy Commissioner, the judgment of the Deputy Commissioner is declared to be final, or, when tried and decided by a Deputy Collector, an appeal is allowed to the Deputy Commissioner, an appeal from the judgment of the Deputy Commissioner or Deputy Collector shall lie to the Judicial Commissioner of the Division, unless the amount or value in dispute exceed five thousand rupees, in which case the appeal shall lie to the High Court.]

In what suits appeal to lie to Judicial Commissioner or High Court.

the appeal lay to the Judicial Commissioner. Besides, under section 11 of the Suits Valuation Act, the appellant is not entitled to succeed without proving that he has been prejudiced.

Babu *Srinath Das* in reply.

The **Judgment** of the High Court (**O'Kinealy** and **Hill, JJ.**) was as follows:—

This is an appeal from the decision of the Judicial Commissioner of Chutia Nagpur, dated the 7th January 1895.

It was first objected that no second appeal lay to this Court; but this objection was overruled some years ago. We think, therefore, that the objection fails.

Then it was argued, and that is the point upon which the appeal turns, that the appeal lay not to the Judicial Commissioner but to the Deputy Commissioner. The suit is of the nature mentioned in clause (4), section 37, and by section 39 several claims of that kind may be joined in one suit. It would appear, therefore, that the several claims as mentioned in the second clause of section 39 form one suit and one suit only.

We now come to determine to what Court the appeal lay. Section 137 says that in suits under clause (4) and certain other Clauses of section 37, if tried and decided by a Deputy Commissioner, if the amount sued for, or the value of the property claimed does not exceed one hundred rupees, the judgment of the Deputy Commissioner shall be final, except under certain conditions which do not arise in this case. Section 139 refers to appeals from the decisions of a Deputy Collector. And then comes section 144 which provides as follows: "In all suits other than those in which, when tried and decided by a Deputy Commissioner, the judg-[251]ment of the Deputy Commissioner is declared to be final, or when tried and decided by a Deputy Collector, an appeal is allowed to the Deputy Commissioner, an appeal from the judgment of the Deputy Commissioner or Deputy Collector shall lie to the Judicial Commissioner of the Division, unless the amount or value in dispute exceed five thousand rupees, in which case the appeal shall lie to the High Court." Bearing in mind that we are of opinion that a suit under section 39, although it includes a number of claims, is one suit, and that under section 137 the judgment, in such a suit as this, is not final, we think, looking at the somewhat obscure language of section 144, that the appeal in this case lies to the Judicial Commissioner, the aggregate amount of the claims being more than one hundred rupees.

We, therefore, dismiss this appeal with costs.

S. C. G. *Appeal dismissed.*

NOTES.

[A Full Bench in (1900) 27 Cal., 508 overruled this decision holding that there was no second appeal.]

[24 Cal. 251]

The 7th December, 1896.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Surja Kanta Acharjee............Plaintiff

versus

Baneswar Shaha and on his death his son, heir and legal representative Jotindra Lal Shaha, by his mother and guardian Kissori Dasi............Defendant.*

Evidence—Rent Receipts, Proof of genuineness of—Onus of proof—Bengal Tenancy Act (VIII of 1885), section 50—Suit for enhancement of rent—Appellate Court, Power of.

In a suit for enhancement of rent the defendant produced certain *dakhilas* and deposed to having received them on payment of rent. *Held*, that this was sufficient evidence to prove them.

Held, further, that it was perfectly open to the Lower Appellate Court, which had to deal with the facts of the case, to say whether taking the receipts, which extended over a number of years together, and having regard to the fact that the receipts did not specify the years to which the amounts related, the amounts paid in any particular year were partly for the rents of that year and partly for the arrears due in respect of previous years.

To entitle the plaintiff to a decree for enhancement of rent on the ground of an alteration in the area of the defendant's holding, the plaintiff must show that the defendant is holding lands in excess of what he is paying rent for, [252] and in order to do that he must show for what quantity of land the defendant is paying rent.

THE suit, out of which this appeal arose, was brought by the plaintiff against the defendant for enhancement of rent and for additional rent for excess lands. It was alleged by the plaintiff that the defendant was an occupancy *raiyat*, and that the rate of rent paid by him was below the prevailing rate paid by occupancy *raiyats* for land of a similar description in the same village; and that, upon measurement of the land held by the defendant in the beginning of the year 1298, it was found that a quantity of land was in his possession in excess of that which had been recorded in the zemindar's *serishta*. The plaintiff claimed assessment of annual *jama* according to the prevailing rate.

The defendant pleaded (*inter alia*) that he was not an occupancy *raiyat*, but a *raiyat* holding at a fixed rate; that he knew nothing of the measurement of lands in 1298; and that he had not taken possession of any land in excess. The defendant filed rent receipts to prove that he had paid rent for the several *jamas* in suit at the same rate per annum for more than 20 years. These receipts showed variations in payments. The Munsif found that the defendant was a *raiyat* holding at a fixed rent, and dismissed the suit. From this decision the plaintiff appealed to the Officiating Judge of Rajshahye who dismissed the appeal.

The following was his finding with regard to the receipts:—

"The defendant has filed rent receipts to show that in each case he has been paying at a uniform rate of rent for more than twenty years. The receipts are over twelve hundred in number; and as a single receipt is often not for a single holding but for

* Appeal from Appellate Decree No. 757 of 1895, against the decree of L. Palit, Esq., Offg. District Judge of Rajshahye, dated the 14th of January 1895, affirming the decree of Babu Adetya Chandra Chuckerbutty, Munsif of Nawabgunge, dated the 28th of December 1893.

several holdings and for different shares and different years, it has been found necessary to prepare tables showing the amount paid for each holding for each year. Both parties have prepared and put in such tables, and I have carefully gone through them and checked them by the receipts filed in the suits. Mistakes have been made in some instances, and I have corrected some of them, but in the main they can be used for the determination of the question of the uniformity of the *jama* for the last twenty years.' Sometimes a particular payment shewn in a receipt is not specifically mentioned as being an arrear collection, and this, if taken as collection for the year in which the payment was made, would apparently make the payments for that year exceed the *jama*. This is exemplified in the case of payments for the years 1278 and 1279. The payments for 1278 amount to only six annas and the payments for 1279 amount to 2 rupees and 2 annas. But there was one payment of fourteen annas which was made in 1279, and the [253] receipt for which does not specifically show it to be an arrear for 1278. If this item is taken to be a payment for 1278, as it evidently is, then the payment for each year is seen to be what the *jama* is alleged to be, *viz.*, one rupee and four annas. Considerations of this kind have to be taken into account in dealing with the question of the uniformity of the *jama*. * * * * In no case do the variations seem to me to suggest the inference that there was any variation in the *jama*. In some instances there might have been excess or deficient collection in one share, but the collections in the other shares for the same year show that the *jama* remained unaltered. In many instances the rent receipts themselves show the total *jama*. Taking everything into consideration, I certainly find that the defendant has been paying at a uniform *jama* in each case for twenty years. * * * * It has been contended on behalf of the appellant that some rent receipts have not been proved, and some have been disproved by the witnesses. The defendant, however, has proved them all by saying that he received the receipts on payment of rent. This I consider sufficient proof. The nature and appearance of the receipts convince me of their genuineness. The very variations that they show in the payments go to show their genuineness. The plaintiff has done nothing to prove what has been the rate at which the defendant has been paying rent in each case."

The *Advocate-General* (Sir *Charles Paul*), Babu *Grish Chunder Chowdhry*, and Babu *Joygopal Ghose* for the Appellant.

Mr. *Hill* and Babu *Mohini Mohun Chukrabutty* for the Respondent.

The *Advocate-General.*—The rent receipts have not been duly proved. In *Ramjadoo Gangooly* v. *Luckhee Narain Mundul* (8 W. R., 488), BAYLEY, J., says: "It is quite insufficient for the Judge, while admitting a variation in these *dakhilas*, to state that it may arise from short payments in one year being made up by full payments in another without that specific fact being duly proved. The variation *primâ facie* is evidence of the rent not being uniform. * * * Further the Lower Appellate Court seems to have adopted the erroneous view of the first Court that *dakhilas*, if not positively denied, need not be proved. They, like other documents, propounded by parties must be shown to be what they purport to be." See also *Bharut Roy* v. *Gunga Narain Mohapattur* (14 W. R., 211).

Mr. *Hill* for the respondent.—The payment may be proved by production of the receipt, and proof that it is the document [254] received in payment of the money. *Raj Mahomed* v. *Banoo Rasmah* (12 W. R., 34) and *Madhub Chunder Chowdhry* v. *Promotho Nath Roy* (20 W. R., 261).

The **judgment** of the Court (**Banerjee** and **Rampini, JJ.**) was as follows :—

In these appeals, which arise out of suits for enhancement of rent and for additional rent for excess lands, two questions have been raised on behalf of the appellant: *first*, whether the Lower Appellate Court was right in relying upon the *dakhilas* produced by the defendants when they have not been duly

proved; and, *second*, whether the Lower Appellate Court, upon the facts found by it, was right in dismissing the claim for additional rent for excess lands.

With reference to the first point this is what the Lower Appellate Court says in its judgment: "It has been contended on behalf of the appellant that some rent receipts have not been proved and some have been disproved by the witnesses. The defendant, however, has proved them all by saying that he received the receipts on payment of rent. This I consider sufficient proof. The nature and appearance of the receipts convince me of their genuineness. The very variations that they show in the payment go to show their genuineness." This, it is contended by the learned Advocate-General, is not sufficient to show that the receipts have been duly proved, and, in support of his contention, he relies upon the cases of *Ramjadoo Gangooly* v. *Luckhee Narain Mundul* (8 W.R., 488), and *Bharut Roy* v. *Gunga Narain Mohapattur* (14 W.R., 211). All that these two cases lay down is that there must be some evidence to prove the genuineness of the rent receipts which a tenant defendant may file. They do not, however, lay down any hard-and-fast rule as to what the nature of the evidence necessary to prove rent receipts should be. On the other hand, it has been held in the cases of *Raj Mahomed* v. *Banoo Rasmah* (12 W. R., 34) and *Madhub Chunder Chowdhry* v. *Promotho Nath Roy* (20 W. R., 264) that where the genuineness of a rent receipt is sworn to by the tenant by whom the rent has been paid, that is legally sufficient to prove [256] the receipt, notwithstanding that the person whose signature it bears has not been examined. Having regard to these authorities, we think that the finding arrived at by the Lower Appellate Court, which considers the evidence of the defendant sufficient to prove the genuineness of the receipts, must be taken to be unassailable in law.

Then, as to the second ground, the Lower Appellate Court observes: "The *onus* is clearly on the plaintiff. He must show that the defendant is holding lands in excess of what he is paying rent for, and in order to do that, he must show for what quantity of land the defendant is paying rent. This the plaintiff has failed to do. If that is so, we do not think that there is any ground for our interfering with the decision of the Lower Appellate Court upon this point in second appeal.

We should add that a third point was urged which was this, that the Lower Appellate Court was wrong in allotting the amounts covered by some of the rent receipts to different years without any evidence to show that they were for those particular years. We think it was perfectly open to the Lower Appellate Court which had to deal with the facts of the case to say whether, taking the receipts which extend over a number of years together, and having regard to the fact that the receipts did not specify the years to which the amounts relate, the amounts paid in any particular year were partly for the rents of that year and partly for the arrears due in respect of previous years.

The grounds urged before us, therefore, all fail, and the appeal must be dismissed with costs.

F. K. D. *Appeal dismissed.*

NOTES.

[See also (1911) 15 C.W N., 921; (1910) 10 I.C. 189]

[256] *The 7th September, 1896.*

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE BANERJEE.

Mohini Mohan Roy...........Plaintiff

versus

Promoda Nath Roy and others ....Defendants.*

Limitation—Waste land subsequently made cultivable - Possession—Onus Probandi—*Constructive possession.*

The doctrine of constructive possession applies only in favour of a rightful owner, and must not (as a rule) be extended in favour of a wrong-doer, whose possession must be confined to land of which he is actually in possession.

In a suit for the possession of lands formerly uncultivable, but subsequently brought under cultivation, the District Judge had allowed the plea of limitation to prevail against the plaintiff upon a finding—based, not upon evidence of actual possession by the defendants, but upon an inference from part of the evidence,—that the defendants had been in constructive possession for over 12 years prior to the suit.

Held, that so far as the judgment and decree of the District Judge related to certain plots described as *patit* or uncultivable lands, they must be set aside, and the case remanded to the District Judge to determine (*a*) how far the presumption in favour of the plaintiff as to the continuance of the uncultivable state of the lands till within twelve years of suit applied; and (*b*) how far that presumption had been rebutted by evidence of actual possession on the part of the defendants.

APPEAL from the decree of the District Judge of Rajshahye.

Dr. *Rash Behari Ghose*, Babu *Lal Mohun Das*, and Babu *Saroda Prosunno Roy* for the Appellant.

Babu *Srinath Das* and Babu *Saroda Churn Mitter* for the Respondents.

The facts and arguments of the case appear in the **judgment** of the Court (**Macpherson** and **Banerjee, JJ.**) which was as follows :—

This appeal arises out of a suit brought by the plaintiff-appellant for possession and mesne profits of certain land, on the allegation that the land is included in *mouzah* Lakhi Chumari appertaining to his *patni taluk* Birchapila ; that it was formerly the bed of a *bhil* which has recently become fit for cultivation, and that the defendants are wrongfully holding possession of the same.

[257] The defendants in their written statement denied the title of the plaintiff to set up the plea of limitation, and urged that a certain *khal* was the boundary between the plaintiff's village Lakshi Chumari and the defendants' village Majgeo Sripur.

The first Court found that part of the land in dispute appertained to the plaintiff's village, but it dismissed the suit as barred by limitation.

Upon appeal by the plaintiff, the Lower Appellate Court ordered a fresh local enquiry, and upon the enquiry being completed the plaintiff confined his claim to those portions of the land lying on his side of the survey boundary between the two villages Lakshi Chumari and Majgeo Sripur which were described as *patit* land of different denominations in the defendants' *chitta* of

* Appeal from Appellate Decree No. 672 of 1895, against the decree of L. Palit, Esq. Officiating District Judge of Rajshahye, dated the 9th of January 1895, modifying the decree of Babu Nobin Chundra Ganguly, Subordinate Judge of that District, dated the 6th of March 1893.

1282. The learned District Judge, however, found the claim barred by limitation, and he accordingly affirmed the first Court's decree.

In second appeal it is now contended for the plaintiff that the decision of the District Judge is wrong in law first, because, having regard to the nature of the land, he should have thrown the burden of proving possession entirely upon the defendants instead of holding, as he has done, "that the *onus* cannot be said to lie exclusively on one party or the other;" and, secondly, because he has erroneously extended the doctrine of constructive possession, which holds good only in the case of rightful owners, to the case of wrongdoers.

In support of the first contention, the cases of *Radha Gobind Roy* v. *Inglis* (7 C. L. R., 364), and *Raj Kumar Roy* v. *Gobind Chunder Roy* (I. L. R., 19 Cal., 660) are relied upon. The true rule deducible from the first mentioned case and from certain other cases is that stated in the judgment of the majority of the Full Bench in *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (I. L. R., 9 Cal., 744) in which the learned Judges, after observing "that as a general rule the plaintiff cannot, merely by proving possession at any period prior to twelve years before suit, shift the *onus* to the defendant," add, "the true rule appears to us to be this: that where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would, and probably did, continue till within twelve years **[258]** before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also until the contrary is shown. This case appears to have been cited in the argument before the Privy Council in *Raj Kumar Roy* v. *Gobind Chunder Roy* (I. L. R., 19 Cal., 660), and there is nothing in their Lordships' judgment to show that they disapprove the rule there laid down.

That being then the rule applicable to cases like this, we observe that if the Lower Appellate Court had considered the case properly with reference to those plots of land falling within the plaintiff's *mouzah* which are entered in the *chitta* of 1282, corresponding to 1875, as *gralaik patit* or uncultivable waste, and also with reference to some of those entered as *patit* land of other denominations, the possession of the plaintiff might, in the absence of evidence to the contrary, have been presumed to have continued till within twelve years before the date of the suit, which was instituted in 1890, more especially when some of these plots were found by the amin deputed to hold the local enquiry to be still uncultivable. The learned District Judge has, however, omitted to consider the case with reference to that rule, and this omission constitutes an error of law in his decision. But it may be said that this error becomes immaterial when the learned District Judge has affirmatively found "that the defendants have been in possession since 1282 at least." No doubt, if that finding stands, the question of the burden of proof becomes immaterial, for the presumption which the rule laid down in *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (I. L. R., 9 Cal., 744) raises in favour of the plaintiff, is a rebuttable one, and may be displaced by evidence of possession in favour of the defendant. This brings us to the consideration of the second contention mentioned above.

The learned District Judge's finding that the defendants have been in possession of the land in dispute since 1282 or 1875 is based, as regards the *patit* or waste lands of different denominations, not upon any evidence of actual possession, but upon evidence from which he infers that the defendants were in constructive possession. For this is what he says in his judgment: "If a plot leased to a tenant contains a portion which is at the time *patit*, and which is gradually brought under **[259]** cultivation, then it seems to

me that the tenant must be held to have been in possession of the whole plot from the beginning. The very fact of the measurement for the preparation of the *chitta*, the leasing out of land, &c., also constitutes possession."

Now acts of possession over a part of any immoveable property may no doubt in many cases be evidence of *de facto* possession of the whole, as has been explained by Baron Parke in *Jones* v. *Williams* [2 M.L.W 326 (331)] and by Lord Blackburn in *Lord Advocate* v. *Lord Blantyre* [L. R., 4 Ap., Cas., 770 (791).] But that rule operates with full force only in favour of the rightful owners; and it should be applied with caution and reservation, if at all, in favour of a wrongdoer; for this reason among others, that the right to the whole, which makes the possession of a part equivalent to the possession of the whole, and forms the connecting link between the whole and the part in the one case, is wanting in the other. In the case of a wrongdoer claiming to possess the whole by reason of possessing a part, it is often difficult to say, in the absence of the connecting link of title, how far the whole extends. The want of this connecting link may in some cases be supplied by others, such as close connection and interdependence between the part actually possessed and the whole of which it is claimed to be a part. But except in such special cases, the possession of a wrongdoer should be held to be confined to what he is actually in possession of, and not to extend constructively to anything beyond that; this rule, which is in one sense deducible from the principle that the ordinary presumption is that possession follows title, is especially necessary for the protection of the rightful owners in a country like Bengal, where extensive tracts of land lie waste and unenclosed, and in a case like the present where we find that the plots of waste land to which the wrongful possession of the defendants has been held constructively to extend, adjoin the plaintiff's property on one side at least. The view we take is amply supported by reason and authority—see Angell on Limitations, Sixth Edition, section 394, and *Siddon* v. *Smith* (36 L.T. 168). The Lower Appellate Court was therefore wrong in arriving at the conclusion that the defendants [260] were in possession of the lands in question from 1282 without adverting to the limitation pointed out above in the application of the doctrine of constructive possession, namely, that it does not, as a rule apply to the case of a wrongdoer.

For the foregoing reasons we think the judgment and decree of the Lower Appellate Court, so far as they relate to the plots described as *patit* land of different denominations in the *chitta* of 1282, must be set aside and the case remanded to that Court in order that it may determine, (1) how far the presumption referred to in the rule laid down in the case of *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (I. L. R, 9 Cal., 744) quoted above applies to this case, and (2) how far that presumption has been rebutted by evidence of actual possession adduced by the defendants, and then dispose of the appeal. Costs will abide the result.

H. W. *Case remanded.*

NOTES.

[This decision has now the support of the Privy Council decision in *Secretary of State* v. *Krishnamoni Gupta* **(1902) 29 Cal., 518**, where the decision was similar.

The rule as to constructive possession enuring only in favour of the rightful owner was applied in (1903) 31 Cal., 397; (1905) 3 C.L.J., 316; (1907) 19 C.W N., 127 : 6 C.L.J., 735; (1907) 12 C.W.N., 273 : 7 C.L.J., 414; (1907) 34 Cal., 753 . 12 C.W.N., 193 · 6 C.L.J., 583; (1907) 35 Cal., 961; (1910) 15 C.L.J., 281.]

[24 Cal. 260]
The 10th July, 1896.
PRESENT:
MR. JUSTICE MACPHERSON AND MR. JUSTICE HILL.

Bindu Basini Chowdhrani and another............Defendants
versus
Jahnabi Chowdhrani............Plaintiff.*

Injunction—Specific Relief Act (I of 1877), section 54—Threatened damage—Damage occurring after suit—Cause of action—Digging so as to endanger neighbour's land.

Where an act threatening danger to a person's land is such that injury will inevitably follow, a Court may grant a perpetual injunction restraining the continuance of that act, even though no damage has actually occurred before institution of suit. And where actual injury has occurred subsequently to the filing of the plaint, the plaint may be amended so as to show the nature and extent of such injury.

Pattisson v. *Gilford* (L. R., 18 Eq., 259) applied.

THE plaintiff and the defendants owned adjoining lands. Close to the boundary line the defendants dug a trench 110 feet long and 9 feet deep, the sides towards the bottom sloping in the direction of the plaintiff's land. The plaintiff sued for a perpetual injunction restraining them from continuing to dig, for the cost [261] of filling up the excavation, and for other relief. The defendants pleaded that they had a right to dig as they pleased on their own land, and that as the plaint did not allege any injury, it disclosed no cause of action. The Munsif held that no cause of action accrued until damage had actually occurred, and he therefore dismissed the suit.

After the suit had been instituted, the plaintiff's land subsided in consequence of the defendants' excavations, and this fact was brought to the notice of the Court.

The plaintiff appealed to the Subordinate Judge, who reversed the Munsif's decision and remanded the case under section 562 of the Code of Civil Procedure, directing the Munsif to allow the plaint to be amended, and to try the questions that had already been or might be raised in the case.

Against this order the defendants appealed.

Babu *Nilmadhub Bose* (with him Babu *Jogesh Chunder Roy*, Babu *Mukunda Nath Roy*, and Babu *Satyananda Bose*) for the Appellants.—There is no cause of action unless there is actual injury or unless the act of the defendants is such that the injury appears, on the face of the plaint, to be inevitable. Gale on Easements, p. 329; Kerr on Injunctions, pp. 220 to 222. Besides it would be impossible, where there is no averment of injury, for the Court to say in what terms an injunction should go; and to restrain the defendants from using their property in such a way as not to injure the plaintiff is not only too vague but is also a mere statement of the general law. Everyone may dig in his own land as he pleases if he takes steps to protect his neighbour from injury; and the defendants were about to do so. Lastly, there cannot, under section 54 of the Specific Relief Act, be a perpetual injunction if the damage occasioned, or likely to be occasioned by the defendants' wrongful act,

* Appeal from Order No. 390 of 1895 from the order of Babu Baroda Prosono Shome, Additional Subordinate Judge of Mymensingh, dated the 25th October 1895, reversing the order of Babu Kali Krishna Chowdhry, Munsif of Atia, dated the 18th September 1894.

can be compensated with damages, as it can in the present case, for the plaintiff has valued the suit at a definite sum.

Babu *Srinath Das*, Babu *Dwarkanath Chuckerbutty* and Babu *Kritanta Kumar Bose* for the respondent.—An averment of actual damage is not necessary; therefore the plaint does disclose a cause of action. Illustration (*r*) to section 54 of the Specific Relief Act is clear upon the point. In the case of **[262]** *The Darley Main Colliery Co.* v. *Mitchell* (L. R., 11 App. Cas., 127) the question arose as to when the cause of action accrued in a suit for damages for subsequent subsidence of the soil; and it was held that each subsidence would furnish a separate cause of action. An injury has actually resulted by the subsidence of the plaintiff's land; and therefore the plaint ought to be amended on the principle adopted in cases where a prayer for recovery is allowed to be added when dispossession has taken place subsequent to institution of suit,—*Abdul Kadar* v. *Mahomed* (I. L. R., 15 Mad., 15), or where the defect is merely one of form,—*Amir Hossein* v. *Imambandi Begum* (11 C. L R., 443).

Babu *Nilmadhub Bose* in reply.

The **judgment** of the Court (**Macpherson** and **Hill, JJ.**) was as follows:—

The plaintiff and the defendants are the owners of adjoining tenures. The plaint sets out that the defendants wantonly and with the intention of causing injury to the plaintiff dug a trench on the verge of the boundary of her tenure, 110 feet long and 8 or 9 feet deep, the depth being perpendicular downwards and sloping inwards towards the bottom in the direction of the plaintiff's land, and that this must necessarily result in the subsidence of the plaintiff's land. It is further alleged that the defendants were still going on with the work. The relief asked for is a perpetual injunction prohibiting them digging earth within a certain distance of the plaintiff's tenement; the filling up of the excavation, or in default a certain sum of money as the costs of filling it up. There was a further prayer for general relief.

The defendants raised various objections to the plaintiff's suit. They asserted their right to dig as they pleased upon their own land, and stated that the plaintiff was not entitled to an injunction. There was no direct denial of the particular acts alleged in the plaint, but it may be gathered from the 9th paragraph of the written statement that they were excavating a tank which had no slopes, although they intended to make them hereafter.

The case proceeded to trial, and, when it was ripe for decision, the defendants contended that the plaint disclosed no cause of action, inasmuch as no injury was alleged to have resulted **[263]** from the acts of the defendants. The Munsif accepted as correct that view of the law, and, holding that until actual damage had ensued no cause of action could arise, dismissed the suit without deciding any of the other questions which arose in the case. It appears that the plaintiff in the course of the trial represented to the Court that, subsequent to the institution of the suit, injury had actually resulted from the acts of the defendants by the subsidence of some of the plaintiff's land, and evidence to that effect was given. The case went on appeal before the Subordinate Judge, who reversed the Munsif's decision and remanded the case under section 562 of the Code of Civil Procedure, directing the Munsif to allow an amendment of the plaint and decide the question already raised in the case and any other questions that might arise after the amendment. This appeal is against the order of remand, and it is contended that the Munsif was right in dismissing the suit on the ground that the plaint disclosed no cause of action.

If the Munsif was right in holding that actual injury would alone give a cause of action, then he was right in dismissing the suit, because anything that happened subsequent to the institution of the suit could not supply a cause of

action which did not exist before. In our opinion he was wrong in his view of the law. A suit for injunction may be a suit for preventive relief, and, under section 54 of the Specific Relief Act, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. The same section provides that when a defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property, the Court may grant a perpetual injunction in certain specified cases. Illustration (r) attached to the same section indicates a case in which an injunction may be sued for to restrian a defendant from doing an act which threatens injury to the plaintiff's property, although no such injury had actually ensued. In the case of *Pattisson* v. *Gilford* (L. R., 18 Eq., 259) the Master of the Rolls, speaking of the principles upon which a Court of Equity interferes when an injunction is asked for, says: "I take it that, in order to obtain an injunction, a plaintiff who complains, not that an act **[264]** is an actual violation of his right, but that a threatened or intended act, if carried into effect, will be a violation of the right, must show that such will be an inevitable result. It will not do to say a violation of the right may be the result; the plaintiff must show that a violation will be the inevitable result." And then he proceeds to cite a case decided by Lord COTTENHAM, and another case in which the Lord CHANCELLOR says: "I consider this Court has jurisdiction by injunction to protect property from an act threatened which, if completed, would give a right of action. I by no means say that in every such case an injunction may be demanded as of right, but if the party applying is free from blame and promptly applies for relief, and shows that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, an injunction will be granted." The facts of that case had, it is true, no analogy to the present case, but still the Master of the Rolls was dealing with the principle upon which relief is given against a threatened wrong, and the case is, we think, an authority that such a suit will lie when the threatened act is of such a character that it must *inevitably* result in injury--inevitably in the sense in which the Master of the Rolls says he uses the word, that is to say not in the sense of there being no possibility the other way, because Courts of Justice must always act upon the theory of very great probability being sufficient, but in the sense that there must be such a great probability, that, in the view of ordinary men, using ordinary sense, the injury would follow. The Munsif was, therefore, we consider, wrong in holding that, as a matter of law, actual injury before suit must in every case be alleged and proved in order to maintain the suit, and that it is sufficient if it is alleged that the result of the act complained of must inevitably, in the sense we have stated, flow from it. Whether the case is one in which an injunction or any other relief should be granted, or what precise form the injunction should take, are questions which the Courts dealing with the facts must decide with reference to the provisions of sections 53 and 54 of the Specific Relief Act. It may be that the plaintiff is not entitled to the relief which she claims or to relief in the particular form which she claimed it, but that would not make the suit unmaintainable. Now, no better proof of the inevitable consequence of an alleged act can be given than **[265]** that the contemplated injury had actually occurred, and, we think, it is quite competent for the plaintiff in this case to give evidence of that injury, although it had not occurred prior to the institution of the suit, and, for that purpose and in order to give due notice to the defendants of the fact, which it is intended to prove, the plaint might properly be amended. It is not quite clear on what grounds the Subordinate Judge reversed the decree of the Munsif and remanded the suit. He does not say that the view which the Munsif took of the law was wrong, but merely that the plaintiff should be allowed to amend

the plaint; in what way he does not say, and his order that the Munsif should allow the plaint to be amended in some undefined way is not a correct order. If he took the same view of the law which the Munsif took, and intended that the plaint should be amended in order to give the plaintiff a cause of action which did not before exist, his view is wrong. Nevertheless, we think that the order of remand is right, and that the plaintiff should be allowed to amend the plaint by inserting in it the nature and extent of the injury suffered. That is not an amendment inconsistent with the provisions of the Code. The act complained of occurred before the institution of the suit, and the injury, which was foreseen and which it was the object of the suit to avert, occurred after the institution of it.

The appeal fails and is dismissed with costs.

H. W. *Appeal dismissed.*

NOTES.

[See also (1904) 31 Cal., 944 : 8 C.W.N., 710; (1913) 21 I.C., 249.]

[24 Cal. 265]

APPEAL FROM ORIGINAL CIVIL.

The 15th September, 1890.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE PRINSEP, AND MR. JUSTICE PIGOT.

Dhanmull............Plaintiff

versus

Ram Chunder Ghose...........Defendant.*

Minor—Representations as to age known to be false—Liability in equity—Action on the contract—Action framed in tort—Costs—Statements as to existence of relationship—Evidence Act (I of 1872), section 32, sub-section (5).

Where an infant obtained a loan upon the representation (which he knew to be false) that he was of age: *Held*, that no suit to recover the money could be maintained against him, there being no obligation binding upon the [266] infant which could be enforced upon the contract either at law or in equity, but that the defendant should not be allowed costs in either Court.

Case in which the plaint in a former suit verified by a deceased member of the family, and as such having special means of knowledge, was held admissible under section 32 †

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* Original Civil Appeal No. 23 of 1890, against the decree of Mr. Justice NORRIS, dated the 9th of May 1890.

† [Sec. 32:—Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant,

* * * * *

(5) When the statement relates to the existence of any relationship between persons as to whose relationship the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.]

or relates to existence of relationship;

sub-section (5) of the Evidence Act (I of 1872), to prove the order in which certain persons were born and their ages.

THIS was a suit brought to recover the sum of Rs. 13,000, and interest due on a mortgage executed by the defendant on the 26th March 1886. The plaintiff alleged that the defendant at the time of execution represented himself to be of full age, and thereby induced the plaintiff to advance the mortgage money, and he contended that, in the event of the defendant establishing that he was a minor at the date of the mortgage, then his representations amounted to a fraud, and were wilfully made with a view to deceive the plaintiff, and that the plaintiff should in any event be held entitled to recover the money. The prayer of the plaint was for the usual mortgage decree and for a money decree. The defendant pleaded minority, and denied the alleged fraudulent representation.

The question of the defendant's age depended partly upon the statements of friends and relatives, and partly upon certain entries in a register of births kept under the system of registration in force in Calcutta (Bengal Act VI of 1863) at the time when the four youngest sons of Sumbo Nath Ghose, the defendant's father, were born. The names did not appear upon the register, so that it was not possible to ascertain from the register alone which of either of the entries had reference to the defendant.

It appeared from the entries that a son was born to Sumbo Nath Ghose on the 15th March 1886 [1868 ?], another on the 6th June 1868, another on the 29th September 1870, and another on the 31st May 1872. The defendant alleged that he was born on the 6th June 1868, and that the entry under that date referred to his birth. As the mortgage was executed on the 26th March 1886, the defendant, if he could establish that he was one of the four whose names were registered, was not of age when he signed the deed, as (a guardian of his person and property having been appointed) he did not attain his majority until the completion of his twenty-first year.

It was argued on behalf of the plaintiff that the name of the [267] defendant and that of either Ackhoy Coomar Ghose, or Dhurandhur Ghose, his brothers, must have been transposed for the purposes of this litigation ; but this theory was rebutted by the fact that in March 1879 a suit was brought on behalf of the defendant and the other sons of Sumbo Nath Ghose other than Dhurandhur, against Dhurandhur, in which they sued as infants by their next friend Nursing Chunder Bose to take the property of their father out of the hands of their elder brother, who had at that time attained his majority ; and afterwards Ackhoy Coomar Ghose, on the death of the guardian who had been appointed to bring the suit, was upon the report of the Registrar appointed guardian of his minor brothers, including the defendant. The statements in the plaint in this suit were tendered in evidence on the defendant's behalf under section 32, sub-section (5), of the Evidence Act (I of 1872).

The case was heard before Mr. Justice NORRIS who found that the plea of minority was proved, but that the defendant falsely pretended, and allowed other persons in his presence and on his behalf to state, to the plaintiff that he was of full age; that such statements were false to the knowledge of the defendant, and operated upon the plaintiff's mind, so as to induce him to advance the money. It was admitted at the Bar that if the plea of minority was established the plaintiff could not be entitled to a mortgage decree, but it was argued that if the case of false representations was made out, he was entitled to a money decree.

The learned Judge upon a full review of all the cases (*q. v. infra*) held that none of the cases cited went beyond supporting the limited liability which

attached to an infant who is guilty of fraud, viz., "that he may be compelled to make specific restitution, where that is possible, of anything he has obtained by deceit." (See Pollock on Torts, p. 48). In the present case the learned Judge found there was nothing to show that the defendant could make specific restitution, and dismissed the suit with costs.

The plaintiff appealed to the High Court.

Mr. *Woodroffe* and Mr. *T. A. Apcar* appeared for the Appellant

Mr. *Pugh*, Mr. *Evans* and Mr. *Garth* appeared for the Respondent.

[268] The following authorities were referred to in the arguments:—

Ex parte Unity Joint Stock Mutual Banking Association (3 De G. & J., 63), *Johnson* v. *Pie* (1 Sid., 258 : 1 Keb. 905, 913 : 1 Lev., 169), *Wright* v. *Leonard* [11 C. B. (N. S.), 258], *Bartlett* v. *Wells* (1 B. & S., 836), *Ex parte Jones* [L. R. 18 Ch. D., 109 (120)], *Stikeman* v. *Dawson* [1 De G. & Sm., 110 (113)], *Clarke* v. *Cobley* (2 Cox Eq. Ca., 173), *Nelson* v *Stocker* (4 De G. & J., 458), *Inman* v. *Inman* (L. R., 15 Eq., 260), *Lempriere* v. *Lange* (L. R., 12 Ch. D., 675), *Jennings* v. *Rundall* (8 T. R., 335), *Wright* v. *Snowe* (2 De G. & Sm., 321), Pollock on Torts, pp. 47, 48; Pollock on Contracts, Ed. 5, pp. 73 to 77.

On the question of evidence, *Bipin Behary Daw* v. *Sreedam Chunder Dey* (I.L.R., 13 Cal., 42), *Haines* v. *Guthrie* (L. R., 13 Q. B. D., 818), and the cases there cited; Evidence Act (I of 1872), section 32, sub-section (5), and section 115.

The following **judgments** were delivered by the Court (PETHERAM, C.J., and PRINSEP and PIGOT, JJ.):—

Petheram, C. J., (after stating the facts).—These facts, in my opinion, show beyond all question that the defendant was one of the four younger sons of Sumbo Nath, whose births were registered, and consequently that he must have been a minor when he signed the deed. But besides all this the plaint in the suit of 1879 was put in; that plaint was signed by Nursing Chunder Bose, the maternal grandfather of the defendant, a person who is since dead, and it is contended on behalf of the defendant that statements in it, as to the order in which Sumbo Nath's sons were born, and as to the dates of their births, are evidence under section 32, sub-section (5) of the Evidence Act, and that, if so, they are conclusive. It was contended on the part of the plaintiff on the authority of the English cases that, as the question at issue in this case did not relate to the existence of any relationship by blood, marriage, or adoption, the section did not apply, and the statements were excluded by the ordinary rules of evidence. I think that on this point the law in India under the Evidence Act is different from the law of England, and that the effect of the section **[269]** is to make a statement, made by such a person, relating to the existence of such relationship, admissible to prove the facts contained in the statement on any issue, and that the plaint was admissible here to prove the order in which the sons of Sumbo Nath were born, and their ages, and when admitted, it to my mind satisfactorily proves that the defendant was the son who was born on the 6th June 1868.

The remaining questions are, whether the advance was obtained by a fraudulent misrepresentation by the defendant as to his age, and, if so, what is its effect on his liability? There can, I think, be no doubt that the advance was obtained by an elaborate and cleverly concocted fraud. The defendant applied to the plaintiff to make him an advance, which the plaintiff agreed to do if he were satisfied that the defendant was of age. The defendant assured him that he was, gave him the date of his birth, and referred him to

Mr. *Pittar*, who, he said, had the documents necessary to prove the truth of his statements. The plaintiff saw Mr. *Pittar*, who showed him some documents, and in effect told him that he was himself satisfied by them that the defendant was of age, and that the plaintiff might safely advance the money. The statement as to the defendant's age was untrue, and some at least of the documents must have been forgeries, and this the defendant must have known.

The fact is that the plaintiff was induced to part with his money by a fraud to which the defendant was a party, and the question which now arises is whether such fraud prevents the defendant from successfully setting up the plea of infancy as a defence to the present action. In my opinion it does not. No case has been cited before us, nor are we aware of the existence of any, in which a person has been held personally liable to pay a debt contracted by him during his infancy, on the ground that he obtained the credit by fraudulent misrepresentations as to his age. The case which was most pressed upon us is that of *Ex parte Unity Joint Stock Mutual Banking Association* (3 De G. & J., 63). The head note correctly sums up the decision in that case as follows: Where an infant had obtained a loan, on a representation which he knew to be false that he was of age, held, that a proof for the loan was properly admitted in bankruptcy. The Lords Justices KNIGHT-[270] BRUCE and TURNER refused to expunge the proof, but except that they said that they were bound by authority they gave no reasons for their decision.

This was a proof in bankruptcy, and I am not aware of any case in which an action at law or suit in equity against the borrower has been held to be maintainable. On the other hand, there are numerous cases by which it appears that there is no obligation binding on the infant which can be enforced by action upon the contract either at law or in equity. *Johnson* v. *Pie* (1 Sid., 258: 1 Keb., 905, 913: 1 Lev., 169), *Wright* v. *Leonard* [11 C. B. (N. S.), 258]. *Bartlett* v. *Wells* (1 B. & S., 836), *Ex parte Jones* [L. R., 18 Ch. D., 109 (120)].

There appears then to be no authority for the proposition contended for by the plaintiff, and I agree with the learned Judge that on principle the suit must be dismissed. Inasmuch, however, as the loan was obtained by a misrepresentation by the defendant as to his age, I think the plaintiff was entitled to test the truth of his present assertion by suit and by this appeal, and that the decree should be so far varied that, although the suit will be dismissed, the defendant will not get costs in either Court.

Prinsep, J.—I am of the same opinion.

Pigot, J.—I fully agree with the conclusion at which the Chief Justice has arrived. I think it clearly established that the defendant was under age when he entered into this contract; that the evidence referred to by him was admissible on that point; and that the plaintiff was induced to enter into the contract with him by misrepresentation as to his age, deliberately and skilfully made by the defendant, with the aid of persons as skilful and unscrupulous as himself.

I think the suit must fail, quite apart from anything in the exact form of the plaint, and allowing it the most liberal construction. Assuming it to be framed in tort, "an infant," as Sir F. POLLOCK accurately says, "could not be made liable for what was in truth a breach of contract by framing the action *ex delicto*. 'You cannot convert a contract into a tort to enable you to sue an infant'" (Pollock on Torts, pp. 47, 48). *Stikeman* v. *Dawson* [1 De G. & Sm., 110 (113)], was very fully cited before us: what the Vice-Chancellor says there, p. 113, is no doubt in condemnation

[271] of the proposition, that a minor is, without any misrepresentation, in equity, answerable after his majority to a person who has contracted with him, having no notice that at the time of the contract he was a minor. But in dealing with this, he cites with complete approval the case of *Johnson* v. *Pie* (1 Sid., 258 : 1 Keb. 905, 913 : 1 Lev., 169). In that case " Winnington prayed judgment in an action upon the case on communication of lending £300, and that the defendant was therefore to mortgage certain lands ; and the defendant affirmed himself to be of full age, and so intending to deceive the plaintiff, and being in appearance a man, and avers he was twenty-and-a-half ; the defendant pleads not guilty, and there is a verdict for the plaintiff, Pasch, 16 Car., 2, Rot., 401. * * * * Keeling said, such torts that must punish an infant must be *vi et armis*, or notoriously against the public ; but here the plaintiff's own credulity hath betrayed him ; also by Windham, the commands of an infant are void ; and for such he shall never be attainted a disseisor, much less shall he be punished for a bare affirmation, which Twisden agreed, and that there must be a fact joined to it, as cheating with false dice, &c. Also by this means all the pleas of infancy would be taken away, for such affirmations are in every contract. The Court awarded on the plaintiff's prayer a *Nil capit per Billam*." 1 Keble, p. 913, as well as Siderfin.

I do not think that any of the equity cases cited apply to the present case, which is, in the most favourable view of it that can be taken for the plaintiff, an action of deceit ; precisely in truth the same case as *Johnson* v. *Pie* (1 Sid., 258 : 1 Keb. 905, 913 : 1 Lev., 169). No doubt an infant will not be allowed to take advantage of his own fraud, and may be compelled to make specific restitution, when that is possible, of anything he has obtained by deceit But this case does not come within either principle. If we as a Court of Equity, as well as of law, were to allow the plaintiff to recover in this suit, it would amount to restraining a defendant from setting up the plea of infancy in an action on a contract by reason of his having made a fraudulent misrepresentation *dans locum contractui* : and in no case has this ever been done.

Appeal dismissed.

Attorney for the Appellant : Mr. *H. C. Chick.*

Attorney for the Respondent : Babu *B. M. Dass.*

A. A. C.

NOTES.

[The minor is generally estopped by his fraudulent misrepresentations, (1898) 25 Cal., 371 : 2 C.W.N., 201 ; (1901) 29 Cal., 126 ; (1908) 31 All., 21, except when the validity of his contract is in question. In that case the contract is void by the Indian Contract Act, 1872, irrespective of these things :—**(1903) 30 Cal., 539**, on appeal from (1898) 26 Cal , 381.

See, however, 15 C.W.N., 239 13 C.L.J., 228 ; (1910) 9 I C., 124.

As regards admissibility under sec. 32, cl 5, of the Evidence Act, see also 8 O C., 94 ; 25 Mad., 183 ; 9 M.L.T., 220 ; 26 Cal., 236 ; (1910) 7 I.C , 218 (Cal.) : (1914) 20 C.L.J , 302.]

[272] PRIVY COUNCIL.

The 19th and 27th June, 1896.

PRESENT:

LORD WATSON, LORD HOBHOUSE, AND SIR R. COUCH.

Bengal Indigo Company............Defendants

versus

Roghobur Das............Plaintiff.

[On appeal from the High Court at Calcutta.]

Bengal Tenancy Act (VIII of 1885), section 5, sub-section 5, and section 25—Definition of raiyati holding—Lessees who are not raiyats within the Act—Zur-i-peshgi lease.

A tenant, holding under a lease assigned to him in 1890 by the original lessee, who since 1867 had continuously occupied the land under successive leases, claimed in virtue of the occupancy, for more than twelve years, to be a *raiyat* within the Bengal Tenancy Act, 1885, either with occupancy, or with non-occupancy, rights: *Held*, that this tenant's holding was excluded from the operation of that Act by the effect of section 5, sub-section 5, on account of the extent of the area of the land leased, which was more than one hundred standard *bighas*.

A *zur-i-peshgi* lease is not a mere contract for the cultivation of the land at a rent, but is a security to the tenant for his money advanced. Two of the leases were *zur-i-peshgi*, or made on money advanced by the lessee to the lessor. The tenant's possession in this case was in part at least that of a creditor operating payment to himself, and was no foundation for a claim for occupancy rights.

As to the effect of written stipulations contrary to the latter, section 7 of the Bengal Rent law, Act X of 1859, is superseded, if not wholly repealed, by section 178 of the Bengal Tenancy Act, 1885.

APPEAL from a decree (7th August 1894) of the High Court reversing a decree (31st October 1892) of the Second Subordinate Judge at Chapra in district Sarun.

On this appeal no facts were in dispute, and the questions raised were entirely of law, consisting principally of the following, viz., whether the appellants, the Bengal Indigo Company, proprietors of the Barouli Factory in the Sarun district, having obtained by assignment in 1890 leasehold lands, which had been occupied by their assignor for more than twelve years, had obtained the rights of a *raiyat* to the protection of their tenancy in virtue of Act VIII of 1885, the Bengal Tenancy Act. They claimed to be either as an occupancy *raiyat*, entitled to hold upon the [273] terms enacted therein or as a non-occupancy *raiyat*, to be entitled to six months' notice to quit.

The defendants took the lease then current, that of the 15th February 1881, by assignment from the original lessee on the 24th April 1890; and in the same year, the lease having terminated on the 27th October 1890, they received notice to quit from the plaintiff. The leases, under which the alleged twelve years' occupancy took place, were the following:—

In 1867, the then proprietors of the Barouli Indigo Factory, E. G. Williams and Abdul Gyas Khan, obtained a lease from the 14th September 1867 for five years of 105 *bighas* 1 *cottah*, at a rent of Rs. 577 per annum, for the cultivation of indigo. This was granted by Mohant Ramcharan Das,

the plaintiff's predecessor in the management of temple property. Both *pottah* and *kabuliyat* contained express agreements for the tenants giving up the land at the end of the term. In 1869 Abdul Gyas made over his interest in that lease to E. G. Williams.

In August 1872, Ramcharan Das executed to E. G. Williams a simple *ticca pottah* for ten years of 25 *bighas*, and on the 18th August 1872 the *mohant* executed to him a *zur-i-peshgi, ticca, patowa, pottah* for nine years of 240 *bighas* which included the 105 *bighas*, already leased, upon an advance by Williams of Rs. 4,500. The rent was Rs. 1,380 per annum, and the advance was to bear 6 annas interest a month, the balance being repayable by stipulated instalments. Both the *ticca pottah*, and the *zur-i-peshgi*, as well as the *kabuliyats* in both cases, contained express provisions for the land to be given up at the end of the terms. On the 15th February 1881, the plaintiff, who had succeeded as *mohant*, granted a *zur-i-peshgi, ticca, patowa, pottah* of the whole 265 *bighas* to Williams and Wilson, who then represented the indigo concern, in proportions according to their shares as partners, for nine years, upon an advance of Rs. 5,000. The rent was to be Rs. 1,523, out of which Rs. 550 yearly, and interest at 6 annas *per mensem*, was to be deducted in payment of the advance. Special provisions for surrender at the end of the term were in the *pottah* and in the *kabuliyat*.

On the 16th June 1890, notice, with fee, Rs. 33, was accepted by the plaintiff that the tenancy had been transferred to the defend-[274]ant-company, to whom, on the 9th October 1890, the plaintiff sent notice to quit, and deliver possession on the 28th of that month, in pursuance of the terms of the lease.

The appellants not having given up the land, the respondent brought this suit on the 18th February 1891. His plaint stated the lease of the 15th February 1881, and alleged its expiration on the 27th October 1890. The appellants having held over, the plaintiff claimed possession with mesne profits of the 265 *bighas*, valuing his claim at Rs. 23,905. The appellants stated in their answer that the last lease had been transferred to them, that they had been recognized as tenants, and submitted that E. G. Williams was, at the time of the transfer, a "settled *raiyat*," having acquired a right of occupancy in the 256 *bighas*, a right which was transferable by the custom of the district. The appellants were therefore entitled to a right of occupancy under the Bengal Tenancy Act, 1885. Even if not so entitled, they were, as they contended, non-occupancy *raiyats*, on whom notice of not less than six months should have been served, to bring the tenancy to an end.

The following sections of Act X of 1859, the Bengal Rent law, and of Act VIII of 1885, the Bengal Tenancy Act, were referred to in the case

Act X of 1859, section 6.—Every *ryot* who has cultivated or held land for a period of 12 years has a right of occupancy in the land so cultivated or held by him whether it be held under *pottah* or not, so long as he pays the rent payable on account of the same, but this rule does not apply to *khamar*, *neejjote*, or *seer* land belonging to the proprietor of the estate or tenure, and let by him on lease for a term or year by year, nor (as respects the actual cultivation) to lands sublet for a term, or year by year, by a *ryot* having a right of occupancy. The holding of the father, or other person from whom a *ryot* inherits, shall be deemed to be the holding of the *ryot* within the meaning of this section.

Section 7.—Nothing contained in the last preceding section shall be held to affect the terms of any written contract for the cultivation of land entered into between a landholder and a *ryot*, when it contains any express stipulation contrary thereto.

Act VIII of 1885, section 5 (2).—"*Raiyat*" means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his

family; or by hired servants, or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right.

Section 5, sub-section 4.—In determining whether a tenant is a tenure-[275]holder or a *raiyat* the Court shall have regard to (*a*) local custom, and (*b*) the purpose for which the right of tenancy was originally acquired. Sub-section 5 —where the area held by a tenant exceeds one hundred standard *bighas* the tenant shall be presumed to be a tenure holder until the contrary is shown.

Section 25.—An occupancy *raiyat* shall not be ejected by his landlord from his holding except in execution of a decree for ejectment passed on the ground (*a*) that he has used the land comprised in his holding in a manner which renders it unfit for the purposes of the tenancy, or (*b*) that he has broken a condition consistent with the provisions of this Act, and on breach of which he is, under the terms of a contract between himself and his landlord, liable to be ejected.

Section 45.—A suit for ejectment on the ground of the expiration of the term of a lease shall not be instituted against a non-occupancy *raiyat* unless notice to quit has been served on the *raiyat* not less than six months before the expiration of the term, and shall not be instituted after six months from the expiration of the term.

Section 178 (1).—Nothing in any contract between a landlord and a tenant made before or after the passing of this Act (*a*) shall bar in perpetuity the acquisition of an occupancy right in land, or (*b*) shall take away an occupancy right in existence at the date of the contract, or (*c*) shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of this Act.

(2)—Nothing in any contract made between a landlord and a tenant since the 15th day of July 1880 and before the passing of this Act shall prevent a *raiyat* from acquiring in accordance with this Act an occupancy right in land.

The following were the issues that raised the principal points :—

Whether under the terms of the two *ticca*, and the two *patowa* leases, dated, respectively, the 28th October 1867, the 17th August 1872, and the 15th February 1881, the defendant-company were bound to give up possession after the expiration of the last term.

Whether the defendants' vendor had acquired a right of occupancy, and whether the defendant-company stepped into that right by purchase.

Whether the notice served on the defendant-company was proper and sufficient.

The second Subordinate Judge made a decree dismissing the suit. In his judgment he gave his opinion that the *zur-i-peshgi* leases constituted *raiyati* holdings, and were not mortgages only; that by virtue of the twelve years' holding that had preceded the transfer to them, the defendant-company [276] had obtained an occupancy right of which it could only be deprived for the causes stated in section 25 of the Bengal Tenancy Act, 1885, and that the conditions for surrender were invalid under section 178 of the same Act. The Judge considered that, in any case, the notice to quit was insufficient under section 45 of that Act.

The plaintiff appealed to the High Court. A Division Bench (TREVELYAN and AMEER ALI, JJ.) allowed the appeal, and reversing the decision of the first Court decreed in the plaintiff's favour. Their judgment stated the above facts, and the opinion of the Subordinate Judge thereon, stating also the questions that had been argued on the appeal before them to be : (1) have the defendant-company obtained a right of occupancy in the land; (2) if they have not obtained such right of occupancy are they non-occupancy *raiyats* and entitled as such to the benefits of section 45 of the Bengal Tenancy Act, 1885? The High Court thought the case depended upon the construction of section 7 of Act X of 1859, and proceeded as follows :—

In a Full Bench case to which we have been referred, *Sheo Prokash Misser* v. *Ram Sahoy Singh* (8 B. L. R., 165), it was held that the mere fact that a *raiyat* held under written lease for a specified term of years, did not prevent his obtaining a right of occupancy in the land. In that case there was nothing more than a provision as to the term of the lease; there was not, as here, an express provision as to the tenant vacating the land at the expiration of his lease, and putting it into proper order. The provision that is made to cut down the *murhans* and their stumps which may be on the land at the expiration of the term, is inconsistent with its being contemplated that he was to hold over the term; so is also the provision that the landlord may, at the end of the term, uproot the stumps and settle the lands with other tenants. This is inconsistent with any right to retain possession of the land. Mr. Justice DWARKA NATH MITTER, in his judgment in the Full Bench case, says: "It is beyond all question, that if a *raiyat* possessing a right of occupancy enters into an express stipulation with his landlord to surrender the land on the expiration of a stated period of time, he would be bound, like any other individual, to fulfil the terms of his contract."

Throughout his judgment Mr. Justice MITTER assumes, that an express stipulation to vacate is an express stipulation within the meaning of section 7. On the first question we hold that the defendant-company has acquired no occupancy right. As to the second question, we think it is clear that there is not in this case a *raiyati* holding at all. The lease under which the tenant [277] was last holding, was a *zur-i-peshgi* lease. The main object of such a lease is to provide for the payment of the *zur-i-peshgi* money, and that was the purpose for which the right of tenancy under which the defendants claim to hold was originally acquired. It is true that their predecessors first held under a lease, that of 1867, which was by no means a simple *raiyati* lease, but one which provided in the alternative either for cultivation by the lessees or for their letting out the land to other tenants. That lease, however, has ceased to have any effect. There has been a new and very different contract between the parties, and it is really to that contract that we must look. We know of no case where it has been held that the *zur-i-peshgidar* has been treated as a *raiyat*, and it would certainly be very hard upon the landlord if he should be so treated, as the landlord would be compelled, after the expiration of the term, to continue the tenancy at a rent instead of being able to get a new advance from some one else. The deeds of 1872 and 1881, though called leases, are ordinary *patowa* mortgages common in Behar, with the usual provision about the satisfaction of the money lent, which was clearly advanced on the security of the lands. The mere fact that the mortgagees would or could cultivate the lands with indigo or any other crop, cannot possibly affect the contract or convert the status of mortgagee into that of a *raiyat*. Certainly this is a novel case; a Limited Company claiming to be not only a settled *raiyat*, but to have occupancy rights. It is not necessary for us to decide any question as to whether *raiyati* rights can be acquired by a Limited Company. It is sufficient to say that the deed under which they are holding does not create any *raiyati* rights, and therefore is no answer to this suit. The plaintiff is entitled to a decree in terms of the prayer of the plaint. The amount of mesne profits must be ascertained by the lower Court. The plaintiff is entitled also to his costs of this suit in the Court below, and of this appeal.

The defendants having appealed,

Mr. *J. H. A. Branson*, and Mr. *Philip L. Buckland*, appeared for the Appellant-company.

Mr. *J. D. Mayne* for the Respondent.

For the appellants it was argued that it should have been decided in the Courts below that under the leases of 1867, 1872, and 1881, and with reference to the possession held continuously for cultivation since the first lease was granted, the right of occupancy had been acquired by the defendant-company. Section 178 of Act VIII of 1885 had not been referred to in the judgment of the High Court, which had been based on section 7 of Act X of 1859. There had been also an omission to notice that the lease of the 15th February 1881 was made at a date after the 15th July 1880, and before the passing of the

Act in 1885, a period referred to in sub-section 2 of section 178 of that Act. It was contended [278] that the leases were only leases, and in no sense mortgages. The Full Bench case, referred to in the judgment of the High Court, *Sheo Prokash Misser* v. *Ram Sahoy Singh* (8 B. L. R., 165), showed that the mere taking a lease did not amount to the express stipulation which the Bengal Tenancy Act, 1885, no less than Act X of 1859, required; if the acquirement of the right of occupancy, by continuous cultivation of one holding for the prescribed period, was to be prevented by the relation of contract between landlord and tenant existing for another purpose besides cultivation only. The payment of money in advance was only a mode of paying the rent. In any view of the appellants' rights, they were not liable to be evicted without the respondent's having given six months' notice of his intention to enforce the agreement to quit and deliver possession.

Counsel for the Respondent was not called upon.

Their Lordships' **judgment** was, afterwards, on the 27th June, delivered by

Lord Watson, J.—The appellant-company are owners of the Barouli Indigo Factory, which they acquired in April 1890. The respondent is proprietor of the entire 16 annas of Mehal Barouli, portions of which were occupied by the owners of the Factory, from the 14th September 1867, until September 1890, under a series of leases from the respondent and his predecessors. These were, (1) a *ticca pottah* of 105 *bighas* 1 *cottah* and 8 *dhoors*, for five years ending in September 1872: (2) a *peshgi patowa ticca*, for nine years ending in September 1881, of the 105 *bighas* 1 *cottah* and 8 *dhoors* included in the preceding lease, together with additional land bringing up the total area to 240 *bighas*; (3) a *ticca pottah*, of same date with the last, of 25 *bighas* for ten years ending in September 1882; and (4) a *zur-i-peshgi ticca patowa pottah*, of the whole 265 *bighas* included in the two previous leases, for an additional term ending in October 1890.

The first and third of these documents were in the ordinary terms of a lease for cultivation.

The second and the fourth of them had this peculiarity, that at their commencement, the tenants advanced to the lessor a lump sum, in the one case of Rs. 4,500 and in the other of Rs. 5,000, [279] for the liquidation of debts due to his creditors, the tenants being entitled to recover payment by retaining out of the rents payable by them, a yearly instalment of the sum advanced, with interest at the rate of six annas *per mensem*. The lands were cultivated for the purpose of growing indigo and the leases contained an express obligation by the tenants to quit occupation at their expiry.

On the 9th October 1890, the last of these leases having expired, the respondent served the appellants with a notice requiring them to remove from possession, and intimating that in the event of their failure to do so, a regular suit would be instituted. The notice having been disregarded, the present suit was brought by the respondent in February 1891, before the District Court of Sarun (1) for a declaration that the appellants had no right to retain possession, (2) to have exclusive possession decreed to the respondent, and (3) for mesne profits. In their written statement, the appellants pleaded that they and their predecessors in the Factory had acquired a permanent right as occupancy *raiyats*; and, alternatively, that, as non-occupancy *raiyats*, they were not liable to be ejected, except upon the terms and conditions specified in section 25 of the Bengal Tenancy Act, 1885 (Act VIII of 1885).

The Subordinate Judge gave effect to the leading plea of the appellants, and dismissed the suit with costs. On appeal to the High Court, his decision was reversed by TREVELYAN and AMEER ALI, JJ., who held, that the second and

fourth of the leases abovementioned did not create a proper right of occupancy for purposes of cultivation, and could not be made the foundation of a claim to *raiyat* occupancy. They further held that the appellants' defence was excluded by section 7 of Act X of 1859, which enacts that the provisions of the Statute "shall not be held to affect the terms of any written contract for the cultivation of land entered into between a landholder and a *ryot*, when it contains any express stipulation contrary thereto."

Their Lordships see no reason to differ from the views expressed by the learned Judges of the High Court, to the effect that the leases in question were not mere contracts for the cultivation of the land let; but that they were also intended to constitute, and did constitute, real and valid security to the **[280]** tenant for the principal sums which he had advanced, and interest thereon. The tenants' possession under them was, in part at least, not that of cultivators only, but that of creditors operating repayment of the debt due to them, by means of their security. Their Lordships cannot concur in the judgment of the High Court, in so far as it is founded upon section 7 of the Act of 1859, because that clause is superseded, if not wholly repealed, by section 178 of Act VIII of 1885, which does not appear to have been referred to in the argument addressed to the Court.

It is unnecessary to notice further the reasoning which prevailed in either of the Courts below, because it entirely ignores the statutory definition of the word "*raiyat*," contained in section 5, sub-section 5 of the Act of 1885. It is in these terms,—"Where the area held by a tenant exceeds one hundred standard *bighas*, the tenant shall be presumed to be a tenure-holder until the contrary is shown." That enactment is conclusive of the present case. The land held in tenancy by the owners of the Barouli Indigo Factory, under the respondent and his predecessors in title, has from the first been in excess, and since 1872, largely in excess, of the statutory limit. The appellants are, therefore, not *raiyats*, either "occupancy" or "non-occupancy," within the meaning of the Act of 1885; and their defence to this suit is groundless.

Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from. The appellants must pay to the respondent his costs of this appeal.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Sanderson, Holland, Adkin & Co.*

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[See also (1898) 2 C.W.N., 758, (1905) 10 C.W.N., 351, (1913) 20 I.C., 781 (Cal.), where the principles relating to the nature of *juri pesqce* rights were applied.]

[281] APPELLATE CIVIL.

The 22nd December, 1896.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Sitab Chand Nahar............Plaintiff

versus

Hyder Malla and others............Defendants.*

Limitation Act (XV of 1877), Sch. II, Art. 132—Suit for money due on mortgage bond—Money payable by instalments—Default in payment of instalment—Right to sue for entire amount due on default of payment of any instalment.

Where, by a mortgage bond (hypothecating immoveable property) executed by the defendants, a sum of money was made payable by four instalments, the plaintiff to be at liberty in case of any default to sue either for the amount of that instalment or for the whole amount due on the bond: *Held*, that limitation ran from the date of the first default.

THE plaintiff brought this suit against the defendants to recover money due on a mortgage bond payable by instalments. The bond was executed on the 10th Bysack 1288 (21st April 1881). The loan was made repayable in four instalments, and it was stipulated that on default of payment of any instalment the plaintiff might, at his option, sue either for the amount due on that instalment or for the whole amount due on the bond. The suit was instituted on the 29th Chaitro 1300 (11th April 1894), more than twelve years after the first two instalments became due, but less than twelve years after the last two instalments became due. The defendants contended that as the first instalment was not paid the whole amount secured by the bond became due from the date of that default, and hence the plaintiff's whole claim was barred by limitation. The Court of First Instance gave the plaintiff a decree for the amount of the third and fourth instalments. Both parties appealed to the Judge of Dinajpur, who held that the suit was barred by limitation, and dismissed the plaintiff's appeal.

The plaintiff appealed to the High Court.

Babu *Kali Kissen Sen* and Babu *Kishori Lal* for the Appellant.

[282] Babu *Mohini Mohun Chuckravarti* for the Respondents.

The **judgment** of the High Court (**Banerjee** and **Rampini, JJ.**) was as follows:—

This appeal arises out of a suit brought by the plaintiff-appellant to recover money due on a mortgage bond payable by instalments. The plaintiff alleged that the defendants had after repeated demands paid two small sums, and the suit was for the balance that remained unpaid. The defence in substance was that the suit was barred by limitation, that the terms of the mortgage bond had been subsequently modified by a verbal contract, and that the defendants having performed their part of that contract, the bond was satisfied.

The first Court found that the part payments alleged in the plaint were not proved, that all the instalments under the bond except the last two were in consequence barred by limitation, and that the subsequent oral contract set up was not established; and it accordingly decreed the suit in part.

* Appeal from Appellate Decree No. 1780 of 1895, against the decree of R. R. Pope, Esq., District Judge of Dinajpur, dated the 28th of June 1895, reversing the decree of Babu Debendranath Roy, Munsif of that District, dated the 18th of March 1895.

On appeal the Lower Appellate Court has dismissed the whole suit on the ground that it is barred by limitation.

In second appeal it is contended that the Lower Appellate Court is wrong in law in dismissing the whole suit on the ground of limitation, when it ought to have affirmed the decree of the first Court.

The suit being one for the recovery of money due on a mortgage bond by the sale of the mortgaged property, the provision of the Limitation Act applicable to it is art. 132, Sch. II; (See *Ram Din* v. *Kalka Prasad* (I. L. R., 7 All., 502), *Miller* v. *Runga Nath Moulick* (I.L.R., 12 Cal., 389) and *Girwar Singh* v. *Thakur Narain Singh* (I. L. R., 14 Cal., 731). The period of limitation under that article is twelve years, and it runs from the time when the money becomes due; and the question is when did the money sued for become due. The mortgage bond stipulates that the money borrowed shall be paid by certain instalments, and that upon default in the payment of any one instalment the mortgagee may at his pleasure sue either for that instalment or for the whole of the money [283] then remaining unpaid. And it is admitted on both sides that upon the facts found, the claim for all the instalments except the last two is barred upon any view of the case, but that the claim for the last two instalments would or would not be barred according as it is held that time runs from the date of the first default or from the due dates of those two instalments. The contention on behalf of the appellant is that the two instalments became due within the meaning of article 132 on their respective due dates; while on the other side, it is urged that the money became due as soon as the first default was made. The learned Vakil for the appellant, in support of his contention, cites *Shankar Prasad* v. *Jalpa Prasad* (I. L. R., 16 All., 371), and *Hanmantram Sadhuram* v. *Bowles* (I. L. R., 8 Bom., 561), and for the respondents the cases of *Juggut Mohinee Dossee* v. *Monohur Koonwar* (25 W.R., 278), *Nobodip Chunder Shaha* v. *Ramkrishna Roy Chowdhry* (I. L. R., 14 Cal., 397), *Bir Narain Panda* v. *Darpa Narain Prodhan* (I. L. R., 20 Cal., 74), *Mon Mohun Roy* v. *Durga Charan Gooce* (I. L. R., 15 Cal., 502), *Ram Pulpo Bhattacharji* v. *Ram Chunder Shome* (I. L. R., 14 Cal., 352), *Hurri Pershad Chowdhry* v. *Nasib Singh* (I. L. R., 21 Cal., 542) and *Ragho Govind Paranjpe* v. *Dip Chand* (I. L. R., 4 Bom., 96) are relied on.

The cases cited are all distinguishable from the present, though certain general principles, either expressly enunciated or impliedly relied on in some of them, clearly bear upon the question now before us.

The first case cited for the appellant, *Shankar Prasad* v. *Jalpa Prasad* (I.L. R., 16 All., 371) is not one relating to the construction of article 132 of Schedule II of the Limitation Act. The question there was whether, where a decree for money is payable by instalments with a provision that upon default in the payment of any instalment the decree-holder may, if he wishes, execute the decree for the whole sum remaining unpaid, limitation runs in respect of each instalment from its due date, notwithstanding that the whole amount covered by the decree became realisable at the decree holder's option at an earlier date by reason of the judgment-debtor's default; and the learned Judges of the Allahabad High [284] Court answered that question in the affirmative. The case evidently was one under clause (*b*) of article 179, Schedule II of the Limitation Act, and the effect of the decision is that the 'certain date' referred to in that clause was the due date for each instalment, notwithstanding that it might have been claimed as realisable at an earlier date. The principle underlying the decision no doubt appears at first sight to lend some support to the appellant's contention that the money sued for became due gradually at the

dates of the successive instalments, notwithstanding that the plaintiff had the option of claiming it as having become due at an earlier date; but we are unable to follow this decision, because it is in conflict with the decisions of our own Court in *Bir Narain Panda* v. *Darpa Narain Prodhan* (I. L. R., 20 Cal., 74) and *Hurri Pershad Chowdhry* v. *Nasib Singh* (I. L. R., 21 Cal., 542) cited for the respondents, and also because we find it difficult to understand how money, which, though made payable by instalments, becomes realisable at once upon default in the payment of any instalment, can be said not to have been directed to be paid on the date of such default so as to make limitation run from that date under clause (*b*) of article 179 merely because it was optional with the creditor to enforce the condition for immediate payment, when there is nothing to show that the optional right had been waived. Where there is an optional right given to enforce payment of money, such right may be waived; but when it is not waived, or when there is nothing to shew that it has been waived, limitation would run from the date when the right accrues. This is what this Court held in *Bir Narain Panda* v. *Darpa Narain Prodhan* (I. L. R., 20 Cal., 74), and not, as the judgment in *Shankar Prasad* v. *Jalpa Prasad* puts it, "that the decree-holder on the happening of a default was bound to execute the decree once and for all."

The second case cited for the appellant *Hanmantram Sadhuram* v. *Bowles* (I. L. R., 8 Bom., 561) goes against him rather than in his favour. The learned Judge who decided that case accepted as correct the observation of Lord DENMAN, Chief Justice, in *Hemp* v. *Garland* (4 Q. B., 519) "that if he (the plaintiff) chose to wait till all [285] the instalments become due no doubt he might do so, but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time the plaintiff had a right to maintain it," and the only ground upon which he held that the suit was not barred was that the language of the bond shewed that in case of default in payment of one instalment the whole amount should become due only if a demand for such amount was made, and the suit was brought within the time allowed by law from the date of the demand.

In the case of *Juggut Mohinee Dossee* v. *Monohur Koonwar* (25 W. R., 278) cited for the respondents, MITTER, J., observed that the principle indicated in article 75 of the second Schedule of Act IX of 1871 might be adopted in determining "when the money sued for becomes due" within the meaning of article 132; but the learned Judge himself added that it was not necessary to express any decided opinion upon the point.

The other cases cited by the learned Vakil for the respondents relate either to execution of decrees for moneys payable by instalments, or to suits on instalment bonds in which the provision for the payment of the whole upon default in the payment of an instalment is an unqualified one, and is not left to be enforced at the option of the creditor, and they do not, after what has been said above, require any detailed examination.

Confining our attention then to the question for determination in this case, namely, when did the money sued for become due within the meaning of article 132 of Schedule II of the Limitation Act, and bearing in mind that while there is no case directly in point, the balance of authority in this Court upon analogous questions relating to execution of decrees for money payable by instalments, preponderates in favour of the respondents' contention, we think we must hold that the decree passed by the Lower Appellate Court dismissing the whole suit is right. The money sued for became due according to the terms of the bond when the first default in the payment of an instalment

was made, and it became due none the less because the right to enforce immediate payment was optional with the creditor. The right might have been waived if **[286]** the creditor chose to do so ; but he did not waive it in this case ; and there is no question of waiver raised here.

It was argued for the appellant that when it was left to the option of the creditor to enforce the provision for immediate payment of the whole, the presumption should be that the right to enforce such payment was waived until the contrary was shewn. The answer to this is that the provision being for the benefit of the creditor, the natural presumption is that the right created by it was not waived by him unless the contrary was proved. To use the words of Lord Denman in *Hemp* v. *Garland* (4 Q. B., 519) the defendant "might well consider the action as accruing from the time the plaintiff had a right to maintain it." We may add that the rule laid down in *Hemp* v. *Garland* that limitation ran from the date of the first default, notwithstanding that it was optional with the creditor to enforce payment of the whole upon such default, has been followed by the Court of Appeal recently in the case of *Reeves* v. *Butcher* (L. R., 1891, 2 Q. B., 509).

For the foregoing reasons we are of opinion that the suit has been rightly dismissed by the Lower Appellate Court, and that this appeal should be dismissed with costs.

F. K. D. *Appeal dismissed.*

NOTES.

[See (1902) 27 Bom., 1, F.B., where the principles are fully discussed. See also 31 Cal., 83 ; 31 Cal., 297 ; (1902) P.R , 100 ; (1908) 1 S.L.R., 252 ; (1901) 6 C.W.N., 348 ; (1909) 36 Cal., 394 : 9 C.L.J., 226 ; 13 C.W.N., 1004 ; (1912) 14 I.C., 685 (Nagpur).]

[24 Cal 286]

CRIMINAL REVISION.

The 8th January, 1897.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Komal Chandra Pal............Accused

versus

Gour Chand Audhikari.......... Complainant.*

Complaint—Dismissal of complaint—Revival of proceedings—Criminal Procedure Code (Act X of 1882), sections 202, 203, 437—Final disposal of case—Want of jurisdiction—Conviction.

Where an original complaint is dismissed under section 203† of the Criminal Procedure Code, a fresh complaint on the same facts before the same Magistrate cannot be entertained, so long as the order of dismissal is not set aside by a competent authority. *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (I. L. R. 23 Cal., 983), followed.

ON 25th May 1896 the complainant Gour Chand Audhikari filed **[287]** a petition under section 426 of the Penal Code in the Court of the Sub-Divisional

* Criminal Revision No. 716 of 1896, against an order passed by the Sub-Divisional Magistrate of Busirhat, dated 15th August 1896.

† [Sec. 203 :—The Magistrate before whom a complaint is made or to whom it has been transferred may dismiss the complaint if, after examining the complainant and considering the result of the investigation (if any) made under s. 202, there is in his judgment no sufficient ground for proceeding.]

Dismissal of complaint.

Magistrate of Busirhat, alleging that the accused had cut down and removed a *gab* tree standing on the complainant's land, and had thereby committed mischief. The Sub-Divisional Magistrate of Busirhat, after examining the complainant, directed an investigation to be made by the *punchayet* under section 202 of the Code of Criminal Procedure. After the investigation had been made, the Magistrate considered the result of it and dismissed the complaint under section 203 of the Code of Criminal Procedure, being of opinion that the case was on the facts one of a civil nature. On the 15th August 1896 the complainant, Gour Chand Audhikari, filed in the same Magistrate's Court a fresh petition of complaint against the accused, Kamal Chandra Pal, relying on the same facts. The Magistrate thereupon revived the proceedings, and after taking evidence in the case convicted the accused of theft under section 379 of the Penal Code, and sentenced him to pay a fine of Rs. 50, or in default to undergo two months' rigorous imprisonment.

The accused on 4th December 1896 moved the High Court, and a rule was granted calling upon the Magistrate to show cause why the conviction and sentence should not be set aside, on the ground that it was bad in law, inasmuch as the Magistrate had no jurisdiction to revive the proceedings without an order by a competent authority under section 437 of the Code of Criminal Procedure.

Babu *Narendra Chundra Bose*, (with him Babu *Upendra Chundra Bose* and Babu *Surendra Chundra Bose*), in support of the rule.—The Magistrate had no jurisdiction to revive the proceedings upon a complaint on the same facts, so long as the order of dismissal is not set aside by a competent authority under section 437 of the Code of Criminal Procedure. As he has done so without such order the conviction is bad in law, and ought to be set aside. *Nilratan Sen* v *Jogesh Chundra Bhuttacharjee* (I. L. R., 23 Cal, 983). Under section 437 the High Court and the Court of Sessions can only order further enquiry into a complaint which has been dismissed under section 203 of the Code of Criminal Procedure. The case of *Queen-Empress* v. *Puran* (I. L. R., 9 All., 85) is not in point, and was distinguished in the case of *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (I. L. R , 23 Cal., 983).

[288] No one appeared to show cause.

The **judgment** of the High Court (**Ghose** and **Gordon, JJ.**) was as follows : —

We think that this rule must be made absolute. In doing so, we need only refer to the case of *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (I. L. R., 23 Cal., 983), in which a view, contrary to that which has been taken by the Magistrate, was adopted by this Court. The order reviving the complaint and the subsequent proceedings will be set aside, and the fine imposed upon the petitioner, if realized, will be refunded.

C. E. G.

NOTES.

[This view is not now followed :—28 Cal., 211 ; 28 Cal., 652 F.B. ; 29 Cal., 726 F.B. ; 36 Cal., 415 ; 16 C.W.N., 988 ; though it was followed in 2 C.W.N., 290 ; 4 C.W.N., 46 ; 24 Cal., 528 ;

As regards Allahabad, see 22 All., 106; 29 All., 7.

The later view of the Calcutta High Court is in accordance with the views of the other High Courts :—22 Bom., 711 ; 27 Bom., 84 ; 9 Bom. L.R., 250 ; 31 Mad., 543 ; 29 Mad., 126 F.B. (see also 28 Mad., 310 : 255 ; 24 Mad., 337) ; (1911) P.R., 10 F.B.]

[24 Cal. 288]

The 12th January, 1897.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Gopal Lall Seal............Complainant

versus

Manick Lall Seal............Accused.*

Witness—Cross-examination of witness called by the Court—Evidence Act (I of 1872), section 165—Criminal Procedure Code (Act X of 1882), section 540.

Where in the course of a criminal proceeding a Magistrate himself summoned a witness and examined her under section 165 of the Evidence Act, but refused to allow the attorney who appeared for the complainant to cross-examine the witness:

Held, that the Magistrate was wrong in not allowing the complainant's attorney to cross-examine the witness when she was summoned.

Held, also, that there is nothing in section 165 debarring or disqualifying a party to a proceeding for cross-examining any witness summoned by the Court.

THE complainant in this case instituted in July 1896 criminal proceedings before the Chief Presidency Magistrate in the Town of Calcutta against his father-in-law, alleging that he had committed criminal breach of trust, and criminal misappropriation of certain ornaments entrusted to him on 2nd May 1896. The ornaments were borrowed by the accused for use by the female members of his family at a certain ceremony; he undertaking to return them within five or six days. This he did not do. In the course [289] of the hearing at the close of the complainant's cross-examination it was arranged that the accused should produce the ornaments, which was done by the daughter of the accused, who was the wife of the complainant, on 19th September 1896. On comparing the ornaments produced with those enumerated in a list belonging to the complainant, the attorney for the complainant stated that items 1, 2 and 9 were not those which had been originally made over to the accused. On this statement being made, the Chief Presidency Magistrate called Nayanmunjari Dossee, the daughter of the accused, who was also the wife of the complainant, and who had produced the ornaments, into the box and himself examined her as a witness, under section 165 of the Evidence Act (I of 1872).

She thereupon gave evidence to the Court to the effect that all the ornaments produced were those made over to her in May last, with the exception of items 6 and 10 which her husband, the complainant, had himself taken away from her about two months previous. The attorney for the complainant, at the close of the examination of Nayanmunjari Dossee by the Court, expressed a desire to cross-examine her on behalf of the complainant, but this was strenuously opposed by Counsel for the accused, and the Court declined to allow him to do so.

The Magistrate in his judgment stated that the case depended on the identity of the ornaments with those set out in the list produced, and that he was not at all prepared to hold that there was sufficiently conclusive evidence that they were not the ornaments referred to in the list produced, or that any case of dishonest misappropriation or conversion had been made out with regard to these items.

He thereupon discharged the accused.

* Criminal Revision No. 769 of 1896 made against the order passed by T. A. Pearson, Esq., Chief Presidency Magistrate of Calcutta, dated 25th September 1896.

The complainant on the ground, amongst others, that his case had been prejudiced by the action of the Chief Presidency Magistrate in not allowing his attorney to cross-examine the witness summoned by the Court under section 165 of the Evidence Act (I of 1872), moved the High Court for a rule calling upon the Chief Presidency Magistrate to shew cause why a further inquiry should not be directed in this case, **[290]** and the records be sent for. On 12th January 1897 this rule came on for hearing.

Mr. *Jackson* (Mr. *P. L. Roy* and Mr. *Farr* with him) in support of the rule.—The Magistrate was in error in refusing to allow the complainant's attorney to cross-examine the witness Nayanmunjari Dossee, who was summoned and examined as a witness by the Court. There is nothing in section 165 of the Evidence Act (I of 1872), which forbids a party to a criminal proceeding cross-examining a witness summoned by the Court. *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi* [3 B. L R., A. C., 145 (158)]. *The Empress* v. *Grish Chunder Talukdar* (I. L. R., 5 Cal., 614). We were prejudiced thereby.

The following **judgment** was delivered by the High Court (**Ghose** and **Gordon, JJ.**):--

No cause has been shewn against this rule; but the Magistrate has submitted an explanation which we have considered. We think that under the circumstances disclosed in the affidavit, and to a great extent admitted by the Magistrate, the order of discharge ought to be set aside.

We desire to say at the same time that the Magistrate was wrong in not allowing the petitioner to cross-examine Nayanmunjari, when she was in the box. There is nothing in section 165 of the Evidence Act debarring or disqualifying a party to a proceeding from cross-examining any witness called by the Court. All that section 165 says is that a party to a proceeding should not be allowed to cross-examine a witness upon an answer given by him to a question put by the Court without the permission of such Court. In this connection, we need only direct the attention of the Magistrate to the cases of *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi* [3 B. L. R., A. C., 145 (158)], and *The Empress* v. *Grish Chunder Talukdar* (I. L. R., 5 Cal., 614).

The rule will therefore be made absolute on these terms.

C. E. G. *Rule made absolute.*

NOTES.

[See 29 Cal., 387; 35 Cal., 243.]

[291] APPELLATE CIVIL.

The 7th September, 1896.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Surno Moyee Debi............Auction-Purchaser

versus

Dakhina Ranjan Sanyal (Judgment-debtor) and another.........Decree-holder.*

Sale in execution of decree—Setting aside sale—Material irregularity—Code of Civil Procedure (Act XIV of 1882), sections 291, 311—Evidence.

Where a debtor's property under attachment had been ordered to be sold at a fixed date, after the disposal of a certain claim thereto made under section 278 of the Code of Civil Procedure, but no hour had been fixed for the sale as required by section 291, and the property was sold at a very inadequate price by reason of the paucity of bidders,

Held, affirming the decision of the Subordinate Judge, that there had been material irregularity causing substantial injury to the debtor; and that it is sufficient under section 311† of the Code, if the evidence, though not "direct evidence," shows that the injury was a necessary result of the irregularity complained of.

Tassaduk Rasul Khan v. *Ahmed Husain* (I. L. R. 21 Cal., 66 L. R., 20 I. A., 176) explained.

ON the 19th August 1893 the respondent's property was attached under an order of that date, and on the 9th September 1893 a sale proclamation was issued fixing the 20th November for the sale. On the 27th September a claim to the property was made under section 278 of the Civil Procedure Code, and the 11th November was fixed for the hearing, which, however, was postponed to the 25th November. On the 20th November, the Subordinate Judge adjourned the sale to the 25th, and ordered the property to be sold on that date after the disposal of the claim The hearing was again postponed to the 27th. The property was put up for sale on the 25th, but no bidders attended. On the 27th November the claim was rejected, and the property was sold for Rs. 200 to the appellant, who was one of only three bidders. The respondent then applied for an order setting aside the sale on the ground of material irregularity causing him [292] substantial injury; and the Subordinate Judge made the order asked for. The purchaser appealed.

Babu *Saroda Churn Mitter*, for the Appellant.

The Advocate-General (Sir *Charles Paul*), Babu *Srinath Das*, and Babu *Bidhu Bhusan Gangooly*, for the Respondents.

The **judgment** of the Court (**Ghose** and **Gordon, JJ.**) was as follows:—

This is an appeal by the auction-purchaser from an order of the Subordinate Judge of Pabna and Bogra setting aside, under section 311 of the Code of

* Appeal from Order No. 285 of 1894, against the order of Babu Srinath Pal, Officiating Subordinate Judge of Zillah Pabna, dated the 30th of April 1894.

Application to set aside sale of land on ground of irregularity.

† [Sec. 311:—The decree-holder, or any person whose immoveable property has been sold under this chapter, may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it;

but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.]

Civil Procedure, a sale of certain property on the ground of material irregularities in publishing and conducting it, by reason of which the judgment-debtors have sustained substantial injury.

The facts are shortly as follows: The property in question was attached by an order of the 19th August 1893, and on the 9th September following a proclamation of sale was issued fixing the 20th November for the sale. Meantime, on the 27th September 1893, Giribala, a step sister of one of the judgment-debtors, preferred a claim to the property under section 278 of the Civil Procedure Code, and the 11th November was fixed for hearing the same. On that date, the hearing was postponed to the 25th November, and as the property could not be sold until the disposal of the claim case, the Subordinate Judge on the 20th November adjourned the sale to the 25th and ordered the property to be sold on that date after the disposal of the claim case. On the 25th November, the claim case was again postponed to the 27th, and notwithstanding this, the property was put up for sale on the 25th, but on the report of the Nazir that no intending purchasers were present the sale was also postponed to the 27th. On that date, the claim of Giribala was rejected, and the property was then sold for Rs. 200 to Nityanand Sarkar, am-mukhtear on behalf of Surno Moyee Debi, the present appellant.

On these facts, which are fully established by the evidence, the Subordinate Judge has held, and we think rightly held, that there were material irregularities in connection with the sale. Both on the 20th November, when the sale was postponed to the 25th,[293] and on the 25th when it was again postponed to the 27th, no hour was fixed for the sale as required by section 291 of the Civil Procedure Code, and the order passed on each date that the sale would take place after the disposal of the claim case was of such a vague and indefinite character that intending bidders could not possibly have known when and at what time the sale would actually take place, and consequently there were no bidders present on the 25th November, and there were only three bidders on the 27th. The property was then sold for Rs. 200, whereas the evidence of one of the decree-holder's witnesses, Koilash Ghose, shows that a smaller share of 16¼ gds. had been previously sold for Rs. 4,000. The Subordinate Judge has accordingly found that the judgment-debtor has sustained substantial injury by the low price which the property fetched, and he thinks that this was no doubt due to the irregularities we have referred to, and in this view he has set aside the sale. Before us, the learned Vakil for the appellant has contended that inasmuch as there is no *direct* evidence connecting the material irregularities with the injury as cause and effect, the Subordinate Judge was wrong in setting aside the sale; and in support of this contention he has relied on the case of *Tassaduk Rasul Khan* v. *Ahmad Husain* (I. L. R., 21 Cal., 66: L. R., 20 I. A., 176) which is the latest authority bearing upon this particular subject. He has also referred to the following cases: *Macnaghten* v. *Mahabir Pershad Singh* (I. L. R., 9 Cal., 656: L. R., 10 I. A., 25); *Arunachellam Chetti* v. *Arunachellam Chetti* (I. L. R., 12 Mad., 19: L. R., 15 I. A., 171); *Gur Buksh Lall* v. *Jawahir Singh* (I. L. R., 20 Cal., 599): and *Jagan Nath* v. *Makund Prasad* (I. L. R., 18 All., 37).

The case of *Tassaduk Rasul Khan* (I. L. R., 21 Cal., 66: L. R., 20 I. A., 176) is a decision of the Privy Council on appeal from the Court of the Judicial Commissioner of Oudh. The Judicial Commissioner set aside the sale on the ground that it was a nullity, because the provisions of section 290 of the Civil Procedure Code had not been obeyed. He was further of opinion that, to set aside a sale under such circumstances, it was not necessary for the objectors to prove substantial injury, but that substantial injury might be [294] inferred to have resulted, as the law had not been complied with. Their

Lordships of the Privy Council in reversing the order of the Judicial Commissioner observed as follows: "It was contended on the part of the respondents that the non-compliance with the interval of thirty days between proclamation and sale made the sale a nullity. Their Lordships cannot accede to that contention. The proceeding in this case was brought by the respondents under section 311, which deals with material irregularity. The non-compliance with the provisions for posting was a material irregularity. But in the cases of *Macnaghten* v. *Mahabir Pershad Singh*, and *Arunachellam Chetti* v. *Arunachellam Chetti* it was held that in all cases of irregularity under section 311 evidence must be given of substantial injury having resulted. In the present case, the decree-holder failed to comply with the full requirements of section 290, but both on principle and authority their Lordships are of opinion that the case must be treated, as the respondents themselves treated it, as one of material irregularity to be redressed pursuant to the provisions of section 311, and in the application of that section it was incumbent on the respondents to have proved that they sustained substantial injury by reason of such irregularity. They gave no such evidence, and it would be extremely improbable that injury could have happened from the non-compliance with the strict letter of section 290. Their Lordships cannot accept the judgment of the Judicial Commissioner, that loss is to be inferred from the mere fact that a sale was bad without full compliance with the provisions of section 290. The section clearly contemplates direct evidence on the subject."

The learned Vakil for the appellant has laid great stress on the words "direct evidence" used by their Lordships in the concluding paragraph of the passage we have cited, and he has argued that what their Lordships meant was that direct evidence, and direct evidence only, must be given in proof of substantial injury having resulted from a material irregularity. We have given the matter our careful consideration, and we think that it is very doubtful whether their Lordships by using these words intended to restrict the mode of proof connecting a material irregularity with substantial injury to evidence of a particular description or to vary the rule laid down in the cases of *Mac-* [295]*naghten* v. *Mahabir Pershad Singh* (I.L.R., 9 Cal., 656; L.R., 10 I.A., 25) and *Arunachellam Chetti* v. *Arunachellam Chetti* (I. L. R., 12 Mad., 19; L.R., 15 I. A., 171) that in all cases of irregularity under section 311 evidence must be given of substantial injury having resulted from the irregularity. We are rather inclined to think that what their Lordships intended to say by using the words "direct evidence" was that there must be evidence shewing that substantial injury was the necessary result of the irregularity complained of. We observe that the present case is somewhat different from the case of *Tassaduk Rasul Khan*. In that case, as we understand the report, there was no evidence of substantial injury, while in the present case substantial injury is proved by the very inadequate price at which the property was sold. No doubt, there is no direct evidence in the strict sense of the term that the inadequate price was caused by the irregularity, still there is evidence from which we think the inference necessarily arises that the irrregularity was the cause of the injury. The uncertainty as to when and at what particular hour the sale would be held was sufficient to prevent intending purchasers from being present on the 25th November; and on the 27th when the property was put up and sold only three bidders attended; and to the paucity of bidders, we think, may reasonably be ascribed the very low price the property fetched. Under all these circumstances we find it impossible to avoid the conclusion that the substantial injury sustained by the judgment-debtors was the necessary consequence of the irregularities, and in this view we think that the order of the Subordinate Judge is right and should be affirmed.

It has been contended on behalf of the appellant that on a previous occasion the property had been sold at a low price, and that the knowledge that a claim had been made to the property cast a cloud over the title of the judgment-debtors, and so materially affected the bids; but even admitting the soundness of this argument, we are unable to hold that for these reasons alone the property was sold for a price so much below its market value.

We think therefore that this appeal fails, and must be dismissed. We make no order as to costs.

H. W. *Appeal dismissed.*

NOTES.

[There must be adequate proof (though not necessarily *direct*) of substantial injury having resulted from the material irregularity: -(1902) 6 C.W.N., 836; (1901) 6 C.W.N., 48; (1902) 6 O.C., 61; (1902) 30 Cal., 1; (1904) 31 Cal., 815; (1906) P.R., 132; 32 Cal., 502; 6 C.W.N., 44; 16 C.W.N., 227;

The adjourned hour of sale should be mentioned :—6 C.W.N., 48; 14 C.L.J., 337.]

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[296] *The 10th July, 1896.*

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE HILL.

Dhunput Singh.........Plaintiff

versus

Mahomed Kazim Ispahain and others...........Defendants.*

Landlord and Tenant —Disturbance, by Landlord, of peaceable possession—Suspension and apportionment of Rent.

Where the act of a landlord is not a mere trespass, but something of a graver character, interfering substantially with the enjoyment, by the tenant, of the demised property, the tenant is entitled to a suspension of rent during such interference, even though there may not be actual eviction.

If such interference be committed in respect of even of a portion of the property, there should be no apportionment of rent where the whole rent is equally chargeable upon every part of the land demised.

But if the interference is in respect of only a certain portion of the demised property, the rent for which is separately assessed, there should be apportionment.

Babu *Saroda Churn Mitter* and Babu *Promothonath Sen* for the Appellant.

Dr. *Rash Behari Ghose*, Babu *Digumber Chatterjee* and Babu *Dwarkanath Chuckerbutty* for the Respondents.

THE facts of this case and the arguments adduced appear sufficiently from the **judgment** of the Court (**Ghose** and **Hill, JJ.**), which was as follows :--

These two appeals arise out of two suits for rent.

The plaintiff in both these cases is the zemindar of Pergunnah Haveli, within which the properties (Lot Saefgunge and Lot Mirzapore) in respect of which rent is claimed are situate. Both these properties had been leased to certain individuals, described as the Iranees, in *patni* under two different leases.

* Appeals from Original Decrees Nos. 341 and 342 of 1894 against the decrees of H. F. Matthews, Esq., District Judge of Zillah Purneah, dated the 26th of September 1894.

In execution of a decree upon a mortgage bond executed by the Iranees, the plaintiffs purchased the two *patnis* and some other properties on the 2nd February 1891 (the sale being confirmed on the 16th April 1891, 21st Magh 1298 *mulki*), and obtained symbolical possession in November 1891. The principal defendant in these two suits, Babu Chutterput Singh, had purchased the same properties in execution of another decree, upon an earlier mortgage **[297]** against the Iranees on the 8th March 1890, and in due course obtained possession through the Court.

It appears that shortly after the plaintiff was put into formal possession of the two *patnis* and the other properties, he attempted to realize rent, and thus to obtain actual possession; and in this he was opposed by Chutterput, the result being the institution of a proceeding by the Magistrate under section 145 of the Code of Criminal Procedure on the 12th September 1892. The Magistrate, after enquiry, found that Chutterput was in possession, and accordingly confirmed him in such possession on the 13th March 1893 (1st Choit 1300 *mulki*).

The present suits were brought on the 21st September 1893, and they are for recovery of rent on account of the two *patnis* Saefgunge and Mirzapore, for the years 1298, 1299 and 1300 *mulki* after allowing credit to the defendant Chutterput for certain sums received from him. Both the Iranees and Chutterput Singh were made defendants; though the rents were claimed against the latter only, upon the ground, that he was in possession of the *patnis*.

Both the suits have been dismissed by the Court below upon the ground that in consequence of disputes between the two parties as to the ownership of the properties leading to violent disturbances and breaches of the peace, the defendant Chutterput could not be regarded as having been in undisturbed possession of the two *patnis* during the term for which the rents are claimed; that the plaintiff interfered with the peaceful possession and collection of rent by the defendant, and himself realized some rent from the *raiyats*; that he (the plaintiff) had treated the defendant as a trespasser and cannot now be allowed to treat him as a tenant, and that the plaintiff's proper remedy is not a suit for rent but for damages or mesne profits.

Against this decree, the plaintiff has preferred the two appeals now before us. The appeal No. 341 relates to Saefgunge, and the other appeal 342 to Mirzapore.

It seems to us that the two cases do not stand upon the same footing, as erroneously supposed by the District Judge. He has mixed up the facts of the two cases and treated them as one, **[298]** and it is owing to this that he has fallen into a serious error, as will be presently shown, as regards one of the cases. No doubt, there are some matters common to both the cases, which have already been noticed; but there are some distinctive features which differentiate the two cases.

We propose therefore to deal with the cases separately.

But before we do so, it would be just as well to refer to one point which has been raised before us by the learned Vakil for the defendant-respondent in both the appeals. It is this: that the plaintiff does not treat the defendant as the rightful *patnidar*, and yet sues him for rent upon the simple ground that he is in possession of the *patnis*, and therefore the plaintiff has no cause of action. It is unnecessary to discuss this point, because the plaintiff has put in a petition in both the cases asking that the plaints be amended so as to make it clearly appear that the defendant is the real *patnidar* of the two

properties in respect of which the rent has been claimed, and upon this being done the learned Vakil for the defendant has waived the point.

Now first as to the appeal No. 341.

It appears upon the evidence that Lot Saefgunge consists of 19 *mouzahs*, of which only one *mouzah*, Luchmipore, was held in *khas* possession, the rest being held by *darpatnidars*. The annual rent roll of the whole property is about Rs 13,000, and the gross collection of Luchmipore is only Rs. 875. It has no doubt been said generally by some of the witnesses that there was a great deal of dispute, and many cases arose between the parties in consequence of the interference of Rai Dhunput Singh with the collection of rent by Chutterput Singh in the Purwaha estate (Saefgunge being a part thereof), and the proceeding before the Magistrate under section 145 of the Code of Criminal Procedure embraced among several other properties Saefgunge as well; but so far as any specific evidence is to be found bearing upon the question of actual interference with the possession of that property, it appears that there was no case either civil or criminal (see the evidence of the witness Mahabeer). The rent from the *darpatnidars* was realized by Chutterput; but the witness Korbanally, the *patwari* called by the defendant, says that both in the years 1299 and 1300 Chutterput's men could not [299] collect more than Rs. 150 from Luchmipore owing to the interference of Dhunput, and the collection made by him. The witness however does not produce his collection papers shewing what he really collected, and he admits that he has not given credit to the *raiyats* for what they paid to Dhunput Singh. We think that the evidence, so far as it refers to Lot Saefgunge, is wholly insufficient to shew that there was any real, if any, interference on the part of Dhunput Singh with the possession of the *patnidar*, so that he is not in justice entitled to recover the rent claimed. It seems to us to be clear, upon an examination of the evidence, that the ground upon which the District Judge has disallowed the claim of the plaintiff has no application to this case. There is no other defence to this action except that which was accepted by the District Judge. And it follows, therefore, that the plaintiff should obtain a decree for the rent claimed in this case. The decree of the Court below will accordingly be reversed and this appeal decreed with costs.

Regular Appeal No. 342 :—

We now proceed to deal with the other appeal (342), which relates to Lot Mirzapore, and which we think stands upon a somewhat different footing. In Lot Mirzapore, several of the *mouzahs* have also been let in *darpatni*, and three *mouzahs* only are held *khas*. There is no evidence as to any interference by Dhunput with the collection of rent in one of these three *mouzahs*, Tangha Majna; but there is evidence shewing such interference in respect of the other two *mouzahs*, Bishenpore and Purmanandpur. The evidence discloses that after the plaintiff had obtained symbolical possession in November 1891, there was not only the proceeding before the Magistrate under section 145 in regard to the possession of Mirzapore, but Dhunput Singh's *tehsildars* collected some rent from some of the *raiyats* of the said two *mouzahs* between Aughrain 1299 and Aughrain 1300 *mulki*. The rents actually collected appear to be small, but still it is impossible to say that there was not an active interference on the part of Dhunput with the enjoyment of possession by Chutterput, so far as those two *mouzahs* are concerned. Then we have the fact that Dhunput Singh, so soon as he made his purchase, asserted his title to the whole of Mirzapore and the other properties [300] comprised in the Purwaha estate, and appointed an European Manager and a large number of *burkandazes* evidently with the object of overawing the *raiyats* of the whole estate and compelling them to pay

their rents to him. And the result was the institution of several criminal cases though no doubt there is no evidence of any such case in connection with Mirzapore itself. It may be possible that Chutterput had no quiet enjoyment of any of the properties until his possession was formally confirmed by the Magistrate on the 13th March 1893 : but of this there is no distinct evidence, and we find Chutterput asserting before the Magistrate that he was in possession of the whole of the properties.

Upon these facts, two questions arise: (1) whether there was an eviction of the tenant by the act of the landlord so that the rent which would otherwise be due to the latter should be suspended during the period of such eviction ; (2) whether the rent due upon the Lot Mirzapore may be apportioned, and a proportionate rent allowed to the landlord in respect of such portion of the property as to which there was no interference proved on his part.

In the case of *Upton* v. *Townend* [17 C. B. 30 (64)] JERVIS, C.J., with reference to the question what constitutes eviction, expressed himself as follows:—

"It is extremely difficult at the present day to define with technical accuracy what is an eviction. Latterly, the word has been used to denote that which formerly it was not intended to express. In the language of pleading, the party evicted was said to be expelled, amoved, and put out. The word 'eviction'—from *evincere,* to evict, to disposses by a judicial course—was formerly used to denote an expulsion by the assertion of a title paramount, and by process of law. But that sort of eviction is not necessary to constitute a suspension of the rent, because it is now well settled that, if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended. The term 'eviction' is now popularly applied to every class of expulsion or amotion. Getting rid thus of the old notion of eviction, I think it may now be **[301]** taken to mean this—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises. If that may in law amount to an eviction, the jury would very naturally cut the knot by finding whether or not the act done by the landlord is of that character and done with that intention."

In *Edge* v. *Boileau* (L. R. 16 Q. B. D., 117) where there was a covenant on the part of the lessor for quiet enjoyment, and it appeared that he had sent a notice to the sub-tenants desiring them not to pay their rents to the lessee, but the lessor himself, and threatened them with legal proceedings in default of non-compliance with such notice, it was held that this was a substantial disturbance of the lessee's quiet enjoyment of the property demised, and that the lessee was entitled to sue for damages for breach of covenant of quiet enjoyment.

In *Kadumbinee Dossia* v. *Kasheenauth Biswas* (13 W. R., 338) where the tenant defendant was dispossessed of the land leased to him, by a third party to whom the landlord (plaintiff) had given a lease of the same land, and assisted him in the dispossession, it was held that the landlord was precluded from suing the tenant for rent during the period of such dispossession, though the latter had recovered a decree for possession with mesne profits.

In *Kristo Soondur Sandyal* v. *Chunder Nath Roy* (15 W. R., 230) the landlord, though he had not actually ejected the lessee (a middleman), had interfered in the collection of rents, and encouraged the *raiyats* to deposit their rents with him as superior landlord, and collected their *dakhilas* with a

view to ascertain how far the arrears due from the lessee were due to the non-payment of rent by the *raiyats*, the Court held that the landlord was not entitled to recover the rent sued for; and BAYLEY, J., in delivering the judgment of the Court observed as follows:—

"Now the real right of the zemindar to receive rents from the farmers depends upon his securing to the latter quiet possession, and giving him proper and lawful means of realizing rents from the *raiyats*. In the present case, it is clear from the **[302]** findings of the Lower Appellate Court, as quoted above, that the quiet possession and proper and legal means of collecting rents have been directly interfered with."

On the subject of eviction and apportionment of rent, Gilbert in his book on Rents, on p. 178, says as follows:—

"But if the lessor takes a lease of part of the land, or enters wrongfully into part, there are variety of opinions whether the entire rent shall not be suspended during the continuance of such lease or tortious entry. Some have held that there shall be no apportionment in either case, but that the whole should be suspended; for this reason, I suppose, because, by the demise, every part of the land was equally chargeable with the whole rent; and therefore the lessor shall not by his own act discharge any part from the burden during the continuance of such contract. This indeed, may be a good reason why the whole rent service shall be suspended if the lord or lessor disseises or ousts his tenant or lessee of any part of the land; because this is a wrongful act to which the tenant consented not, and, if it were not attended with a total suspension of the rent until he makes restitution of the land, it would be in the power of the lord or lessor to resume any part of the land against his own engagement and contract; and so by taking that which lies most commodious for the tenant, render the remainder in effect useless, or put him to expense and trouble to restore himself to such part by course of law. Therefore to prevent these inconveniences, and that no man might be encouraged to injure or disturb his tenant in his possession, when, by the policy of the feudal law, he ought to protect him and defend him, these resolutions have been and so the law is at this day, that such disseisin or tortious entry suspends the whole rent, and the lessee or tenant is discharged from the payment of any part of it till he be restored to the whole possession."

In *Neale* v *Mackenzie* [1 M. & W., 747 (763)], where a lessee to whom one hundred acres of land had been demised, found upon his entry that eight of the acres were in the possession of another party under a prior lease from the landlord, and was thus kept out of possession therefrom, and where, notwithstanding this, the landlord dis-**[303]** trained the goods of the lessee for the whole rent due upon the lease, and the lessee sued for damages on account of such distraint, Lord DENMAN, C.J., in delivering the judgment of the Court, among other matters, with reference to the question of apportionment of rent, observed as follows:—

"In the case before the Court, which is not the case of a demise by indenture, the rent is reserved in respect of all the land professed to be demised and to be issuing out of the whole and every part thereof; and as the plaintiff, as to a portion of the land comprised in the demise (which might be great or small as far as the principle is concerned) has taken no interest, and had no enjoyment and is not bound by any estoppel, we are of opinion that the distress made by the defendant is not justifiable, either in respect to the whole rent reserved or any portion of it."

In the case of *Gopanund Jha* v. *Lalla Gobind Pershad* (12 W. R., 109 where a tenant sued for rent had been evicted from a portion of the land)

demised by a title paramount, PEACOCK, C.J., in delivering the judgment of the Court, thus expressed himself :—

"According to the English law 'if the lands demised be evicted from the tenant, or recovered by a title paramount, the lessee is discharged from the payment of the rent from the time of such eviction,' and if he is evicted from part, the rent is to be diminished in proportion to the land evicted. It is laid down in Bacon's Abridgment, Tit. Rent (M) 'where a lessor enters forcibly into part of the land, there are variety of opinions whether the entire rent shall not be suspended during the continuance of such tortious entry, and it seems to be the better opinion and the settled law at this day, that the tenant is discharged from the payment of the whole rent till he be restored to the whole possession, that no man may be encouraged to injure or disturb his tenant in his possession, whom by the policy of the law he ought to protect and defend :' and it has been held that when a lessee is evicted by title paramount to that of his lessor, an apportionment of rent may take place in an action brought for the rent. It appears to me that the *onus* is on the lessor, who claims to be entitled to an apportionment to show what is the fair rate of the lands out of which the tenant was not evicted."

The principles to be gathered from these cases are, *first*, that **[304]** where the act of the landlord is not a mere trespass, but something of a grave character interfering substantially with the enjoyment by the tenant of the property demised to him, there is a suspension of rent during such interference, though there may not be an actual eviction. And, *second*, that if such interference be in respect of even a portion of the property, there should be no apportionment of the rent, the whole rent being equally chargeable upon every part of the land demised.

Some other cases upon the same subject were quoted before us by the learned Vakil for the appellant, but they do not go any further than this, that though by entry upon the land demised the rent is suspended, yet where there is no eviction but a mere trespass, there is no suspension of rent, and that the mere discontinuance of rent by the *raiyats* does not amount to dispossession [see *Hunt* v. *Cope* (1 Cowp., 242), *Tarini Mohun Mozumdar* v. *Gunga Prosad Chuckerbutty* (I. L. R., 14 Cal., 649), *Obhoya Charan Bhooia* v. *Koilash Chunder Dey* (I. L. R., 14 Cal., 751), and Woodfall on Landlord and Tenant, p. 425].

We think that, in the circumstances of this case, the act or acts of the landlord were not mere acts of trespass, but something of a graver character, substantially interfering with and disturbing the enjoyment and possession of the property by the *patnidar*, and that there ought to be a suspension of rent during the period of such interference.

The period during which the landlord is not entitled in our judgment to recover rent is from Aughrain 1299 to Aughrain 1300 *mulki* ; and we think that the rents which fell due during this interval of time, according to the *kists* laid down in the *patni* lease should, subject to what we shall presently say with regard to apportionment, be disallowed.

As to the question whether there should be an apportionment of rent in this case (the actual interference by the landlord being only with respect to two of the several *mouzahs* constituting the *patni*), it appears that, though the whole *patni* rent may be taken upon the terms of the *patni* grant to be reserved upon every part of the land comprised in the *patni*, so that in default of payment by the *patnidar* of any part of the rent, the **[305]** whole *patni* is liable to be brought to sale, yet the rent payable for each of the *mouzahs* was separately assessed. The true principle upon which an apportionment is

not ordinarily allowed is, we apprehend, that every part of the property demised being equally chargeable with the whole rent, it is not possible to determine what should be the proper apportionment when the landlord interferes with the possession of the tenant with respect to a part only, and that the landlord should not be permitted to resume any part of the land demised which may be most advantageous to him. In the present case, so far as the various *mouzahs* which were let out in *darpatni* are concerned, the collection of rent by the plaintiff could have been only from the *darpatnidars* and not from the *raiyats*, and it appears upon the evidence that the *darpatnis* were not interfered with, nor was there any interference in respect of one of the three *khas mouzahs*. In this view of the matter, and as the rents payable on account of the two *mouzahs* Bishenpore and Parmanandpore (also called Purmanpore in some of the documents) as to which there was an interference by the landlord are ascertainable from the *patni* lease, we think that the plaintiff is entitled to recover so much of the rent reserved by the *patni* lease as is assignable upon the property other than the two *mouzahs* Bishenpore and Parmanandpore. The rent in respect of these two *mouzahs* should be suspended and disallowed during the period already referred to.

It was, however, contended before us that if the landlord is entitled in this case to an apportionment of rent the tenant may well claim an equitable set-off for damage caused to him by reason of the unjust interference by the landlord. It is impossible in this case to determine what may be the amount of damage which the defendant sustained in respect of the two *khas mouzahs*, and what, having regard to the acts and conduct of the landlord generally in regard to the whole Purwaha estate, is the extent of equitable set-off which should be allowed to him. And we think that the question, what may be the extent of damage sustained by the defendant, should be left to be determined in a separate action framed for that purpose.

Upon these grounds, we disallow the plaintiff the rents payable for the two *khas mouzahs* Bishenpore and Parmanandpore, **[306]** and which fell due according to the *patni* lease between Aughrain 1299 and Aughrain 1300 *mulki*, and save and except this, allow the rest of the claim.

In the circumstances of the case, we think that each party should bear his own costs both in this and the lower Court.

H. W.

NOTES.

[This principle has been applied in these cases:— (1900) 28 Cal., 188; (1910) 14 C.W.N. 446; (1900) 5 C W.N. 353; (1910) 13 C. L. J. 115. See also (1912) 23 M. L. J. 119: 15 I. C. 711.

This principle was held not to apply to a case where owing to a careless statement in the deed and without any *mala fides* on the lessor's part, the lessee was deprived of a part of the land:—(1909) 9 C. L. J. 585: 13 C. W. N. 702.

It was held inapplicable to a case of dispossession not by the landlord but by lessees under him without his agency or procurement:—(1907) 34 Cal., 191; (1909) 11 C. L. J. 601.

In (1909) 36 Cal., 856: 9 C. L J. 578: 13 C. W. N. 853, the cases were distinguished on the ground that the act of dispossession was through the act of God i.e. the encroachment of the river.

The question was not decided whether the rule would apply in the case of disturbance with respect to a portion of the demised property for which rent was separately assessed:—13 C. L. J., 115.]

[24 Cal. 306]

The 8th December, 1896.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

The Secretary of State for India in Council............Defendant No. 1

versus

Dip Chand Poddar and others............Plaintiffs.*

Railways Act (IX of 1890), section 77—Notice of suit—Agent of Manager—Traffic Superintendent—Civil Procedure Code (Act XIV of 1882), sections 147, 149—Practice—Pleadings.

The Traffic Superintendent is not the Manager's agent and notice to him is not notice to the Railway Administration within section 77† of the Indian Railways Act (IX of 1890).

Under section 77 of the Indian Railways Act it is not necessary for the defendant to plead want of notice of action in order to avail himself of it, but he may raise the objection at the hearing.

THE plaintiffs brought this suit against the Secretary of State for India as the Proprietor of the Eastern Bengal State Railway, and against the Bengal Central Flotilla Company, for compensation for goods lost while being conveyed from Calcutta to Noakhali. The plaintiffs alleged that six bales of cotton goods were consigned to them on the 8th of June 1893, and that only five of these were delivered; the other bale was detained at Khulna, where goods are transhipped from the Bengal Central Railway to the steamers of the Bengal Central Flotilla Company, and did not reach Noakhali till the end of September, when the covering was torn and the contents so damaged as to be unsaleable, and the plaintiffs refused to take delivery.

For the Secretary of State it was pleaded that he was not liable, as there was no negligence shown; that the bale was badly packed, and when weighed at Khulna was found to be in excess of [307] the weight stated by the consignor; that the bale had been detained at Khulna because it was found on arrival there to be torn; that while in the godowns at Khulna some of its contents had been stolen and that some of the stolen clothes had been recovered, and the bale sent on to Noakhali for delivery to the plaintiffs. The price of the goods as claimed was also disputed. The Flotilla Company denied all liability, as they were ready to deliver the goods in the same condition as when received. The Munsif gave the plaintiffs a decree for the value of the goods as claimed. The Secretary of State appealed to the Judge of Noakhali, who dismissed the appeal.

The *Senior Government Pleader* (Babu *Hem Chandra Banerjee*) and Babu *Ram Charan Mitter* for the Appellant.

Dr. *Rash Behari Ghose* and Babu *Lal Behari Mitter* for the Respondents.

* Appeal from Appellate Decree No. 1252 of 1895, against the decree of W. H. M. Gun, Esq., District Judge of Noakhali, dated the 22nd of May 1895, affirming the decree of Babu Lal Singh, Munsif of Sudharam, dated the 17th of December 1894.

† [Sec. 77:—A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway.]

Notification of claims to refunds of overcharges and to compensation for losses.

The **judgment** of the Court (**Banerjee** and **Rampini, JJ**, was as follows :—

This appeal arises out of a suit brought by the plaintiffs (respondents) against the Secretary of State for India and the Bengal Central Flotilla Company for compensation for the loss of goods delivered for carriage to the Eastern Bengal State Railway and the Flotilla Company. The plaintiffs allege that they sent notices of demand to the Traffic Superintendent and to the District Collector before the institution of the suit. The defence was denial of liability on the ground that there was no negligence on the part of the defendants. A further objection, not taken in the written statement, was urged on behalf of the Secretary of State at the time of argument, that the claim for compensation was untenable under section 77 of the Indian Railway Act (IX of 1890) for want of notice to the Railway Administration.

The first Court overruled the objection in bar and found for the plaintiffs on the merits, and give them a decree for a certain amount, and that decree has been affirmed on appeal by the District Judge.

In second appeal it is urged on behalf of the Secretary of State, *first*, that the Lower Appellate Court is wrong in holding that the Traffic Superintendent should be considered as the Manager's agent, and that the notice to him was a sufficient compliance with **[308]** section 77 of the Railways Act ; and, *secondly*, that the Lower Appellate Court is wrong in giving the plaintiffs a decree for the amount claimed when there is no evidence to prove that that was the value of the goods damaged.

Upon the second point it is necessary to say only this, that the evidence of the plaintiffs' agent shows that the amount claimed is the true value of the goods, and that evidence has been considered sufficient by the Lower Appellate Court. The second contention of the appellant must therefore fail.

The first contention urged for the appellant is however in our opinion correct. Section 77 of the Indian Railways Act requires that in a case like this a notice of the claim should be preferred to the Railway Administration within six months from the date of the delivery of the goods, and by section 3 of the Act " Railway Administration " in the case of a State Railway is defined to mean the Manager, and to include the Government. The notice that was given to the Government was not served within six months from the date of delivery of the goods ; and the notice which was served within six months was a notice not to the Manager but to the Traffic Superintendent ; and though there is nothing to show that the notice, though addressed to the Traffic Superintendent, reached the manager, within six months from the date of delivery of the goods, the Lower Appellate Court holds the notice to be sufficient, because it is of opinion that the Traffic Superintendent should be considered as the Manager's agent in such matters. We think the Court below is wrong in law in taking this view.

The learned Vakil for the respondents argued in support of the decree of the Court below that, though the notice served in this case might not have been shown to be sufficient under the law, the plaintiffs were not bound to prove the service of any notice, want of notice not having been pleaded in defence ; and in support of this argument the cases of *Davey* v. *Warne* (14 M.&. W., 199), *Smith* v. *Pritchard* (2 C. & K., 699), and certain other English cases, were relied upon. We are of opinion that this argument cannot succeed, regard being had to the terms of section 77 of the Railways Act and to the provisions of sections 147 and 149 of the Code of Civil Procedure, which **[309]** authorize the Court to frame issues from certain materials besides the pleadings and to amend the issues at any stage of the case. The objection on the ground of absence of notice, though not taken in the written statement, was raised in argument,

and the objection was entertained and disposed of, though erroneously, by the Courts below. It cannot therefore be thrown out on the ground that it was not specially pleaded.

But though we hold that the objection on the ground of want of notice cannot be thrown out altogether, we are of opinion that as it was not taken in the written statement and was urged only in argument, the plaintiffs are entitled to have an opportunity of meeting it. In our opinion it will be sufficiently met if it is shewn that the notice served on the Traffic Superintendent reached the Manager within six months from the date of delivery of the goods.

The case must therefore go back to the first Court, in order that it may be disposed of after determination of the point indicated above. Both parties will be at liberty to adduce evidence upon the point. Costs will abide the result.

As the appeal is only on behalf of defendant No. 1, and the ground upon which the appeal succeeds relates only to the liability of defendant No. 1, the decrees of the Courts below as against defendant No. 2 will stand.

F. K. D. *Appeal allowed and case remanded.*

NOTES.

[This was followed in (1908) 28 All. 552; (1907) 35 Cal., 194 : (1908) P. R., 76; (1912) I. C. 684 (Nagpur). See however (1898) 22 Mad., 137 ; (1912) 23 M. L. J., 511 where the notice was held to be a good notice if in fact it reached the Agent within six months. See also (1909) 5 I. C. 81 on the construction of such provisions.]

[24 Cal. 309]

The 10th December, 1896.

PRESENT :

MR. JUSTICE BEVERLEY AND MR. JUSTICE AMEER ALI.

Banoo Tewary............Defendant

versus

Doona Tewary and others............Plaintiffs.*

Limitation Act (XV of 1877), Schedule II, Articles 62, 127—Separation in Joint Hindu family—Suit for share in joint property.

At the separation of members of a joint family governed by the Benares School of Hindu Law, in 1885, the unrealized debts of the family were left undivided. The debts were subsequently realized by some of the members of the separated family. In a suit brought by the other members in 1893 *(inter alia)* to recover their shares in the debts so realized.

[310] *Held*, that the claim of the plaintiffs could only be treated as coming under article 62† Schedule II of the Indian Limitation Act (XV of 1877), and the claim in respect of such of the debts as were realized more than three years before the institution of the suit was

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* Appeal from Original Decree No. 262 of 1894 against the decree of Babu Abinash Chandra Mitter, Subordinate Judge of Tirhoot, dated the 21st of June 1894.

† [Art. 62 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three years ...	When the money is received.]

barred by limitation. Article 127 of the same Schedule would not apply to such a case. *Thakur Prasad* v. *Partab* (I. L. R., 6 All., 442) referred to.

THE facts of this case are fully set forth in the judgment of the High Court. The present report relates only to a portion of the claim, viz., debts forming items Nos. 1, 2, 3, 4 and 6 of Schedule IV of the plaint filed in the case, which were realized by the defendants more than three years before the institution of the present suit. The Subordinate Judge held that article 127, Schedule II of the Limitation Act (XV of 1877), governed the case, and the plaintiffs' claim to their share in these realizations was not barred by limitation.

The defendant No. 1 appealed to the High Court.

Mr. *C. Gregory*, Babu *Durga Mohan Das* and Babu *Jogindra Chandra Ghose* for the Appellant.

Babu *Umakali Mukerjee* for the Respondents.

Mr. *C. Gregory*. –The plaintiffs admit separation ; the claim to realization beyond three years is therefore barred under article 62. Article 127 does not apply. *Thakur Prasad* v. *Partab* (I. L. R., 6 All , 442), *Arunachala Pillai* v. *Ramasamya Pillai* (I. L. R., 6 Mad., 102), *Webor Ali* v. *Gaddar Behari* (2 C. L. R , 165), *Kundun Lal* v. *Bansi Dhar* (I. L. R., 3 All., 170), *Lootf Ali Khan* v. *Afzuloonissa Begum* (16 W. R., P. C., 20).

Babu *Umakali Mukerjee* for the respondents.—There was partition of some of the properties only. Article 127 would apply to the case. [AMEER ALI, J.—Does not article 127 relate to an *existing* joint family ?] That article would apply as well to a portion left undivided as to the whole estate ; *Ram Chandra Narayan* v *Narayan Mahadeb* (I. L. R., 11 Bom., 216). There is no distinction between moveable and immoveable properties ; the question is whether the properties were joint or not : *Raoji* v. *Bala* [I. L. R., 15 Bom., 135 (143).]

Mr. *C. Gregory* in reply cited *Amme Raham* v. *Zia Ahmad* (I. L. R., 13 All., 282) **[311]** *Sarode Soondury Dassee* v. *Doyamoyee Dassee* (I. L. R., 5 Cal., 938) ; Mitra on Limitation, 3rd edition, p. 782. There was a joint family in the case of *Raoji* v. *Bala* [I. L. R , 15 Bom., 135 (143).] In the case of *Ram Chandra Narayan* v. *Narayan Mahadeb* (I. L. R , 11 Bom., 216) the ruling was that the suit was barred, and there was no decision on the present question.

The **judgment** of the High Court (**Beverley** and **Ameer Ali, JJ**.) was as follows :—

These appeals arise out of a suit brought by the plaintiffs under the following circumstances. The plaintiffs and defendants were at one time members of a joint Hindu family subject to the Mitakshara law. According to the plaintiffs' case a separation took place between them in the year 1293 (1886), and the bulk of the immoveable property, together with ornaments, etc., was divided among the different members ; but it is alleged by the plaintiffs that two elephants, together with debts payable to the joint family upon bonds and decrees standing in the names of the different members, and certain pieces of land, were left joint. The principal defendant in the case (defendant No. 1) was to realize the major portion of these bond and decretal debts. The plaintiffs allege in their plaint that he has realized the amounts covered by the bonds and decrees which stood in his name, but has refused to give them their shares in the same ; that as regards the elephants he has sold one and appropriated the price thereof to his own use, and was claiming the other as his own. They further allege that they on their part had realized a certain debt on behalf of themselves and others entitled to it, and were willing to deposit the amount in Court, and that the defendant Hemraj had similarly realized the debts which stood in his name and divided the same rateably among the persons

entitled. Upon these allegations the plaintiff sued to obtain partition of the lands which were said to have been left joint, for a declaration that the debts realized by the defendant No. 1 were on behalf of all the persons who had formed members of the joint family, and for a decree for their share in the same and in the price of the elephant sold by Banoo Tewary. They also asked for a declaration that the elephant in his possession belonged to all the parties, and for a [312] direction that it may be sold and the proceeds divided rateably. The defendants other than Banoo Tewary and Jhinga Tewary supported the plaintiffs' allegations. The defendant Hemraj expressed his willingness to pay to Banoo Tewary his share in the money which he (Hemraj) had realized, and they all asked that their share in the bond and decretal debts might be decreed in their favour.

The defendant No. 1 alleged that the family had separated in 1285 (1878) and not in 1293 (1886), and that nothing was left joint : that in fact all the properties possessed by the joint family had been divided, that the bond and decretal debts which he had realized belonged to him exclusively, and that nobody else had any interest in them. He denied the existence of two elephants at any particular time, and claimed the one in his possession as his own property acquired by his money. And he pleaded that so far as the debts were concerned the plaintiffs' claim was barred by limitation.

The defendant Jhinga set up a totally different case. He alleged that the family had never separated, and claimed a division of all the properties.

Upon these allegations of fact several issues were framed in the lower Court, but it is unnecessary to refer to them particularly. As a matter of fact it appeared in the course of the trial that the lands which were said to have been left joint had been subsequently partitioned either by the Collector or privately, and that the parties were in separate possession of their respective shares. The Subordinate Judge accordingly gave the plaintiffs a declaration of their rights in some of the lands mentioned in Schedule II, and as regards the others he dismissed their suit; but he found that the story of the defendant that a complete partition had taken place in 1285 was untrue. He held upon the evidence that the family had actually separated in 1293 when the bulk of the landed property was partitioned as alleged by the plaintiffs, but the debts owing to the family not being ripe for realization were left outstanding to be divided when realized. He also found that the existing elephant was joint property, and he accordingly made a decree in favour of the plaintiffs in respect of their one-fifth share in the amounts realized by the defendant No. 1, and also gave a declaration in respect of their right to a one-fifth share in the elephant.

[313] From this decree there are three appeals, viz., one by Jhinga, another by defendant No. 1, and the third by way of cross-appeal by the plaintiffs in respect of the price of the elephant appropriated by Banoo Tewary.

They also ask for a direction that the existing elephant may be sold and the proceeds distributed among the parties entitled.

As regards Jhinga's appeal we may say at once that we entirely agree with the Subordinate Judge that there is absolutely no evidence excepting his own discredited statements in support of his story, and his own conduct, as proved by the documents executed by him, contradicts his testimony. His appeal will accordingly be dismissed with costs.

On behalf of the defendant No. 1 two contentions have been raised in this Court—(1) that the lower Court is wrong in holding that separation took place in 1293 and not in 1285; and (2) that the lower Court is wrong in overruling the plea of limitation raised by the defendant.

On the question of partition we are of opinion that the Subordinate Judge is right in his conclusion that the family separated in 1293 and not in 1285. The evidence of the defendant himself leaves no room for doubt that his story of a separation in 1285 is false. He admits that after 1285 various properties were purchased in his father's name, which were divided among the different co-sharers. He admits that the shares so given were of considerable value, amounting to twelve or thirteen thousand rupees, and the sole explanation he furnishes is that he gave the shares to the other parties out of favour. We agree with the Subordinate Judge in holding that the explanation given by the defendant is absolutely false, and that the only ground upon which his action can be explained is that those persons to whom the shares were given were entitled to them, and that no separation had taken place in 1285 as alleged by him. We think that the other circumstances referred to by the Subordinate Judge also tend to the same conclusion.

Mr. *Gregory* relied upon two documents to prove separation in 1285.

As regards the *mukhtarnamah* given by the members of the [314] family to the father of the defendant it is clear that it was given for the purpose of enabling him to transact the business of the family. There were many transactions in the separate names of the different members and it was clearly necessary for one of them to have a *mukhtarnamah* from the others in order to be able to transact the business of the family. We agree with the Subordinate Judge that the *mukhtarnamah* does not establish separation. The sale of the decree by Budhoo Tewary in favour of Udho Tewary is proved, as the Subordinate Judge points out, to be an unreal transaction made for a certain purpose stated by the pleader, Umes Baboo. We agree therefore with the finding of the Subordinate Judge that the partition was in Assar 1293.

The main point, however, turns upon the question of limitation.

Mr. *Gregory* for the defendant urged that the items Nos. 1, 2, 3, 4 and 6 in pages 28 and 29 of the Paper Book were barred by the Statute of Limitation, as those sums were realized beyond three years from date of suit. The Subordinate Judge has held that the plaintiffs' suit comes under article 127 of the Limitation Act Mr *Gregory's* contention is that it is governed by article 62. Article 127 of the Limitation Act runs as follows: "In a suit by a person excluded from joint family property to enforce a right to a share therein the period of limitation is twelve years from the time when the exclusion becomes known to him." The only case directly in point is *Thakur Prasad* v. *Partab* (I. L. R., 6 All., 442) and although there was no argument in that case, it seems to us that the reasoning of the District Judge which was adopted by the High Court is deserving of consideration. Article 127 presupposes the existence of a joint family, and proceeding upon the hypothesis that there is a joint family it provides that when any member of such joint family is excluded from the enjoyment of the joint property or any portion thereof, the period of limitation shall run from the date when the exclusion comes to his knowledge. But when there has been a disruption of the status of jointness, it is difficult to conceive that it could have been the intention of the Legislature that the same provision should apply. The case of the plaintiffs is, that everything was divided, the family became separate, and only those debts were left undivided [315] which were not ripe for realization. They were to be divided of course when they were realized In such a state of circumstances it does not appear to us that article 127 would apply. The person or persons in whose names the debts stood would not be trustees for the other separated members, and if they realized the debts and withheld payment to the others the claim of those who were thus deprived of their shares in the money can only be treated as coming under article 62 of the Limitation Act. That article provides as

follows: "In a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiffs' use, the period of limitation shall be 'three years' from the time when the money is received." The defendant was acting on behalf of the other co-sharers merely as their agent in the realization of their shares in these moneys, and we think therefore that the case is subject to three years' limitation, and that the claim of the plaintiffs, so far as the items Nos. 1, 2, 3, 4 and 6 are concerned, is barred inasmuch as they were realized more than three years before the institution of the suit.

With regard to the cross-appeal of the plaintiffs we are of opinion that it is clearly established that there was another elephant belonging to the joint family which was sold by the defendant some time in 1299 (1892) for the price stated by the plaintiffs in their evidence. The reason given by the Subordinate Judge for disbelieving that portion of the plaintiff's evidence does not appear to us to be sufficient.

On the whole case, therefore, we hold that the plaintiffs are entitled to a declaration regarding their one-fifth share in the sum of Rs. 3,286 plus 2,500, the value of the elephant sold by defendant No. 1. They are also entitled to an order that the elephant now existing might be sold under the direction of the Court and the proceeds distributed among the persons entitled thereto.

In order to avoid a multiplicity of suits, and having regard to the allegations made in the plaint and written statements, it seems to us that the decree in this case ought to contain a similar declaration in favour of the defendants other than Jingha, who appears to have received from the defendant No. 1 his share in these sums of money. Of course as regards these defendants Banoo [316] Tewary would be entitled to set off his share in the amounts realized by any of them on behalf of all the members.

The result, therefore, is that instead of Rs. 1,532 the decree in favour of the plaintiffs will be for 1/5th of 5,786.

Save and except this modification and the direction as to the sale of the elephant and the declaration as to the rights of the defendants other than Jhinga, we affirm the decree of the Court below.

Considering the circumstances we think that in appeals Nos. 262 and 325 the parties ought to pay their own costs in this Court.

Appeal allowed in part.

S. C. C. *Decree modified.*

NOTES.

[This was followed in (1903) 5 Bom. L. R., 355; (1912) 16 I. C., 882 (Oudh); (1908) 32 Mad., 191: 19 M. L. J., 94. See also (1909) 14 C. W. N., 221. The general scope of actions for money had and received is discussed fully in (1905) 32 Cal., 527.]

[24 Cal. 316]
CRIMINAL REFERENCE.

The 20th January, 1897.
PRESENT:
MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Ramzan Kunjra............Complainant
versus
Ramkhelawan Chowbe and others............Accused.*

Criminal Procedure Code (Act X of 1882), section 423, clause (b), sub-section 3—Penal Code (Act XLV of 1860), sections 147, 379—Enhancement of sentence.

In a case where the accused were convicted by a Deputy Magistrate of the offence of rioting under section 147, and theft under section 379,† of the Penal Code, and sentenced to four months for the first and two months for the latter offence, but on appeal the District Magistrate, considering the case to be one of theft rather than rioting, abandoned the sentence under section 147, but upheld the conviction under section 379 of the Penal Code and sentenced them to six months' rigorous imprisonment,

Held, that what the District Magistrate had in effect done was to enhance the sentence under section 379 of the Penal Code, which he had no power to do under section 423, cl. (*b*), sub-section 3 of the Code of Criminal Procedure.

THIS was a reference by the Sessions Judge of Shahabad to this Court asking for an authoritative decision on the following point :—

On 28th August 1896 Ramkhelawan Chowbe, Ramgad Chowbe, and Mohipat Ahir, were convicted by the Deputy Magistrate of [317] Shahabad of the offences of (1) rioting under section 147, Penal Code, and (2), theft under section 379, Penal Code, and were sentenced for the first offence to four months and for the latter offence to two months' rigorous imprisonment. On appeal, the District Magistrate, Mr. Egerton, considering the case to be one of theft rather than of rioting, made the following order: "The conviction is upheld, and that part of the sentence which is passed under section 147, Penal Code, will be changed to a sentence under section 379, Penal Code; the conviction under section 147, Penal Code, is changed to one under section 379, Penal Code, and the sentence of six months' rigorous imprisonment is upheld."

The accused thereupon applied to the Sessions Judge to refer the case to the High Court on the ground that the sentence under section 379, Penal Code, had been enhanced by the District Magistrate in contravention of section 423, clause (*b*), sub-section 3 of the Code of Criminal Procedure. The Sessions Judge accordingly referred the matter for the decision of this Court.

The **judgment** of the High Court (**Ghose** and **Gordon, JJ.**) was as follows :—

It seems to us that the legal effect of the order of the District Magistrate in this case is to acquit the accused of the offence under section 147 of the Penal Code, and enhance the sentence under section 379. If the accused have

* Criminal Reference No. 294 of 1896, made by F. H. Harding, Esq., Sessions Judge of Shahabad, dated the 30th of December 1896.

† [Sec. 379 :—Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.]

Punishment for theft.

been rightly acquitted of the offence under section 147, it follows that the sentence imposed under that section must fall through. And we are of opinion that the necessary consequence of the order of the District Magistrate maintaining the same sentence which the Deputy Magistrate had awarded is to enhance the sentence under section 379 which he had no authority to do under section 423, clause (b), sub-section 3 of the Code of Criminal Procedure [see in this connection the decision of this Court, in *Arpin Sheik* v. *Arobdi Datial*.*

[318] The order of the District Magistrate enhancing the sentence from two to six months under section 379 of the Penal Code will be set aside.

C. E. G.

NOTES.

[See also (1906) 30 Mad., 48; 1 M. L. T., 403.]

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* Revision case No. 60 of 1893 decided by PRINSEP and AMEER ALI, JJ., on the 22nd February 1893.

In this case a rule was obtained by the petitioner Arpin Sheik to shew cause why the sentence passed by the Sessions Judge should not be set aside.

Babu *Dwarka Nath Chuckerbutty* for the Petitioner.

The *Deputy Legal Remembrancer* (Mr. *G. C. Kilby*) for the Crown.

The **judgment** of the High Court (**Prinsep** and **Ameer Ali**, **JJ.**) was as follows.--

In this case the Magistrate has convicted the petitioner of robbery, under section 392 of the Penal Code, and hurt, under section 323 of the Penal Code, and sentenced him for the former offence to 18 months' rigorous imprisonment, and for the latter to one day's rigorous imprisonment.

On appeal, the Sessions Judge found that the charge of robbery was not established, and he held that it was what we may term an exaggeration of the actual facts of the case. He accordingly set aside the conviction on the charge of robbery, but, in confirming the conviction of hurt, he sentenced the appellant to six months' rigorous imprisonment.

It is contended on behalf of the petitioner that this was an enhancement of sentence which the Sessions Judge as an Appellate Court was not competent to pass.

In granting the rule we intimated that, although the sentence appeared to be open to this objection, in dealing with the case we should consider the facts found and pass such sentence as would seem to us to meet the ends of justice. We have no doubt that the Sessions Judge had no power to pass this sentence which amounted to an enhancement from one day to six months for the offence of hurt. At the same time, after considering the facts found by both Courts, it seems to us that the attack on the complainant was of a somewhat serious nature, and that severe injuries were inflicted. We think therefore that the sentence of six months' rigorous imprisonment is a proper sentence, and we accordingly direct that that sentence be recorded under section 323 of the Penal Code. The effect of this order will be to make legal the sentence which the Sessions Judge has already passed.

C. E. G.

[319] APPELLATE CIVIL.

The 26th January, 1897.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Kanti Chunder Mookerjee............Defendant

versus

Saligram and another............Plaintiffs.*

Second appeal—Order setting aside order granting review—Civil Procedure Code (Act XIV of 1882), sections 591, 623, 629.

No second appeal to the High Court lies from an order setting aside an order granting a review of judgment.

THIS was an application for the admission of an appeal from an order of the Subordinate Judge of Lakimpur, dated 2nd September 1896, setting aside an order of the Munsif of Dibrugarh, dated 24th June 1896, by which he granted a review of a former order by which the suit was decreed against the defendant, the present appellant.

The case was put in the *loazima* board, the Deputy Registrar noting on it that "section 629 of the Civil Procedure Code permits of but one appeal against an order admitting a review in an application under section 623," and referring to a previous case [appeal from order 61 of 1897 decided by TREVELYAN and BANERJEE, JJ., on 7th December 1893],† in which it was held [320] that "there is no provision of law allowing a second appeal in a case of this kind."

On the application for admission of the appeal coming on for hearing,

Mr. *Abdool Majid* and Moulvie *Mahomed Mustofa Khan* appeared for the Appellant.

The **order** of the High Court (**Banerjee** and **Rampini, JJ.**) was as follows :—

The appeal is rejected.

F. K. D.

NOTES.

[This was followed in (1906) 6 C. L. J., 226]

* Miscellaneous Appeal No. 410 of 1897.

† *Imam Bux* v. *Mahadeo Gope.* Appeal from Appellate Order No. 61 of 1893, against the order of G F. Mathews, Esq., District Judge of Purneah, dated the 8th of December 1892, affirming the decree of Babu Raj Narain Chuckerbutti, Munsif of Arrah, dated the 27th of August 1892.

Moulvie *Mahamed Yusoof*, and Moulvie *Mahamed Habibulla* for the Appellant.

Babu *Golap Chunder Sarkar* for the Respondent.

The **judgment** of the Court (**Trevelyan** and **Banerjee, JJ.**) was as follows :—

This is an appeal from an order of the District Judge dismissing an appeal to him from an order of the first Court admitting a review. Objection has been taken, somewhat late, that we have no jurisdiction, because no second appeal lies. We think it clear that the objection is fatal. Section 591 of the Code of Civil Procedure permits but one appeal. There is no provision of law allowing a second appeal in a case of this kind. That being so, the appeal must be dismissed, but under the circumstances we make no order as to costs.

[24 Cal. 320]

CRIMINAL REFERENCE.

The 19th January, 1897.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Queen-Empress
versus
Jogendra Nath Mukerjee and others.........Accused.

Warrant of arrest—Illegal issue of warrant—Code of Criminal Procedure (Act X of 1882), sections 76, 81, 90 -Penal Code (Act XLV of 1860), sections 143, 186, 406—Justifiable assault—Criminal Procedure Code, section 160—Investigation by Police—Witness.

Where a District Magistrate issued a warrant for the arrest and production of a witness for the purpose of giving evidence at an investigation held by the police, and in attempting to execute such warrant the Police arrested the wrong person and were assaulted in the attempt,

Held, that apart from the fact that the attempt to arrest was made on the wrong person, a District Magistrate has no authority to issue a warrant for the production of a witness at an investigation by a Police Officer, but only before his own Court under sections 76, 81 of the Code of Criminal Procedure.

Held, also, that as the investigation was held by a Police Officer under Chapter XIV of the Criminal Procedure Code, the proper course was for the Sub-Inspector of Police to require the attendance of this witness under section 160 of the Code of Criminal Procedure, and on failure by her to comply with such order, prosecute her under section 174 † of the Penal Code.

Held, also, that the accused were justified in their resistance, and that no offence, either under section 143 or section 186 of the Penal code, was committed, and that they should be acquitted.

[321] *In re Rakhmaji* (I.L R, 9 Bom, 558), *Queen-Empress* v *Tulsiram* (I. L. R., 13 Bom., 168), *Lala Singh* v *Queen-Empress* (I L R 22 Cal, 286), *In re Baroda Kant Pramanick* (1 Cal., W. N., 74).

THIS was a reference under section 438 of the Code of Criminal Procedure on the following facts: A charge of criminal breach of trust had been referred to the Police for investigation, and the prosecutor was desirous of examining one

* Criminal Reference No. 240 of 1896, made by J F Bradbury, Esq., Sessions Judge of Hooghly, dated 22nd of September 1896

† [Sec. 174.—Whoever being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order, or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same, intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart, shall be punished with simple imprisonment for a term which may extend to one month, or with fine, which may extend to five hundred rupees, or with both; or if the summons, notice, order, or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.]

(Non-attendance in obedience to an order from a public servant.)

Monmohini as a witness. The Police were unable to obtain her appearance before them as a witness, and moved the District Magistrate for the issue of a warrant for her apprehension and production at the investigation by the Police, as a witness. On obtaining the warrant, the Police attempted to arrest one Aghoremoni instead of Monmohini, and, in the attempt, were assaulted by five men, who were subsequently convicted by the Deputy Magistrate of Howrah under sections 143 and 186 of the Penal Code and sentenced to pay a fine of Rs. 30 each, or in default to undergo rigorous imprisonment for one month.

Babu *Hara Prasad Chatterjee* (with him Babu *Debendra Chandra Mullick*) for the accused.—There is no provision in the Criminal Procedure Code which authorises a Magistrate to issue a warrant for the arrest and production of a person for examination before a Police Officer. A Magistrate can only issue a warrant for the appearance of a person before a Court of Justice to give his evidence. See sections 76, 81, 90, 91 of the Criminal Procedure Code. No doubt the Police have power under section 160 of the Criminal Procedure Code to require the appearance and attendance before them, during a Police investigation, under Chapter XIV of the Criminal Procedure Code of any person acquainted with the facts and circumstances of the case they are enquiring into, but they cannot compel a witness by force to attend before them. See *Queen* v. *Behary Sing* (7 W. R. Cr., 3). For non-compliance with an order to appear before the Police the person whose attendance is required can only be prosecuted under section 174 of the Penal Code.

The issue of the warrant being illegal and *ultrà vires* there can be no conviction of the accused under either of the sections **[322]** 143 or 186 of the Penal Code. See *In re Rakhmaji* (I.L.R., 9 Bom., 558), *Queen-Empress* v. *Tulsi Ram* (I.L R., 13 Bom., 168), *Lalla Singh* v. *Queen-Empress* (I. L. R., 22 Cal., 286), *In the matter of Baroda Kant Pramanick* (1 Cal., W. N., 74), *Cod* v. *Cabe* (45 L. J. M. C., 101).

The issue of the warrant being illegal, it cannot be said that the Police officers were acting in the discharge of their public duties ; and if in the attempt to execute an illegal warrant the Police officers were assaulted the accused persons could not be held guilty of an offence under section 186 of the Penal Code. In the present case, not only were the Police officers not acting in the discharge of their public duties, but they laid hands on a wrong person, which, as the Magistrate finds, " led to the Police being assaulted " by one or other of the accused.

Section 99 of the Penal Code, to which reference has been made by the Magistrate in his explanation, has no application whatever to a case where the public officer concerned purports to act under a warrant or other authority, the issue of which is illegal and *ultrà vires.* Whether the action of the Police officers was *bonâ fide* or not does not arise now, and is not before the Court. *Queen-Empress* v. *Tulsi Ram* (I.L.R., 13 Bom., 168).

No one appeared for the Crown.

The following **judgment** was delivered by the High Court (**Ghose and Gordon, JJ.**) :—

This case comes before us on a reference by the Sessions Judge of Hooghly under section 438 of the Code of Criminal Procedure, and we have heard the learned Vakil who appeared in support of the reference. It appears that one Upendra Nath Bhuttacharjee preferred a complaint of criminal breach of trust under section 406 of the Penal Code against certain persons, and this complaint was referred to the Police for enquiry by the Magistrate of Howrah. One of the witnesses whom the complainant wished

to be examined by the Police in support of his charge was a lady named Monmohini Devi, and the Sub-Inspector of Police who was holding the investigation by an order in writing, required her to attend before him for [323] the purpose of being examined as a witness in the case. She, however, failed to attend in accordance with his order, and accordingly the Sub-Inspector reported the matter to the District Magistrate, who eventually issued a warrant for her arrest and production before the Sub-Inspector in order that she might be examined by him as a witness. The Sub-Inspector, a head constable and some constables, armed with the warrant, proceeded to the lady's residence to execute it, and there having lain hands on one Aghoremoni instead of on Monmohini they were obstructed, and one or other of them was assaulted by certain persons. These persons, five in number, were accordingly prosecuted for committing offences under sections 143 and 186 of the Penal Code, were convicted by the Deputy Magistrate of Howrah of such offences, and sentenced each to pay a fine of Rs. 30 or in default to undergo one month's rigorous imprisonment.

The learned Sessions Judge is of opinion that the District Magistrate had no authority in law to issue a warrant of arrest against Monmohini for her production as a witness before the investigating Police Officer, and that therefore the conviction of the five accused persons under sections 143 and 186 of the Penal Code is bad in law; and in support of this view he has referred to *In re Rakhmaji* (I. L. R., 9 Bom., 558), *Queen-Empress* v. *Tulsi Ram* (I. L. R., 13 Bom , 168), *Lalla Sing* v. *Queen-Empress* (I. L. R., 22 Cal., 286), and the learned Vakil has drawn our attention to another case in point, *In the matter of Baroda Kant Pramanick* (1 Cal., W. N., 74). We have considered the terms of the reference, the explanation of the District Magistrate, the authorities cited, and the arguments advanced by the learned Vakil in support of the reference, and we are of opinion that the Judge has taken a correct view of the law in this case. We are unable to find any provision in the Criminal Procedure Code authorising the issue of such a warrant of arrest as the District Magistrate issued in this case. Reading sections 76 and 81 of the Code together it would appear that a Magistrate is only competent to issue a warrant of arrest for production of a person before his own Court and not before a Police Officer.

[324] No doubt, as the District Magistrate points out, section 90 of the Criminal Procedure Code empowers him to issue a warrant in any case in which he is competent to issue a summons, but we observe that the Code makes no provision for the issue of a summons by a Magistrate requiring a person to appear before a Police Officer. The investigation in the present case was being made by the Police under chapter XIV of the Criminal Procedure Code, and accordingly the Sub-Inspector was empowered under section 160* by an order in writing to require the attendance of Monmohini before him, and on her failure to comply with the order she might have been prosecuted for disobedience under section 174 of the Penal Code; but we think that no warrant of arrest could under such circumstances be lawfully issued against her. We are also of opinion that inasmuch as the issue of the warrant was illegal the convictions under sections 143 and 186 of the Penal Code cannot be sustained, and the authorities above cited support this view. The District

[S. 160. Any Police-officer making an investigation under this chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the circumstances of the case; and such person shall attend as so required.]

Police-officer's power to require attendance of witnesses.

Magistrate relies on section 99 of the Penal Code; but we think that this section has no application to a case like the present in which the Police officers were acting under a warrant, the issue of which was altogether illegal. For the above reasons we set aside the conviction and sentences, and direct that the fines, if realised, be refunded.

C. E. G.

NOTES

[See also (1904) 9 C W N, 125.]

[24 Cal 324]

CRIMINAL REVISION

The 19th January, 1897

PRESENT

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Jagarnath Mandhata and others . . . . .Petitioners

versus

Queen-Empress. ....Opposite Party.*

Bengal Excise Act (Bengal Act VII of 1878), sections 4, 40, 75—Bengal Excise Act Amendment Act (Bengal Act IV of 1881), section 3—Right of Search —Gurjat-ganja—Exciseable article—Foreign exciseable article.

In a case where an Excise Sub Inspector attempted to search a house for *gurjat-ganja*, a "foreign exciseable article," under the Excise Act (Bengal Act VII of 1878), and resistance was offered —

Held, that *gurjat ganja* being a "foreign exciseable article" under [325] section 4 of the Act as amended by Bengal Act IV of 1881 the excise officer had no legal authority to enter and search the house under section 40 of the Act, he had authority only to enter and search for any "exciseable article" as defined in section 4 of the Act and that no offence, either under section 141 or section 353 † of the Penal Code, was committed.

Held, also, that section 75 of the Act does not apply to a "foreign exciseable article."

ON 26th August 1896 the Excise Sub-Inspector of Puri received information through an informer that *gurjat ganja* was concealed in the house of accused No. 1, Jagarnath Mandhata. After taking down this information in writing,

* Criminal Revision No 665 of 1896, against the order passed by F. E. Pargiter, Esq., Sessions Judge of Cuttack, dated the 7th of November 1896, affirming the order passed by N. Bhuttacharjee, Deputy Magistrate of Puri, dated the 7th of October 1896.

† [Sec 353 —Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]

Using criminal force to deter a public servant from discharge of his duty.

in accordance with section 40 of the Excise Act (VII of 1878) the Sub-Inspector went to the village where Jagarnath lived, taking with him a head-constable and a constable of the Khurdah Police Station, in accordance with section 40 of the Excise Act, also four excise peons and the carter in whose cart they travelled. On arrival at the village the Sub-Inspector, taking with him in addition two of the villagers, as witnesses, proceeded to the house of Jagarnath. In an out-house, forming the entrance to the inner apartments, they found Jagarnath and Bisunath accused No. 3. Bisunath was pounding the *ganja*. The Sub-Inspector arrested Bisunath and gave the pounded *ganja* into the custody of one of the excise peons, himself keeping possession of the loose *ganja*. Jagarnath then interfered and told the Sub-Inspector he must not arrest Bisunath. The Sub-Inspector thereupon told Jagarnath, who he was and what he had come for The party then went into the second courtyard, where the Sub-Inspector pointed out to Jagarnath the room which he suspected contained *ganja*, and asked for the key, the door being locked.

Jagarnath told his son, Satyabadi, to go and fetch the key. Satyabadi went away, and after some delay they heard a noise of some one jumping down into the room. The Sub-Inspector insisted on Jagarnath getting the key, and at this moment Satyabadi returned, and both he and Jagarnath then ordered the Sub-Inspector and his party to leave the house, stating that they would not allow it to be searched. The Sub-Inspector thereupon ordered his peon to break open the door, and while he was attempting to do so, he was twice pushed aside by Jagarnath. In the [326] meantime 40 or 50 other villagers had assembled, and the Sub-Inspector, fearing that he would be attacked and beaten, went away with the head-constable to the Delary Police outpost, which was six miles distant, and there lodged an information with the head-constable in charge against the three accused.

Jagarnath, in his defence, stated that no resistance was offered to the search made in his house, and that they did not find any *ganja*, and pleaded not guilty.

Accused No. 2 and No. 3 pleaded *an alibi*.

The Deputy Magistrate found all three accused guilty under sections 147 and 353 of the Penal Code, and sentenced them to rigorous imprisonment for two months.

On appeal to the Sessions Judge of Cuttack, the Sessions Judge upheld the conviction, and on 7th November 1896 delivered the following judgment :—

4. "The appellants have been convicted under sections 147 and 353 of the Penal Code of having attacked a special Excise Sub-Inspector and his attendants when he visited the appellant Jagarnath's house and found *gurjat-ganja* there. The facts are quite clear, and there is no reason to disbelieve the witnesses for the prosecution. The common object is quite clear; it was to prevent the house from being searched. It is contended on the appellant's behalf that the Excise officers exceeded their duty in making the search, and were not protected by section 99 of the Indian Penal Code This contention rests on the argument that they made the search under section 40 of the Excise Act, and that applies only to 'exciseable articles' and not 'foreign exciseable articles.' But reading sections 4 and 17 and 17 A together, I am of opinion that 'exciseable article' includes 'foreign exciseable articles,' and that the latter is only a particular sub-class under the former class. Section 75, therefore, applies to the *gurjat-ganja* which is admittedly a 'foreign, exciseable article,' and section 40 therefore covers the proceedings of the Excise officers; and even if it did not, they acted in good faith under colour of their office, and the rulings *Bhawoo Jivaji* v. *Mulji Dayal* (I. L. R., 12 Bom., 377), and *Queen-Empress* v. *Daiip* (I. L. R., 18 All., 246) shew that section 99 covers their conduct I think, therefore, the convictions are right. The appeal is therefore dismissed."

The accused thereupon moved the High Court to set aside the conviction and sentences.

Babu *Monmotho Nath Mitter* for the petitioner.—The Excise Officer had no authority to enter and search the house of the [327] petitioners. Section 40 of the Excise Act (Bengal Act VII of 1878) empowers him to enter and search the house of a man, when he is suspected of having kept concealed in his house any *exciseable articles* which are liable to confiscation under section 75 of the Act. In the present case, according to the finding of both the lower Courts, *gurjat-ganja*, which the petitioners were suspected of having kept concealed in their house, is a "foreign exciseable article," and not an "exciseable article." Under the Act "exciseable" and "foreign exciseable" articles are different from each other, and the Sessions Judge is in error in holding that "exciseable article" includes "foreign exciseable article." There was no such term as "foreign exciseable article" in Bengal Act VII of 1878 when it was originally passed, but that term was introduced by the amending Act (Bengal Act IV of 1881), and that introduction was not by an amendment of the definition of the term "exciseable article" as given in section 4 of Act VII of 1878, but by the addition of a separate definition altogether. It also appears from the different sections of the amending Act that, whenever the Legislature had occasion to deal with "foreign exciseable articles," they have added new sections, *vide* sections 17A and 61A. Section 75, as it originally stood in the Act of 1878, has been amended by section 10 of Act IV of 1881, but there is nothing in that amendment to indicate that "exciseable article" includes "foreign exciseable article." The Excise Officer had therefore no authority under section 40 to enter and search the house of the petitioners, who were legally justified in offering such resistance to the Excise Officer and his party as was necessary to prevent the house from being searched. The common object of the assembly being to offer lawful resistance, there was no unlawful assembly as defined by section 141 of the Penal Code. Section 99 of the Penal Code has no application to the facts and circumstances of the present case.

The following **judgment** was delivered by the High Court (**Ghose** and **Gordon, JJ.**) :—

The petitioners have been convicted by the Deputy Magistrate of Puri of offences punishable under sections 147 and 353 of the Penal Code, and have been sentenced each to two months' rigorous imprisonment. On appeal the conviction and sentences have [328] been affirmed by the Sessions Judge. The facts found by both lower Courts are that Janki Nath Basu, Special Excise Sub-Inspector of Puri, having received information that *gurjat-ganja* was concealed in the house of the petitioner, Jagarnath Mandhata, went to his house to search it, accompanied by certain Police Officers and Excise peons, and that he and his party were opposed by the petitioners and others in their attempt to search the house in question, and were at the same time assaulted. The main ground urged in support of the rule, which we granted on the application of the petitioners, is that, inasmuch as *gurjat-ganja* is a "foreign exciseable" article as defined in section 4 of Bengal Act VII of 1878 (as amended by Bengal Act IV of 1881), it is not included in the term "exciseable article" as used in sections 75 and 4 of that Act; and consequently the Excise Officer had no legal authority under section 40 to enter and search the house of Jagarnath Mandhata. We have considered the terms of the various sections referred to, and the definitions of "exciseable" and "foreign exciseable" article, as given in the Act, and we are of opinion that the Excise Officer had no legal authority to search the petitioner's house. Section 4 of the

Act, as amended by Bengal Act IV of 1881, contains separate and distinct definitions of "exciseable article" and "foreign exciseable article," and therefore, we think, that, whenever either of these expressions occurs in the Act, it is used in the sense and with the meaning given to it in the definitions. The words used in section 75 are "exciseable article" and the words "foreign exciseable article" do not occur therein, so that in the view we take the Excise Officer in the present case had no authority under section 40 to enter and search the petitioner's house; he had authority only to search for any exciseable article as defined in section 4 of the Act.

The learned Judge has expressed the opinion that, reading sections 4, 17 and 17A together, "exciseable article" includes "foreign exciseable article," and that the latter is only a "particular sub-class," under the former class; and that section 75 is therefore applicable to *gurjat-ganja*. We are, however, unable to adopt that view. As already stated, section 4 distinguishes between "exciseable" and "foreign exciseable" articles.

Section 17 refers to exciseable articles only, while section **[329]** 17A gives to the Board of Revenue, with the sanction of the local Government, the power to declare by notification that the possession of any "foreign exciseable article" is prohibited within districts and tracts specified in the notification. No doubt, it appears from the Deputy Magistrate's explanation that a notification has been duly published prohibiting the possession of any "foreign exciseable article" without a license from the Collector in the District of Puri, but all the law provides with reference to such articles is that the person in possession thereof shall be liable to a fine (see section 61A). There is nothing to indicate, as far as we can discover, that "foreign exciseable articles" are meant to be a sub-class of "exciseable article;" and, indeed, we do not find that such articles are liable to seizure and confiscation as exciseable articles are under section 75 of the Act. It follows, therefore, that the Excise Officer had no authority to proceed under section 40 of the Act. We may also refer to section 82 of the Act, in which a distinction is drawn between an "exciseable article" and a "foreign exciseable article," thus indicating that the Legislature did not mean "foreign exciseable" articles to be a sub-class of "exciseable" articles. We also think that section 99 of the Penal Code, and the authorities referred to by the Sessions Judge in his judgment, are not applicable to the facts and circumstances of the present case. The common object of the assembly was to resist the search of the house, which, as we have already said, the Excise Officer had no legal authority to make; and that being so, we are unable to say that such assembly was an "unlawful assembly," as defined in section 141 of the Penal Code, and that when force was used the offence of resisting was committed. Similarly, we are of opinion that the conviction under section 353 of the Penal Code cannot be supported, because the Special Excise Sub-Inspector, when assaulted, was not acting in lawful discharge of his duty. [See *In re Rakhmaji* (I. L. R., 9 Bom., 558)]. We observe that the Sessions Judge is of opinion that the Excise Officer was protected by section 99 of the Penal Code; and he cites two cases [*Bhawoo Jivaji* v. *Mulji Dayal* (I. L. R., 12 Bom., 377) and *Queen-Empress* v. *Dalip* (I. L. R., 18 All., 246)] in support of this view. But the facts of those cases are essentially **[330]** different from the facts of the present case, and we do not think that the law laid down therein is applicable here; or that section 99 of the Penal Code can protect the Excise Officer, when his conduct was altogether illegal. For the above reasons we set aside the conviction and sentences.

We might, however, hold that the petitioners are guilty of the offence of ordinary assault punishable under section 352* of the Penal Code, but we are not quite sure whether the resistance offered or the force used was not necessary to resist the Excise Officer in what he attempted to do, *viz.*, to break open the door of the petitioner's house. But in any view of the matter, it seems to us that the incarceration, which the petitioners have already suffered under the sentence imposed by the Magistrate, is sufficient in the circumstances of the case, and that there need not therefore be any formal conviction for assault under section 352.

C. E. G. *Rule made absolute.*

[24 Cal 330]

APPELLATE CIVIL.

The 8th December, 1896.

PRESENT.

MR. JUSTICE BANERJEE AND MR JUSTICE RAMPINI.

Gobind Chunder Nundy and another..........Plaintiffs
versus
Srigobind Chowdhry and another .... .Defendants †

Contribution, Suit for—Joint wrong-doers—Decree for costs—Evidence—Proceedings in former case not between same parties—Admissibility in evidence of finding in former case.

S granted to *G* and *A* a *putni* of a certain share in a zemindari, and thereupon *P* brought a suit against *G*, *S* and *A* for specific performance of an agreement to grant to him (*P*) a *putni* of the same share. That suit was decreed with costs, the whole of which were realized from *G*. In a suit for contribution brought by *G* against *S* and *A*, the lower Appellate Court found that *G S* and *A* had conspired in setting up a false defence in the former suit in order to defeat *P*'s claim.

[331] *Held*, in second appeal that, assuming such collusion were proved, the suit for contribution was not maintainable, *G*, *S* and *A* being joint wrong-doers.

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* [Sec 352 —Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, which may extend to five hundred Rupees, or with both.

Punishment for using criminal force otherwise than on grave provocation

Explanation.—Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or

If the provocation is given by anything done in obedience to the law or by a public servant in the lawful exercise of the powers of such public servant; or

If the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact]

† Appeal from Appellate Decree No. 1237 of 1895, against the decree of K. N. Roy, Esq., District Judge of Pubna and Bogra, dated the 20th of April 1895, affirming the decree of Babu Rash Behari Bose, Munsif of Serajgunge, dated the 10th of September 1894.

Vayangara Vadaka Vittil Manja v. *Pariyangot Padingara Kuruppath Kadugochen Nayar* (I. L. R., 7 Mad., 89), followed; *Brojendra Kumar Roy Chowdhry* v. *Rash Behari Roy Chowdhry* (I. L. R., 13 Cal., 300), distinguished.

The only evidence on which the Lower Appellate Court had acted as establishing such collusion was the finding of the Court in the former suit (gathered from the grounds of appeal in that suit). *Held*, that that finding was inadmissible in evidence as laid down in *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry* (I. L. R., 13 Cal., 352), being the finding in a case in which *G*, *S* and *A* were all co-defendants, and a third party the plaintiff: and the case was remanded for the determination of the question whether *G*, *S* and *A* were wrong-doers, and were as such held liable for the costs of the former suit.

SRI GOBIND CHOWDHRY, defendant No. 1, the proprietor of a three annas share in *mouzah* Mouhaly, let out in *putni* 2 annas and 5 gundas to the plaintiffs, and the remaining 15 gundas to Anand Chunder Tarafdar, defendant No. 2. Under a previous contract he had, however, agreed to grant a *putni* of the entire 3 annas share to one Prannath Nundy. On that contract Prannath Nundy brought a suit No. 25 of 1891 in the Subordinate Judge's Court at Pubna against the plaintiffs and the defendants in this suit for cancellation of the leases granted to the plaintiffs and the defendant No. 2, for execution of a lease in his favour by the defendant No. 1, and for possession of the property. In that suit Prannath obtained a decree, which was upheld on appeal, and the present plaintiffs and the defendants were made jointly liable for his costs. In execution of the decree for costs the plaintiffs' property was attached and advertised for sale. They paid the money into Court and brought this suit against the defendants for contribution. The defendant No. 2 appeared and contended that the suit was not maintainable, that he was not liable to contribute, and, that if he was so liable, the proportion of his liability should not exceed the proportion of the share let out to him in *putni*. The Court of First Instance dismissed the suit on the ground that no suit for contribution lies by one of several joint wrong-doers against another. The plaintiffs appealed to the Officiating Judge of Pubna, who dismissed the appeal.

[332] The plaintiffs appealed to the High Court.

Babu *Mohini Mohun Chuckravarti* for the Appellants.

Babu *Hur Chunder Chuckravarti* and Babu *Sarat Chunder Khan* for the Respondents.

The **judgment** of the Court (**Banerjee** and **Rampini, JJ.**) was as follows.—

This appeal arises out of a suit brought by the plaintiffs-appellants for contribution, on the allegation that the plaintiffs and defendant No. 2 took from defendant No. 1 a 2 annas 5 gundas and a 15 gundas share of a certain zemindari in *putni* by two separate documents, that thereupon a suit was brought by one Prannath Nundy against the plaintiffs and defendants Nos. 1 and 2 for enforcing specific performance of a contract to grant a *putni* to him of the said two shares; that that suit was decreed with costs, and the whole costs decreed in favour of Prannath Nundy were realized from the plaintiffs. The plaintiffs seek to recover two different amounts from the two defendants Nos. 1 and 2.

The defence of the defendants was a denial of liability. They also pleaded that the suit was not maintainable, and they took some exception as to the extent of the liability of each.

The Courts below have thrown out the suit on the ground that no suit for contribution lies by one of several joint wrong-doers against the others.

In second appeal it is contended that the Lower Appellate Court is wrong in finding that the plaintiffs and the defendants were joint wrong-doers, or that they conspired together in setting up a false defence in the suit in which

the decree for costs was made, when there is no legal evidence to sustain the finding; and further that the Lower Appellate Court is wrong in treating this suit as one for contribution by one of several wrong-doers against the others

Upon the first point what the Lower Appellate Court says is this: "From the grounds of appeal of the original suit, it is clear that the Court held that the plaintiffs and the defendants made a conspiracy to defeat the contract between the defendant No. 1, Sri Gobind Chowdhry and Prannath Nundy, and, as such, were joint wrong-doers, and they knew that they were [333] doing an illegal and wrongful act." Exception is taken to this finding on the ground that the grounds of appeal in the former suit could not be used as evidence to establish the fact found. We are of opinion that this contention is correct. The utmost that the grounds of appeal can be taken to show is that the plaintiffs, who were some of the appellants, admitted in their grounds that the finding of the first Court was what the Lower Appellate Court in this case states it to be. But though that may be so, the finding of the Court in the former suit would be no evidence in the present suit of the fact found, for this simple reason, that that finding was arrived at in a case in which the present plaintiffs and the defendants were all co-defendants and a third party was the plaintiff. This is the rule of law laid down by a Full Bench of this Court in *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry* (I. L. R., 13 Cal., 352). The finding of the Lower Appellate Court upon this point cannot therefore stand.

The next question is whether the case should be remanded for the determination of the question whether the plaintiffs and the defendants in this case combined to defeat the plaintiffs in the former suit, and with that object put in false defences. We are of opinion, having regard to the manner in which this case has been dealt with by the Courts below, that if the determination of this question is necessary for the right decision of the case, the case ought to go back to the Court of First Instance. It becomes important, therefore, to determine whether it is necessary for the decision of the case that the question stated above should be determined. The learned Vakil for the appellants relies upon the case of *Brojendro Kumar Roy Chowdhry* v. *Rash Behari Roy Chowdhry* (I. L. R., 13 Cal., 300) in support of his contention that the plaintiffs in a case like this are entitled to contribution quite irrespective of the question referred to above, as the suit which resulted in the award of costs in respect of which contribution is asked for was a suit based, not upon tort, but upon contract. But we are of opinion that that case is distinguishable from the present one, as no question arose in that case as to whether the parties who were made liable for damages and costs in that [334] suit had incurred that liability by reason of their having set up any false defence. On the other hand, we think the case of *Vayangara Vadaka Vittil Manja* v. *Pariyangot Padingara Kuruppath Kadugochen Nayar* (I. L. R., 7 Mad., 89) is much more in point upon this question. In that case it was held that where the plaintiffs colluded with the defendant in a former suit to endeavour to defeat the plaintiffs there, and were made liable for costs, no suit for contribution in respect of such costs would lie. Following this decision of the Madras High Court, which in our opinion lays down a wholesome rule, we think the case ought to be remanded to the first Court for the determination of the question stated above and of any other question relative to the apportionment of liability that may be found necessary.

The costs will abide the result.

F. K. D. *Case remanded.*

NOTES.

[See also (1901) 25 Mad., 599 where BHASHYAM AYYANGAR, J. elaborately discussed the law on the subject. See also (1901) P. R., 7.]

[24 Cal. 334]

The 28th November, 1896.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE GORDON.

Jatra Mohun Sen.........(Plaintiff) Applicant

versus

Aukhil Chandra Chowdhry (Defendant No. 1) and others...... .....Opposite Parties.

Sale for arrears of Revenue--Right of Auction-purchasers to annul incumbrances--Act XI of 1859, section 37-- Suit to cancel under-tenures--Parties--Review Civil Procedure Code (Act XIV of 1882), section 630.

The right that is given by section 37 of Act XI of 1859 to the auction purchaser of an entire estate in the permanently-settled districts of Bengal, Behar, and Orissa, sold for arrears of revenue, to avoid and annul an under-tenure is a right that must be exercised by all the purchasers jointly where there are more purchasers than one.

THE plaintiff brought a suit to recover possession of some land comprised in two schedules appended to the plaint as appertaining to a *taluk* held and owned by him. The defendant No. 1 resisted the claim upon the ground chiefly that he, the defendant, being one of the purchasers of the entire estate within which the *taluk* set up by the plaintiff was situated, at a sale for arrears of Government revenue, the plaintiff was not entitled as against him to enforce his right as *talukdar*. The other defendants did not appear. The Court of First Instance decreed the claim **[335]** in part, and the Lower Appellate Court affirmed that decree so far as it was in favour of the plaintiff, and gave him a decree for a portion of that part of the claim which was dismissed by the first Court. The Lower Appellate Court held that the plaintiff was entitled to enforce his decree as *talukdar* against the defendant auction-purchaser on the ground that section 37 of Act XI of 1859 gives the right to avoid incumbrances only to the purchaser of an entire estate, and that the defendant No. 1, who was merely one of several purchasers of the estate, was not the purchaser of an entire estate and was not therefore entitled to avoid incumbrances. The defendant No. 1, in appeal to the High Court, contended that the right to avoid incumbrances belongs to the purchaser or purchasers at a sale for arrears of Government revenue whenever an entire estate is sold, quite irrespective of the fact whether the purchase is made by one or more persons, and quite irrespective also of the fact whether, where the purchase is made by more persons than one, only one of them or all of them seek to avoid the same. This contention was held to be correct.

The following was the **judgment** of the Court (**Banerjee** and **Gordon**, JJ.) so far as it is material for the purposes of this report :—

"The provisions of section 37 of Act XI of 1859 are intended as a safeguard for the realization of Government revenue, and are intended to prevent any

* Civil Rule No. 883 of 1896 and Application for Review in Appeal from Appellate Decree No. 1757 of 1894.

proprietor for the time being from so incumbering the estate, and thereby reducing its value, as to diminish the security afforded by the estate for the realization of Government revenue. The right in question attaches to the purchaser or purchasers at a sale for arrears of Government revenue, whenever what is sold is an entire estate, as distinguished from a share of an estate which may under certain circumstances be in the first instance brought to sale for arrears of Government revenue due from the sharer in whose name it is recorded, but the law does not require that, in order to exercise the right to avoid incumbrances, the purchasers, when there are more than one, should all unite in a body to bring a suit or take other steps necessary for the purpose. Of course when some only of several purchasers seek to avoid an **[336]** incumbrance it will be avoided only to the extent of their shares, and with regard to the shares of the other co-sharers, the incumbrancer will be left undisturbed."

The plaintiff then applied for a review and obtained this rule calling upon the opposite party to show cause why the application should not be granted. The Court (BANERJEE and GORDON, JJ.) granted the application on the ground that in their judgment in the appeal under review they had omitted to consider two decisions of the High Court, one in the case of *Dwarka Nath Pal* v. *Grish Chunder Bandopadhya* (I. L. R., 6 Cal., 827), and the other in the case of *Bungo Chunder Mozoomdar* v. *Brojo Mohun Waladar* (Appeal from Appellate Decree No. 1772 of 1892). The case was then at once re-heard under section 630 of the Civil Procedure Code.

Mr. *Woodroffe*, Babu *Akhoy Kumar Banerjee*, and Mr. *Percival* for the Petitioner.

Babu *Hari Mohan Chuckerbutty* for the opposite party.

The **judgment** of the Court (**Banerjee** and **Gordon, JJ.**) was as follows: —

The main question raised at this re-hearing is whether the right that is given to the auction-purchaser of an entire estate in the permanently-settled districts of Bengal, Behar and Orissa, sold for arrears of revenue, under section 37 of Act XI of 1859 to avoid and annul an under-tenure, is a right that must be exercised by all the purchasers jointly, where there are more purchasers than one, or whether it is open to any one of a number of co-purchasers to enforce that right. The Lower Appellate Court has taken the former view as being the one that is in accordance with the true meaning of the section, and it has accordingly held that it was not competent to the defendant No. 1, who was one of a body of purchasers by whom the estate had been purchased, to defeat the plaintiff's right as *talukdar*. Against that judgment this second appeal was preferred, and in our former judgment we held that the view taken by the Subordinate Judge was wrong, and that under section 37 of Act XI of 1859 any one of several purchasers of an entire estate sold for arrears of revenue was competent to avoid an under-tenure subordinate **[337]** to the estate, although the other co-purchasers might not join him. We held that the object of section 37 was simply to protect the public revenue, and that to secure that object it gave to the purchaser of an entire estate as distinguished from a purchaser of a share of an estate sold for arrears of revenue as provided in section 53 of the Act, the right to avoid incumbrances and under-tenures, and to take the estate in the condition in which it was at the time of the Permanent Settlement. In taking that view, we omitted to take into consideration one other wholesome purpose that the language of section 37 was intended to serve, viz., the purpose of preventing hardship to holders of incumbrances and under-tenures such as they would be subjected to, if where more persons than one purchase an estate, it was competent to any one of them to set aside an incumbrance or an under-tenure notwithstanding

that his co-purchasers might be unwilling to join him in doing so. This matter was taken into consideration in the unreported case to which we have referred, viz., *Bungo Chunder Mozoomdar* v. *Brojo Mohan Watadar* (Appeal from Appellate Decree No. 1772 of 1892), in which there occurs the following passage in the judgment: "If we could feel sure that the only object of section 37 was that referred to above, we should be bound to attach the greatest possible weight to this argument. But it is not unreasonable to suppose that, besides the one mentioned above, which is no doubt its primary object, the section has been intended to secure also certain other objects, such as the prevention of undue inconvenience and hardship which might arise from subjecting the holders of incumbrances to a multiplicity of suits by different purchasers at one sale, or to suits for partial cancellation of incumbrances at the instance of some out of several co-purchasers when the others are unwilling, or (as in this case) incompetent, to effect such cancellation. And if that is so, we must hold that the language of the section has advisedly been made what it is and we must construe it literally." The same view has been taken in the case of *Dwarka Nath Pal* v. *Grish Chunder Bundopadhya* (I.L R, 6 Cal., 827), and it has our full concurrence. We may add that stringent provisions like that laid down in section 37 of Act XI of 1859 have always been construed strictly and in favour of holders of **[338]** incumbrances and under-tenures so as to prevent hardship as much as possible. We need only refer to the decision of the Judicial Committee in the case of *Surnomoyee* v. *Suttees Chunder Roy Bahadur* (10 Moo. I.A., 123).

Babu Hari Mohun Chuckerbutty for the appellant-defendant No. 1 contended that, though this may be true for those cases where an auction-purchaser is the plaintiff and seeks to avoid a tenure, the same rule ought not to hold good where the auction-purchaser is not a plaintiff seeking to cancel an under-tenure, but is only a defendant resisting the claim of an under-tenure-holder to recover possession. We are unable to accept this contention as correct. It has been found in this case that the plaintiff-respondent before us owned a *taluk*, and that his right as proprietor of that *taluk* has not been affected by the law of limitation. His right as *talukdar* must, therefore, be held to be a subsisting right, unless it is shown to have been avoided by the revenue sale at which the appellant became one of the purchasers. The appellant failed to show that he was the sole purchaser or that defendants Nos. 7 and 8 who, according to the plaintiff, were some of the purchasers, have not acquired any right as auction-purchasers; in other words, he has failed to show that he represents the entire body of auction-purchasers. The defendant No. 1 has also failed to show that anything was done by the entire body of auction-purchasers to avoid the plaintiff's *taluk*. That being so, in the view we have taken of section 37, that *taluk* must be held to be a subsisting *taluk*, and the plaintiff must be held entitled to recover upon the strength of his title as a proprietor of that *taluk*. The result then is that the decree of the lower Appellate Court will be affirmed and this appeal dismissed with costs.

F. K. D. *Appeal dismissed with costs.*

NOTES.

[This was explained in (1902) 1 C. L. J., 579]

[339] *The 14th January, 1897.*

PRESENT:
MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Kailash Chandra Chuckerbutty and others............Plaintiffs
versus
Kashi Chandra Chuckerbutty and another............Defendants.*

Hindu Law—Bengal School of Hindu Law—Co-heiresses—Compromise—Reversioners.

According to the law of the Dayabhaga, when several daughters inherit the estate of their father, they are competent to enter into any arrangement regarding their respective rights in that estate, provided that such arrangement does not interfere with the rights of the reversionary heirs except by way of accelerating their succession.

THE plaintiffs in this suit claimed the share of one Subhadra in certain lands as heirs of their maternal grandfather, one Radhakrishna Chuckerbutty.

Radhakrishna Chuckerbutty, Kali Shankar Chuckerbutty, and Bhabani Shankar Chuckerbutty were three brothers constituting a joint Hindu family, holding certain *lakheraj* lands. Bhavani Shankar predeceased Radhakrishna, leaving a widow, Syama Sundari, who died some years afterwards. Next died Radhakrishna, leaving him surviving a widow, Saroda Sundari, and three daughters, Subhadra, Bishakha and Gaganeswari. Subhadra, whose share of the lands was in dispute, was married to the defendant No. 1 during the life-time of her father. Bishakha, the mother of the plaintiffs, and Gaganeswari, were married after the death of their father while they with their mother were living jointly with their uncle Kali Shankar. Saroda Sundari, Radhakrishna's widow, died on the 13th of Pous 1273 B.S (27th December 1866). Radhakrishna's share of the joint lands remained with Kali Shankar, who refused to part with it in favour of the three daughters of his deceased brother. Bishakha, the plaintiff's mother, sued Kali Shankar for her share of her father's lands in 1870, making her sisters, Subhadra and Gaganeswari, defendants in the suit. The suit was compromised by each of the sisters getting a third of the lands that Kali Shankar gave up. Subhadra was in possession of her one-third share till her [340] death without issue in 1299 (1892). Bishakha, plaintiff's mother, died in 1295 (1888), and Gaganeswari became a widow without any male child in 1294 (1887). The plaintiffs, as already stated, sued for recovery of possession of Subhadra's share in the lands as heirs of their maternal grandfather Radhakrishna. Defendant No. 1, who was in possession of all the lands in suit, asserted his claim to the share upon the compromise of 1870, the effect of which, according to his contention, was to create a separate estate for his deceased wife. The terms of that compromise were contained in two petitions, one filed by the plaintiff and the other by Subhadra and Gaganeswari. The material portion of Bishakha's petition was as follows:—

"This suit has resulted in compromise with me by the said Kali Shankar Chuckerbutty, the principal defendant, as also the co-sharers, defendants Nos 2 and 3, whereby they have relinquished to me a total quantity of (here the amount was set out) land and a third of the joint homestead or 2 *gandas* 2 *karas* and 2 *karantis* of land, while Subhadra and Gaganeswari have each taken on as much quantity of *lal* lands with specification of boundaries, &c. . . . .

* Appeal from Appellate Decree No. 1098 of 1895, against the decree of Babu Gopal Chandra Bose, Subordinate Judge of Tipperah, dated the 9th of April 1895, reversing the decree of Babu Romesh Chandra Sen, Munsif of Comillah, dated the 15th of May 1894.

with a third of joint homestead, etc —and I as well as defendants Nos. 2 and 3 have given up our claims to all other lands Under the circumstances I, as well as my son and son's son and so on in succession, will hold and enjoy with power to sell or make a gift thereof, the exclusive possession of all the . . . land which has fallen to my share, as also an equal or a third share of the homestead, jointly with my co sharer defendants, defendants Nos. 2 and 3, and the same shall never be claimed either by defendant No. 1, or any of the other co-sharers. In the above way we will hold now and for ever the respective shares each in adverse right to others. Neither myself nor my future heirs will lay claim to the lands of others, nor dispute for any right thereto."

The petition filed by Subhadra and Gaganeswari was to the same effect.

Babu *Promotho Nath Sen* for the Appellants.

Babu *Hari Mohan Chuckerbutty* and Babu *Aukhoy Coomar Banerjee* for the Respondent.

The **judgment** of the Court (**Banerjee** and **Rampini, JJ**) was as follows: –

This appeal arises out of a suit brought by the plaintiffs-appellants to recover possession of certain immoveable property, on the allegation that the said property, along with other properties, belonged to one Radhakrishna Chuckerbutty, the maternal **[341]** grandfather of the plaintiffs, that upon the death of Radhakrishna's widow in whom they had vested by inheritance, the three daughters of Radhakrishna, *viz*, Bishakha, mother of the plaintiffs, Gaganeswari, defendant No. 2, and Subhadra, the wife of defendant No. 1 became jointly entitled to the same, that Kali Shankar Chuckerbutty, brother of Radhakrishna, having kept Bishakha out of possession, she brought a suit against him and her two sisters Subhadra and Gaganeswari to recover possession of her share in the properties left by her father; that that suit resulted in a compromise, by which Bishakha and her two sisters obtained certain properties to be held by them separately; that subsequently Bishakha died and Gaganeswari became a childless widow; and that upon the death of Subhadra, the property obtained by her under the terms of the compromise became vested in the plaintiffs.

The defence, so far as it is material for the purposes of this appeal, was to the effect that the properties obtained by Subhadra under the compromise, did not belong to Radhakrishna, and that the plaintiffs are not entitled to claim the same during the lifetime of Gaganeswari, the surviving daughter of Radhakrishna and of defendant No. 1, who is the heir to Subhadra's property in preference to the plaintiffs, her sister's sons.

The first Court gave the plaintiffs a decree, but on appeal the lower Appellate Court has reversed that decree, holding that Hindu joint tenants such as widows and daughters, "are incompetent to convert, by mere acts of their own, joint estates into estates of severalty,' and that Gaganeswari was consequently entitled to hold Subhadra's share.

In second appeal it is contended on behalf of the plaintiffs that the lower Appellate Court is wrong in holding that, under the Bengal School of Hindu law, daughters are incompetent to convert their joint estates into estates in severalty, and that it ought to have held that, under the terms of the compromise, the plaintiffs were entitled to the properties left by Subhadra in preference to Gaganeswari and Subhadra's husband. On the other hand, it is contended for the defendants-respondents in support of the decree of the lower Appellate Court, that all that the daughters of Radhakrishna did under the compromise was **[342]** only to give up their rights in favour of each other during their joint lives, and that, if it be conceded that any estates in severalty were created by the compromise in favour of the three daughters of Radhakrishna, the properties now in dispute did not all belong to him.

We are of opinion that the lower Appellate Court is wrong in holding that, under the Hindu law of the Bengal School, when several daughters take a joint estate, they are incompetent to convert that joint estate into estates in severalty. We think that according to the law of the Dayabhaga, when several daughters inherit the estate of their father, they are competent to enter into any arrangement regarding their respective rights in that estate, provided that such arrangement does not interfere with the rights of the reversionary heirs except by way of accelerating their succession. This view is fully borne out by the law as laid down in the case of the widow, which is analogous to that applicable to the case of daughters, and also by that laid down in cases relating to the succession of daughters (see the Dayabhaga, chapter XI, section 2, paragraphs 30 and 31, and the cases of *Janoki Nath Mukhopadhya* v. *Mothuranath Mukhopadhya* (I. L. R., 9 Cal., 580), and *Padmamani Dasi* v. *Jagadamba Dasi* (6 B. L. R., 134). We are also of opinion that the respondents' contention that all that the daughters gave up in favour of each other under the compromise related to their rights during their joint lives is untenable, and we think that what the daughters intended to do by the compromise was to create in favour of each an absolute estate in the properties allotted to her, freely alienable by her and descendible to her heirs. How far they were competent to do so and how far this arrangement would entitle the plaintiffs to succeed in the present suit are questions which remain to be considered. Whilst taking this view of the compromise, we must, on the other hand, say that it does not in terms amount to a relinquishment by each daughter of her right of survivorship, so as to make the shares allotted to the other daughters pass on to the reversionary heirs on their death. The petitions of compromise nowhere say that; but, on the contrary, they distinctly provide that, upon the death of each daughter, the properties taken by her, **[343]** if not alienated by her in her life-time, should go to her sons, grandsons, etc., that is, to the heirs of her separate property which must mean her *stridhan*, though the word *stridhan* is not used in the petitions. That being so, can it be said that though the compromise does not in terms entitle the plaintiffs to claim the estate left by Subhadra, still the effect of the Hindu law, which is to prevent the compromise from taking effect to its fullest extent, is to accelerate the succession of the plaintiffs who are the ultimate reversionary heirs at the present date in regard to the properties left by the deceased daughter? We are of opinion that this question must be answered in the negative. For, we think it was competent to the daughters of Radhakrishna to come to any arrangement amongst themselves as to their respective rights which would last during the continuance of the daughter's estate, that is, up to the time of the death of the last surviving daughter, and that irrespective of the fact whether the last surviving daughter became disqualified to inherit after the succession had vested in her and her other sisters jointly. In support of the view that the subsequent disqualification of a daughter after the succession has vested in her along with other daughters does not deprive her of her right to continue to hold the daughters' estate, we need only refer to the case of *Amirto Lal Bose* v. *Rajonee Kant Mitter* (15 B. L. R., 10 23 W. R., 214). That being so, the estate that devolved on the daughters of Radhakrishna would not determine until after the death of Gaganeswari, and, until that event happens, the arrangement come to between the daughters, which was assented to by all the daughters, should, in our opinion, remain in operation. This would not in any way interfere with the rights of the reversionary heirs for the simple reason that those rights do not come into existence until after the death of Gaganeswari. Now, what is the effect of the arrangement come to amongst the daughters? As we have already indicated its effect was to make the properties allotted to each daughter remain her property capable of being alienated

by her, and, if not alienated, capable of passing on her death, to the heirs to her separate property as distinguished from the property inherited by her from her father. [344] In this view, the properties obtained by Subhadra, granting that they were properties which, as the plaintiffs alleged, originally belonged to Radhakrishna, would pass to the nearest heir to her *stridhan*, that is, to her husband, defendant No. 1, in the same way as the properties left by the plaintiffs' mother passed to them, not because they were the reversionary heirs of their maternal grandfather, but because they were the nearest heirs of their mother. We therefore think that the plaintiffs' suit has been rightly dismissed by the lower Appellate Court, though upon a wrong ground. The result then is that this appeal fails and must be dismissed with costs.

F. K. D. *Appeal dismissed.*

NOTES.

[Any alienation by limited owners does not of itself destroy their right of survivorship *inter se*; (1899) 22 Mad., 522; (1910) 7 I. C., 884; (1904) 14 M. L. J., 175.]

[24 Cal. 344]

CRIMINAL REVISION.

The 13th January, 1897.*

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Shama Charan Chakravarti and others............Petitioners

versus

Katu Mundal and another...........Opposite Party.*

Recognizance to keep the peace—Criminal Procedure Code (Act X of 1882), section 107—Jurisdiction of Magistrate.

In a case where an accused was bound over to keep the peace by the Deputy Magistrate of the district in which the accused was *temporarily* residing at the time when the Magistrate received information and instituted proceedings against him:

Held, that, although the accused permanently or habitually resided in another jurisdiction, he was sufficiently within the jurisdiction of the Magistrate within the meaning of section 107† of the Criminal Procedure Code.

IN this case the District Magistrate of Dinajpur, upon information contained in a Police report, drew up a proceeding on the 2nd of May 1896 under section 107 of the Criminal Procedure Code against two accused persons, calling upon them to show cause before the Deputy Magistrate of Dinajpur why they should

* Criminal Revision No. 485 of 1896 against the order passed by Babu Banku Behary Dutt, Deputy Magistrate of Dinajpur, dated the 29th of June 1896.

† [Sec. 107:—Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class receives information that any person is likely to commit a breach of the peace, or to do any wrongful act that may probably occasion a breach of the peace, within the local limits of such Magistrate's jurisdiction, or that there is within such limits a person who is likely to commit a breach of the peace or do any wrongful act as aforesaid in any place beyond such limits, the Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.]

Security for keeping the peace in other cases.

not be bound down in their own recognizances of Rs. 500 each with two sureties of Rs. 200 each to keep the peace for one year.

[345] On the 29th of June the accused appeared before the Deputy Magistrate to show cause, and the first accused, Shama Charan Chuckerbutty, contended that as he was not residing within the District of Dinajpur, the Magistrate of Dinajpur had no jurisdiction to require security from him under section 107. The Deputy Magistrate found that both the accused were actually residing within the district of Dinajpur at the time when the acts likely to lead to a breach of the peace were committed and when the proceeding was drawn up by the District Magistrate, and therefore ordered that they should each execute a bond in their own recognizances for Rs. 250 with two sureties of Rs. 100 to keep the peace for one year.

Thereupon the accused Shama Charan Chuckerbutty applied to the High Court for and obtained a rule to set aside the order of the Deputy Magistrate on 14th August 1896.

Mr. *Jackson* (with him Babu *Grish Chunder Chowdry*) for the Petitioner. —Inasmuch as Shama Charan Chuckerbutty habitually resides in the district of Maldah, the Magistrate of Dinajpur had no jurisdiction to institute proceedings and issue process against him under section 107 of the Criminal Procedure Code, and in support of this contention I rely on the following cases: *In the matter of the petition of Jai Prakash Lal* (I. L. R., 6 All., 26). *In the matter of the petition of Rajendra Chandra Roy Chowdhry* (I. L. R., 11 Cal., 737). *In the matter of the petition of Dinonath Mullick* (I. L. R., 12 Cal., 133).

Mr. *A. Chowdhry* and Babu *Surat Chundra Rai Chowdhry* for the Opposite Party.

The **judgment** of the High Court (**Ghose** and **Gordon, JJ.**) was as follows:—

This is a rule upon the Magistrate of Dinajpur to show cause why an order passed by the Deputy Magistrate of that district under section 107 of the Criminal Procedure Code should not be set aside. The learned Judges in granting the rule observed as follows: "The main ground for the application is that one of the parties bound down to keep the peace is not a resident of the district, and as it may possibly be necessary to look at the **[346]** evidence on the record, we do not separate the case of the two applicants, but let the rule run in favour of both." One of the two petitioners, Shama Charan Chuckerbutty, is the *suddernaib*, and the other, Tarak Nath Ghose, is the *tehsildar* of one Ghanesham Babu, proprietor of certain villages situated within the district of Dinajpur. Shama Charan Chuckerbutty resides in the district of Maldah, while Tarak Nath Ghose lives in the district of Dinajpur. The Deputy Magistrate has found on the evidence that there is a dispute existing between these two persons on the one side and the tenants of the villages in question on the other, which is likely to cause a breach of the peace. These villages have been recently measured, and an attempt is being made by the proprietor, through his agents, the present petitioners, to enhance the rents of the tenants; and with the object of compelling the tenants to submit to their landlord's demand the petitioners assembled a large number of *paiks* and *burkendazes*, and attempted to overawe them by threats, show of force and other oppressive measures, and have thus, in the opinion of the Deputy Magistrate, committed various acts within the local limits of his jurisdiction, which show that they are likely to commit a breach of the peace therein; and he has accordingly bound them down to keep the peace for the period of one year.

As regards Shama Charan Chuckerbutty, Mr. *Jackson* has contended that, inasmuch as he habitually resides in the district of Maldah, the Magistrate

of Dinajpur had no jurisdiction to institute proceedings and issue process against him under section 107 of the Criminal Procedure Code; and in support of this contention he has relied on the following cases: *In the matter of the petition of Jai Prakash Lall* (I. L. R., 6 All., 20), *In the matter of the petition of Rajendra Chandra Roy Chowdhry* (I. L. R., 11 Cal., 737), and *In the matter of the petition of Dinonath Mullick* (I. L. R., 12 Cal., 133). We observe that the facts of these cases are not similar to those of the present case. In those cases it appears that the petitioners had committed no acts likely to cause a breach of the peace within the local limits of the jurisdiction of the Magistrate, who instituted proceedings against them under **[347]** section 107 of the Criminal Procedure Code; whereas in the present case it is found that petitioners have committed various acts of this character within such limits.

It appears upon the record that Shama Charan, being deputed by the zemindar, came over to the Dinajpur district, committed various acts calculated to cause a breach of the peace, and was residing (though temporarily) within the local limits of that district at the time when the Magistrate received information of the probability of a breach of the peace, and instituted proceedings under section 107 of the Code Criminal Procedure. The Magistrate finds that "he was hovering about the district, or at least he did so in the months of Falgoon, Chyt, Bysack, Joisto and Assar." This would cover the whole of the period antecedent and subsequent to the institution of the proceedings. He means, as we understand, that Shama Charan was hovering in various parts of the district during these months. That being so, we are of opinion that the Magistrate had jurisdiction over him.

Section 107 says: "Whenever a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class receives information that any person is likely to commit a breach of the peace, or to do any wrongful act that may probably occasion a breach of the peace, within the local limits of such Magistrate's jurisdiction, or that there is within such limits a person who is likely to commit a breach of the peace or do any wrongful acts as aforesaid in any place beyond such limits, the Magistrate may in manner hereinafter provided require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix."

It appears to us that if, at the time when the Magistrate receives information and institutes proceedings, the accused person is residing within the local limits of his jurisdiction, he would have authority to proceed against him under section 107, though that person may be habitually or permanently residing in another jurisdiction. To hold otherwise would lead to various difficulties and inconveniences. No doubt, there are observations in the cases cited before us which may at first sight seem to be opposed **[348]** to this view; but having regard to the facts of those cases we do not think that those observations militate against the opinion which we have formed in this case.

As regards Tarak Nath Ghose no such question of jurisdiction arises.

Upon these grounds we are of opinion that this rule should be discharged.

C. E. G. *Rule discharged.*

NOTES.

[See also (1897) 23 Bom., 32.]

[24 Cal. 348]
ORIGINAL CIVIL.

The 24th February, 1897.
PRESENT:
MR. JUSTICE JENKINS.

Srinath Roy
versus
Godadhur Das.*

Deposit of Title-deeds—Transfer of Property Act (IV of 1882), section 59—Equitable mortgage—Immoveable properties situated partly outside the limits of Calcutta—Transaction in Calcutta—Decree for sale—Form of decree—Practice.

The defendant borrowed money from the plaintiff in Calcutta by deposit of title deeds relating to immoveable properties situated partly inside and partly outside the limits of the town of Calcutta. In a suit by the plaintiff it was held that the transaction having taken place in Calcutta the mortgage was valid as an equitable mortgage under section 59† of the Transfer of Property Act, though some of the properties were situated outside the limits of the town, and that according to the practice of the Court the appropriate remedy in such a mortgage suit is a decree for sale.

THE facts of the case are these: One Godadhur Das borrowed a sum of Rs. 35,000 from Rajah Srinath Roy, and deposited with him in Calcutta the title deeds of premises No. 306, Upper Chitpore Road, No. 7, Shampookar Street, and No. 138, Baliaghata Street, and executed the following memorandum which was registered: "Having this day borrowed from you Rs. 35,000 I do hereby deposit with you the title deeds as collateral security for the repayment of the said sum." Of the abovenamed properties the first two are situate within and the third outside the town of Calcutta. On default by the defendant in repayment of the loan, the plaintiff having obtained leave under clause 12 of the Charter brought the present suit for recovery of his claim by sale of the properties mortgaged.

[349] At the hearing two questions arose: *first*—whether an equitable mortgage could be created with respect to properties situated outside the town of Calcutta; and, *secondly*, whether the mortgagee was entitled to a decree for sale.

Mr. *Sen Gupta* and Mr. *C. R. Das* for the Plaintiff.

No one appeared for the Defendant.

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* Original Civil Suit No. 91 of 1896.

† [Sec. 59:—Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Mortgage when to be by assurance.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.]

Mr. *Sen Gupta.*—The mortgage is valid under section 59, paragraph 3 of the Transfer of Property Act (IV of 1882). That section lays down no restriction as to the situation of the property. All that is necessary to the validity of a mortgage contemplated under section 59 of the Transfer of Property Act is that the deposit of title deeds should be made within the towns mentioned in that section. See *Madho Das* v. *Ramkissen* (I. L. R., 14 Cal., 238), *Manekji* v. *Rustomji Naserwanji Mistry* (I. L. R., 14 Bom., 269). Besides, the plaintiff in this case has obtained leave under clause 12 of the Charter. As regards the second question as to whether the mortgagee was entitled to a decree for sale. In England an equitable mortgagee by deposit of title deeds, whether such a deposit was accompanied by a memorandum in writing or not, was entitled only to foreclosure and not to sale. See *James* v. *James* (L. R., 16 Eq., 153). But now however, under the Conveyancing Act of 1881, 44 and 45 Vict., c. 41, section 25, an equitable mortgagee may obtain a decree for sale in lieu of foreclosure. If the mortgage in the present case is valid under section 59 of the Transfer of Property Act (IV of 1882) the mortgagee is entitled to the same rights as an ordinary mortgagee under section 67 of that Act.

Jenkins, J.—In this case the documents of title relating to the immoveable property mentioned in the plaint were delivered with intent to create as security thereon, and as the transaction took place in the town of Calcutta I am of opinion that a good mortgage was thereby created, though some of the properties are situate outside the limits of the town. The only question is as to the appropriate remedy. I was referred to the statement in a text book that the practice in mortgages of this class is regulated by the English practice, and if that statement **[350]** were correct then the remedy would be foreclosure. It seems, however, that the practice in this Court has for a long series of years been to decree a sale, and I accordingly will make a decree in that form. I think it would be right to preface the decree with a statement to the following effect: "It appearing that the documents of title relating to the immoveable properties in question and mentioned in the plaint have been delivered to the plaintiff or his agent with intent to create security thereon. Declare, &c."

By this means it will appear on the face of the decree that the case comes within the last paragraph of section 59 of the Transfer of Property Act.

Attorney for the Plaintiff: Babu *Ashutosh Dhur.*

S. C. B.

[24 Cal. 350]

FULL BENCH.

The 4th September, 1896.

PRESENT:

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, MR. JUSTICE O'KINEALY, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN AND MR. JUSTICE BANERJEE.

Fatimunnissa *alias* Kanez Fatima and others............Petitioners

versus

Deoki Pershad and others............Opposite Party.*

Review—Appeal—Appeal from original decree—High Court Rules, Part II, Chapter VIII, Rule 17—Deposit of cost for paper book—Order of dismissal for default—Procedure to set aside such order—Civil Procedure Code (1882), sections 623, 626.

A decree of a Division Bench of the High Court, dismissing an appeal for default in depositing the estimated costs of preparation of the paper book under Rule 17 of the High Court Rules, Part II, Chapter VIII, can only be set aside by an order under section 626 of the Civil Procedure Code (Act XIV of 1882).

Ramhari Sahu v. *Madan Mohan Mitter* (I. L. R., 23 Cal., 339), so far as it decides the contrary, is wrongly decided.

THE question referred to the Full Bench in this case arose in a rule upon the application of the petitioners for restoration of an appeal from an original decree, which was dismissed for default [351] in the payment of costs for the preparation of the paper book in the appeal The appeal was dismissed on the 29th July 1895, under High Court Rules, Part II, Chap. VIII, Rule 17, by a Division Bench consisting of PRINSEP and NORRIS, JJ., who were at that time hearing cases from "the Patna Group" of districts; and the present application was made to TREVELYAN and BEVERLEY, JJ., who subsequently took charge of those districts, and the rule was granted by them. At the hearing of the rule the opposite party objected that the prayer of the appellants was really one to set aside the decree, and that this could be asked for only by way of review under section 626 of the Civil Procedure Code, before Mr. Justice PRINSEP, Mr. Justice NORRIS having then retired from the Bench of the High Court. The Bench hearing the rule were of opinion that the objection was well founded, but as there was a ruling of another Division Bench to

* Full Bench Reference on Rule Nisi No. 333 of 1896 issued in Appeal from Original Decree No. 215 of 1894, being an appeal against the decree of the Court of the Second Subordinate Judge of Saran passed in suit No. 15 of 1892, and dated the 28th March 1894.

† [Sec. 626:—*Application when rejected.* If it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

Application when granted. If the Court be of opinion that the application for the review should be granted, it shall grant the same, and the Judge shall record with his own hand his reasons for such opinion:

Proviso. Provided that—

(a) No such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree a review of which is applied for; and

(b) No such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him, when the decree or order was passed, without strict proof of such allegation.]

the contrary in the case of *Ramhari Sahu* v. *Madan Mohan Mitter* (I. L. R., 23 Cal., 344) the present case was referred to a Full Bench.

The facts of the case are fully stated in the order of reference by TREVELYAN and BEVERLEY, JJ., which was as follows:—

"On the 28th March 1894 a decree was made by the second Subordinate Judge of Chupra in a suit in which one Fatimunnissa was, amongst others, a defendant. She died on the 30th of April 1894, leaving her surviving Mahomed Asgar, her husband, an adult son, Athur Hosain, and three minor sons. The heirs of Fatimunnissa were, by an order of this Court, dated the 25th July 1894, permitted to prosecute an appeal in this Court, from the above-mentioned decree, Mahomed Asgar acting as next friend for his minor sons. Mahomed Asgar died on the 15th September 1894, and by an order of this Court, dated 7th of February 1895, his sons were substituted in his place, and his adult son was appointed 'guardian *ad litem*' of the minors.

"On the 9th of April 1895, an estimate for the costs of preparing the paper-book, amounting to Rs. 782 was served. On the 23rd of May the case first came on the *loazima* list, and was then postponed for a fortnight to allow the appellant to put in an affidavit.

"On the 1st June 1895, Athur Hosain affirmed an affidavit, [352] saying 'I am dangerously ill, and cannot do any work and cannot walk, hence I am unable to try to search for money for the expenses of the suit in appeal in High Court at Calcutta.'

"On the 7th June 1895, this Court, doubting the truth of the affidavit, allowed fifteen days' time for the deposit of the money, and in their order the learned Judges stated that, 'If within that time the deposit is not made, it will become necessary for us to consider whether the interests of the minors should not be entrusted to other hands for the purposes of this suit.' The money not having been paid, the same learned Judges on the 15th of July directed the case to be placed on the board for orders, on the 29th July. On the latter date the appeal was dismissed for want of prosecution by a Division Bench consisting of PRINSEP and NORRIS, JJ., and a decree was accordingly drawn up and signed.

"On the 29th August Athur Hosain died, having, it is now said, been ill since March.

"On the 6th February 1896, the minors represented by a new next friend asked us to restore the case and to permit them to deposit the necessary money. We issued a rule which we have now heard. There are three questions to be determined—

"*First.*—Have we power to make an order of this kind?

"*Second.*—Is the application barred by limitation?

"*Third.*—Do the merits of the case justify an order?

"We have no difficulty in dealing with the last two questions. Section 7 of Act XV of 1877, in our opinion, saves the limitation, and on the merits we should be inclined to make the order.

"It is contended that an order of the kind asked for can only be made by way of review, *i.e.*, under section 626 of the Civil Procedure Code. If that contention be right we have no jurisdiction, and the application can, under section 627, be dealt with by Mr. Justice PRINSEP only.

"Our attention has been called to a judgment of a Division Bench of this Court in Letters Patent Appeal No. 6 of 1895 (I.L.R., 23 Cal., 339) on the 13th March 1895, in which it was held that an application of this kind did not amount to an application for a review, but could be properly made under section 558 of the Civil Procedure Code. In a subsequent judgment (I. L. R., 23

Cal., 344) in the case by two out of the [353] three learned Judges who decided the Letters Patent Appeal, it was held that the application should be regarded as one under Rule 17 of Chapter VIII of the Rules of this Court (Appellate Side).

"In our opinion the decree of the 29th of July can only be set aside by an order under section 626 of the Civil Procedure Code. A decree can only be set aside as far as we are aware in a way expressly provided by law. Except under section 626 there is, as far as we can see, no such provision applicable to the present case.

"It is, in our opinion, desirable that the question whether we have any power to make an order should be determined by a Full Bench. We, therefore, refer this case for the decision of a Full Bench."

Babu *Harendra Narayan Mitra* (for Moulvie *Serajul Islam*) and Syed *Mahomed Tahir* for the Petitioners.

Babu *Kali Kishen Sen* for the Opposite Party.

Babu *Harendra Narayan Mitra* contended that the application could be granted under section 558 read in connection with Rule 17, or at all events under Rule 30. [PETHERAM, C.J.—Did the appellants appear on the 29th July, when the appeal was dismissed? Babu *Kali Kishen Sen*, Vakil for the opposite party, pointed out that the appellant's Vakil did appear and ask for time.]

The order of the Court (PRINSEP and NORRIS, JJ.) is not a "decree" under section 2 of the Code of Civil Procedure. *Jagarnath Singh* v. *Budhan* (I. L. R., 23 Cal., 115). [O'KINEALY, J.—See section 158. The Court had not the materials to decide the case and dismissed it.] The dismissal by default is by an order and not by a decree. *Munsab Ali* v. *Nihal Chand* (I.L.R., 15 All., 359). No doubt the dismissal in that case was for a default under section 556, but the provision of section 558 was applicable here, as was decided in *Ramhari Sahu* v. *Madan Mohan Mitter* (I. L R., 23 Cal., 339). [PETHERAM, C. J.—There is no provision there for setting aside the order in this case.] I submit that section 558 and Rule 17 must be read together, but if that could not be done, Rule 30 is sufficiently wide to authorize an order for [354] receiving the money now. [MACPHERSON, J.—After the decree?] An order may be made so long as the matter is pending. The Rule does not lay down any limitation A liberal construction of section 558 would make Rule 17 more consistent. Section 623 does not apply.

The opposite party was not called upon.

The **judgment** of the Full Bench (**Petheram C. J.**, and **O'Kinealy, Macpherson, Trevelyan** and **Banerjee, JJ.**) was as follows: —

In March 1894, a decree was given against one Fatimunnissa and others. She died and her heirs prosecuted an appeal in this Court. In April 1895 they were called upon to deposit Rs. 782 as costs for the preparation of the Paper-Book. The money was not paid, and after some delay the appeal was on the 29th July 1895 dismissed for want of prosecution under Rule 17 of the Rules for the preparation of Paper-Books in appeals from Original Decrees. An application was then made to a Divisional Bench of this Court on the 6th February 1896, and the Judges of that Bench, being of opinion that the decision and decree of the 29th July could only be set aside by review, referred the case to a Full Bench, as they disagreed with the judgment of another Divisional Bench of this Court in *Ramhari Sahu* v. *Madan Mohan Mitter* (I.L.R., 23 Cal., 339).

Now, under the Code there are only two ways known to the law by which a judgment and decree of a Divisional Bench of this Court can be set aside in India. These two methods are described in sections 558 and 623 of the Code.

The present case is clearly not one in which default was made in appearing at the hearing of the case, for the record shows that the pleaders on both sides were in attendance and heard. It seems to us, therefore, that the view expressed in the reference is correct, and that the case of *Ramhari Sahu* v. *Madan Mohan Mitter* (I. L. R., 23 Cal., 339) so far as it decides the contrary is wrongly decided.

[The rule was discharged by the Division Bench on the 15th February 1897.]

S. C. C.

NOTES.

[See also (1907) 32 Bom., 1 : 9 Bom., L. R., 508 ; (1898) 3 C. W. N., 24.]

[355] APPELLATE CIVIL.

The 1st January, 1897.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Bhiram Ali Shaik Shikdar............Defendant

versus

Gopi Kanth Shaha............Plaintiff.*

Civil Procedure Code (Act XIV of 1882), section 244—Question for Court executing decree—Issue raised by defendant in separate suit—Bengal Tenancy Act (VIII of 1885), sections, 65 and 73—Right of occupancy, Transferability of.

Section 244 of the Civil Procedure Code bars a suit brought for the determination of certain questions specified therein, but does not bar the trial of any issue involved in those questions if the issue is raised at the instance of a defendant in a suit brought against him. *Basti Ram* v. *Fattu* (I. L. R., 8 All., 146) distinguished.

In the absence of custom or local usage to the contrary, a *raiyati* holding in which the *raiyat* has only a right of occupancy is not saleable at the instance of the occupancy *raiyat* or any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent.

THE lands in suit, in which the defendant had a mere right of occupancy, were sold in execution of a money decree obtained by the plaintiff against him and purchased by the plaintiff himself on the 21st August 1885. The plaint set forth that the plaintiff had been recognized as a tenant by the proprietors, and that he had obtained formal possession in 1886, but had failed to obtain actual possession. The suit was for *khas* possession with mesne profits.

* Appeal from Appellate Decree No. 1349 of 1895, against decree of A. Pennell, Esq., District Judge of Mymensingh, dated the 4th of May 1895, modifying the decree of Babu Krishna Chandra Chatterjee, Subordinate Judge of that district, dated the 30th of July 1894.

The defence (so far as it is material) was that the defendant had no saleable interest in the property, and that the plaintiff did not therefore acquire any interest by his purchase.

The Court of First Instance dismissed the suit. That decision was reversed on appeal by the Lower Appellate Court, and the defendant brought this appeal to the High Court.

Babu *Dwarka Nath Chuckravarti* for the Appellant.

[356] Babu *Saroda Charan Mitter* and Babu *Promotho Nath Sen* for the Respondent.

The **judgment** of the Court (**Banerjee** and **Rampini, JJ.**) was as follows:—

This was a suit brought by the plaintiff-respondent to recover possession of some land constituting a *raiyati* holding of the defendant with the right of occupancy, on the allegation that the plaintiff purchased the same at a sale in execution of a decree for money obtained by him against the defendant, the plaintiff further alleging that he had, sometime after the sale, obtained from the landlord a settlement of the same.

The defence in substance was that the holding in question was not transferable by sale, and that the plaintiff, therefore, acquired no right by his purchase

The first Court found for the defendant, and dismissed the suit. On appeal, the Lower Appellate Court has reversed the decision of the first Court and given the plaintiff a decree.

In second appeal it is contended for the defendant that the decision of the Lower Appellate Court is wrong, inasmuch as the holding in question, being merely a *raiyati* holding with a right of occupancy, was not transferable, there being no evidence of any custom in favour of the transferability of such holdings, and that the Lower Appellate Court ought to have held that the plaintiff had acquired no right by his purchase. On the side of the plaintiff-respondent, it was contended, in the first place, that section 244 of the Code of Civil Procedure was a bar to the defendant's raising the question whether the plaintiff acquired any right by his auction purchase, and, in the second place, that, according to the law as enacted in the Bengal Tenancy Act, a right of occupancy is transferable, unless the transfer is objected to by the landlord. The two questions, therefore, that arise for determination in this appeal are: first, whether section 244 of the Code of Civil Procedure is a bar to the defendants' contention that the plaintiff acquired no right by his auction purchase; and, second, whether a *raiyati* holding in which the *raiyat* has only a right of occupancy is transferable in the absence of any custom or local usage in favour of its transferability.

[357] We are of opinion that the first question must be answered in the negative. In support of the contention that section 244 was a bar to the suit, the case of *Basti Ram* v. *Fattu* (I. L. R., 8 All., 146) was cited. But that case is quite distinguishable from the present. There the judgment-debtor whose occupancy holding had been sold brought a suit to establish his tenant-right to the holding notwithstanding the sale, on the ground that an occupancy right was not saleable by law, and it was held that he was not entitled to maintain the suit, section 244 of the Code of Civil Procedure being a bar to such a suit. In the present case, the party who raises the objection that the plaintiff has acquired no right by his auction-purchase because the holding sold was a non-transferable one, has not brought any suit. He is only raising that objection in defence to the suit which the other side has brought, and section 244 is not, in our opinion, any bar to this plea being raised by the defendant in his defence. All that section 244 enacts is that certain questions therein

specified shall be determined by the order of the Court executing the decree and not by separate suit; and granting that the question that the defendant now raises was one that came within the scope of section 244, still it does not follow that a defendant is precluded from raising that question by the provisions of section 244 when the question was not raised in the execution proceedings and has not been determined. The view that we take of section 244 is that it bars a suit brought for the determination of certain questions, but it does not bar the trial of any issue involved in those questions, if the issue is raised at the instance of a defendant in a suit brought against him. In our opinion section 244 in this respect differs from section 13 of the Code of Civil Procedure, which not only bars the trial of a suit or of an issue where the suit or the issue has actually been previously heard and determined, but also the trial of an issue which might and ought to have been raised in a previous suit by either party. Of course it would have been different if the question that is now raised had been raised in the proceedings under section 244 and determined. But then the trial of the issue would have been barred, not under section 244 by its own force, but under section 13 as being a matter that was *res judicata*, a decision under section 244 having the force of a decree. If section 244 was a bar [358] to anything in a case like this, it would be a bar to the suit brought by the plaintiff, for it was competent to the plaintiff to have obtained a decision of the question that is now raised by instituting proceedings under section 244.

The answer to the second question must depend in the first instance upon the provisions of the Bengal Tenancy Act, which governs this case. Now referring to the chapter relating to occupancy rights, that is Chapter V of the Act, we find that while section 26 expressly makes occupancy rights heritable, there is no provision in this chapter, such as we find in the two preceding chapters relating to tenures and *raiyati* holdings at fixed rates, declaring occupancy holdings to be transferable. This omission, to our minds, clearly indicates that the Legislature did not intend to make occupancy rights transferable. Great stress was laid upon section 65 of the Bengal Tenancy Act as showing that the holding of an occupancy *raiyat* is intended to be made transferable; and section 73 of the Act was also referred to as pointing to the same conclusion. But we are of opinion that neither section 65 nor section 73 bears out the contention of the learned Vakil for the respondent. Section 65 enacts that where a tenant has an occupancy right, he shall not be liable to ejectment for arrears of rent, but his holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon. That, no doubt, makes an occupancy holding saleable at the instance of the landlord in execution of a decree for rent; but though that is so, it does not follow from that that an occupancy holding is saleable at the instance of the occupancy *raiyat* or of any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent. Such an inference is, in our opinion, clearly negatived by the absence in Chapter V of any provision relating to the transferability of occupancy holdings. Nor does section 73 warrant any contrary conclusion, seeing that there are cases in which occupancy *raiyats* may transfer their holdings without the consent of the landlord; we mean cases in which such holdings are transferable by custom or local usage. Of course, if occupancy holdings were transferable under the law as it stood before the passing of the Bengal Tenancy Act, they would continue to be transferable, as there is nothing in the Act to the contrary. If, on the other hand, they were not transferable [359] before the Bengal Tenancy Act came into operation, then, as the result of our examination of the Bengal Tenancy Act shows,

they have not been rendered transferable by that enactment, and the old law in that respect continues unaltered.

This brings us to the consideration of the old law on the subject; and that need not detain us long, as the old law on the subject is clearly and conclusively laid down by a Full Bench of this Court in the case of *Norendro Narain Roy* v. *Ishan Chundra Sen* (13 B. L. R., 274 : 22 W. R., 22). In that case it was held that a right of occupancy was a right that was personal to the *raiyat*, and and could not be transferred by sale. It may be anomalous that a landlord may, in satisfaction of his decree for arrears of rent, sell an occupancy holding, and yet neither the occupancy *raiyat* nor any creditor of his can sell it. But if there is any anomaly, we must take it that the anomaly has been intentionally created. It may well be that the Legislature thought it desirable not to make occupancy holdings liable to be cancelled for arrears of rent, as they were under the old law, and, as a compensation to the landlord, it was enacted that the landlord may bring occupancy holdings to sale for the satisfaction of any decree for arrears of rent due thereon; and yet the Legislature might have thought it undesirable to make occupancy holdings freely transferable by the occupancy *raiyat*, or at the instance of his creditors, apprehending that the effect of such free transferability would, in many instances, be to place the holdings of cultivating *raiyats* in the possession of money-lenders, and to place the *raiyats* themselves at their mercy.

It remains now to consider, the effect of the landlord's consent to the transfer under which the plaintiff claims. Ordinarily, the only persons interested in impugning the validity of the transfer of an occupancy holding are the occupancy *raiyat* and the landlord; and where the former transfers his holding and the latter accepts the transferee in the place of the former tenant, there may arise no difficulty in the way of the transfer being given effect to. But that case is very different from the one now before us, where the transfer has been effected by compulsory sale at the instance of the *raiyat's* creditor, and the landlord's recognition has been obtained years after the transfer, although since the purchase he had been receiving rent from the former tenant. For **[360]** all these reasons we are of opinion that the second question raised in the case should also be answered in the negative. The result is, that the decree of the Lower Appellate Court must be set aside and that of the first Court restored with costs in this Court and in the Court of Appeal below.

F.&K. D. *Appeal allowed.*

NOTES.

[I. TRANSFER OF TENURES—

As regards the effect of the transfer in the absence of custom or local usage of an occupancy holding, see the Full Bench decision in *Dayamoyi* v. *Ananda Mohun Roy* **(1914) 42 Cal., 172 F.B.** where the decision was given after exhaustively discussing with Counsel all the previous case law.

See also (1899) 26 Cal., 937 : (1899) 27 Cal., 187 ; (1899) 3 C.W.N., 586 ; (1900) 4 C.W.N., 571 ; (1903) 7 C.W.N., 572 ; (1905) 9 C. W. N., 972 ; (1907) 34 Cal., 199 : 5 C.L.J., 294 : 11 C.W.N. 513 ; (1907) 6 C.L.J., 43 ; (1909) 13 C.W.N., 630 : (1910) 14 C.L.J., 620 ; (1910) 37 Cal., 687 ; (1913) 23 I.C., 939.

As regards the effect, in the general case, of alienation by mortgage, when such alienation is not permitted, see (1905) 30 Bom., 290.

II. CIVIL PROCEDURE CODE (1908) sec., 47 :—

This was followed in (1897) 1 C.W.N., 396 ; (1899) 20 Cal., 946 ; (1899) 27 Cal., 187 ; (1903) 7 C.W.N., 607 : (1904) 19 M.L.J., 1 ; (1909) 32 Mad., 242.]

[24 Cal. 360]
CRIMINAL REVISION.

The 28th January, 1897.
PRESENT:
MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Aukhoy Chandra Hati............Petitioner
versus
Calcutta Municipal Corporation............Opposite Party.*

Calcutta Municipal Consolidation Act (Bengal Act II of 1888), sections 335, 336—Date of taking out license.

In a case where the owner of a cowshed delayed taking out a license under section 335 of the Calcutta Municipal Consolidation Act (Bengal Act II of 1888), until the end of the month of May;

Held, that under the section as it stands there is nothing to compel a licensee to take out his license before 1st June in every year.

THE petitioner in this case who was a goala was charged before the Deputy Magistrate of Sealdah by the Conservancy Inspector of Ward No. 4 of the Calcutta Municipality with keeping cows on 20th and 21st May 1896 in an unlicensed cowshed, and that he kept his shed on those two days in a noxious state, and had thereby committed an offence under sections 335 and 337 of the Calcutta Consolidated Municipal Act. In defence the petitioner did not deny the second allegation of the prosecution, but alleged that as regards the first allegation he had applied to the Municipality for a license in accordance with the provisions of the section. The Deputy Magistrate of Sealdah sentenced him to pay a fine of Rs. 50 for committing an offence under section 335 of the Calcutta Municipal Act.

Babu *Boidonath Dutt* and *Hari Charan Sarkal* for the Petitioner.- The prosecution was premature. The alleged offence under section 335 is said to have been committed on the 20th and 21st May 1896. Under section 335 of the Calcutta Municipal [361] Act the owner of a cowshed is allowed time until 1st June in every year to take out his license. In this case the application for a license had already been made. This applies to all licenses and not merely to old licenses.

Mr. *Barrow* (Babu *Nogendranath Mitter* with him) for the Opposite Party.— No doubt paragraph 2 of section 335 allows an owner time up to the 1st June in every year to take out a license, but this only applies to a renewal of a license and not to cases where an owner has only just started keeping cows for profit. If that were so, an owner of cows might keep them in an unlicensed shed for the first five months of every year, and then abandon them without taking out a license. This was not the intention of the Legislature. Paragraph 1 of the section expressly prohibits any person from keeping any animal for profit, except in a place licensed by the Commissioners, that no place shall be licensed unless the conditions prescribed by the last paragraph of the section have been complied with, and that the penalty mentioned in section 336 is incurred whenever any animal is kept without a license. The license must be taken out before such animals are allowed to be kept. The petitioner has never

* Criminal Rule No. 667 of 1896, made against the order of Babu Shamadhub Ray, Deputy Magistrate of Sealdah, dated 3rd of August 1896.

taken out a license before and cannot defend himself by contending that he did not do so until 1st June of that year.

The **judgment** of the High Court (**Ghose** and **Gordon, JJ.**) was as follows:—

The only question involved in this rule is what is the true construction of paragraphs 1 and 2 of section 335 of the Calcutta Municipal Consolidation Act, Bengal Act II of 1888.

The petitioner has been convicted under sections 335 and 336 of the Act of keeping cows for profit in an unlicensed shed on the 20th and 21st May 1896, and has been sentenced to pay a fine of Rs. 50 and Rs. 1-8 as costs.

Section 335 runs as follows:—

"No person shall keep any animal for profit within Calcutta except in a place licensed by the Commissioners. Such license shall be taken out yearly before the first day of June in every year. The word 'animal' in this section shall include an elephant, camel, horse, mule, donkey, horned beast, sheep, goat and pig.

[362] "The Commissioners in meeting shall determine the places where such animals may be kept, and the rules as to paving, drainage, water-supply, cubical space, light and other conditions, subject to which the license may be granted, and may impose an annual fee not exceeding Rs. 10 for such license, and no place shall be licensed until the conditions imposed have been complied with."

It was contended on behalf of the petitioner before the Deputy Magistrate who tried him, and it has also been contended before us, that the conviction is illegal, because by paragraph 2 of section 335 he was allowed time up to the 1st June 1896 to take out a license, and that therefore the prosecution for keeping an unlicensed shed in the month of May was premature.

It has, however, been argued by the other side that paragraph 1 of the section expressly prohibits any person from keeping any animal for profit except in a place licensed by the Commissioners; that no place shall be licensed unless the conditions prescribed by the last paragraph of the section have been complied with; and that the penalty mentioned in section 336 is incurred whenever any animal is kept without a license. That section runs thus:—

"Whoever, being the owner of any land, permits any animals to be kept thereon in contravention of the provisions of the last preceding section, shall be liable to a fine not exceeding Rs. 100, and to a further fine not exceeding Rs. 20, for each day during which the offence is continued after he has been convicted of such offence, and the person keeping the animals shall also be liable to a similar fine," and so on.

The section says: "In contravention of the provisions of the last preceding section." The question is whether by keeping animals without a license on the 20th and 21st May, the petitioner contravened the provisions of section 335.

No doubt, the law prescribes that no person shall keep any animal except in a place licensed by the Commissioners; but what we have to see is whether it is intended that the license must be taken out *before* such animal can be allowed to be kept, and whether the penalty provided by section 336 is incurred whenever a party keeps an animal for profit without a license; or does not **[363]** the law allow such license being taken out at any time before the first day of June in every year, and the penalty is not incurred, unless the license is not obtained by the end of the month of May.

With a view to enable us to arrive at a correct conclusion upon this question, we have examined several other sections relating to licenses for carriages and carts, profession, animals, slaughter house, market, and druggists'

shop. We desire to refer particularly to section 368 (druggists' shop), sections 94 to 96 (carts), sections 87 to 90 (profession), sections 341 to 346 (slaughter houses).

It appears to us that, in cases where the Legislature thought that the penalty should be incurred immediatly when the act is done without a license, they have unmistakeably expressed it in the Act (*e.g.*, section 341), but where they considered that persons might well be allowed to do acts subject to the license being taken out, and that some time might properly be given to them for obtaining such license, they have indicated their intention in different language and manner (*e. g.*, sections 368, 335 and 336).

The question no doubt is not free from difficulty, but it seems to us, after the best consideration we have been able to give to it, that section 335 was not intended to bear the meaning which the prosecution would have us to accept, and that when the Legislature have thought it fit to accord to persons the liberty of taking out licenses before the 1st of June in every year, the penalty provided by section 336 is not incurred, unless such license is not obtained by the end of the month of May; otherwise there would really be no object in inserting paragraph 2 in section 335.

Upon these grounds we think that the conviction is wrong and that this rule should be made absolute. The fine and costs, if realized, will be refunded.

C. E. G. *Rule made absolute.*

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[364] ORIGINAL CIVIL.

The 16th February, 1897.

PRESENT :

MR JUSTICE SALE.

T. Barlow and others

versus

Gobindram and another.*

Trade-mark—Right of exclusive user—Infringement—Combination of numerals as a trade-mark.

The question of the right to the exclusive user of a trade-mark or trade number is largely if not entirely, a question of fact, and the question whether it exists in any given case must depend upon whether the evidence in that case is sufficient to show such an association or connection between the mark or the number and the firm which uses it as to indicate to the ordinary purchasers in the market that the goods are the goods of that particular firm.

To show that a particular trade number has acquired a reputation in the market, and that purchasers buy the goods by that number and not from an examination of the nature or quality of the cloth, is not sufficient to establish the right of exclusive user of that number.

* Original Civil Suit No. 410 of 1896.

There must be such an association between the number and the firm's name as to indicate in the understanding of the public that the goods bearing that number came from that particular firm.

The right of exclusive user of a name or a number as a trade-mark is not an absolute and unqualified right which would entitle the owner to prevent another person from using it under all circumstances. It is only when the use of that name or number deceives or is reasonably likely to deceive the public that it can be interfered with or prevented. There must be a reasonable probability of purchasers being deceived, it is not enough to show a mere possibility of deception.

THE plaintiffs, who are merchants and importers, carrying on business in Calcutta, have for many years imported black-beetled cloth, and are by far the largest importers in Calcutta of this particular variety of cloth. They alleged they were entitled to the exclusive use of the number 9000 as a mark for distinguishing the above variety of cloth and as indicating that the same was of a certain quality and of their importation. The mark on the cloth imported by the plaintiffs consisted of the following combination, *viz.*,—a balloon ticket attached to the cloth with the name of the plaintiffs printed on the ticket, and under it the number 9000 stamped on the cloth; and that on the cloth im-**[365]**ported by the defendants consisted of a butterfly ticket with the name of the importers in *nagri* character printed on it and the name of the importing firm and the number 9000 stamped on the cloth.

The only infringement complained of in this suit was the unauthorized use of the number 9000 in respect of cloth not imported by the plaintiffs. No reference was made in the plaint to any other mark or design used by them in combination with the number 9000, and no suggestion was made that there was any imitation by the defendants of the general combination of marks used by the plaintiffs to distinguish their goods.

The plaintiffs based their claim on two allegations: (1) that they used the number 9000 to denote that the cloth bearing the number was of a certain quality and was of their importation; and (2) that the number had come to be recognized in the market as representing the quality and importation of the cloth.

The defendants are dealers in cloth who have been in the habit of purchasing black-beetled cloth from various firms in Calcutta, (and amongst them from Messrs. Hoare, Miller & Co), and of selling the same by retail in the Calcutta market. In September 1895 the plaintiffs received information that the defendants were selling the above cloth in the market bearing the number 9000 imported by the firm of Hoare, Miller & Co. The defendants admitted this, but denied that the plaintiffs had any right to the exclusive use of the number 9000 as a distinguishing mark for the goods imported by them, and they also denied that in selling and disposing of the goods marked in the manner aforesaid they infringed any right to which the plaintiffs were entitled. This suit was brought for the purpose of restraining the defendants by an injunction from selling or dealing with any black-beetled cloth other than that imported by the plaintiffs, which is stamped or impressed or marked with the number 9000 or any colourable imitation of such number.

Mr. *Hill*, Sir *Griffith Evans*, Mr. *Hyde* and Mr. *Peacock* for the Plaintiffs.

Mr. *Jackson*, Mr. *T. A. Apcar* and Mr. *Caspersz* for the Defendants.

[366] Sir *Griffith Evans.*— Plaintiffs claim the right of exclusive user of the number 9000. Numerals can be used as a trade-mark. See the definition of "trade description" in section 3 of the Merchandise Marks Act 1887 (50 and 51 Vict., C. 28). In *Ralli* v. *Fleming* (I. L R., 3 Cal., 417) it was held that a combination of numerals should be protected as a trade-mark. The

plaintiffs' cloth bearing the number 9000 has gained a reputation in the market as regards quality and origin of importation, and they are entitled to restrain others from using that number as their trade-mark. *Somerville* v. *Schembri* (L. R., 12 Ap. Ca., 453). The law laid down in the last case was adopted by KEKEWICH, J., in *Humphries & Co.* v. *The Taylor Drug Co.* (59 L. T., 820). The adoption of the number 9000 by the defendants is likely to deceive the ordinary purchasers in the market, and therefore they are guilty of infringing the plaintiffs' right of exclusive user.

Mr. *Jackson* for the Defendants.—A mere numeral or combination of numerals standing alone cannot constitute a trade-mark, see Sebastian on Trade Marks (3rd Ed.) p. 86. Section 64 of the Patents, Designs and Trade Marks Act, 1883 (46 and 47 Vict. C. 57), and section 3 of the Merchandise Marks Act, 1887 (50 and 51 Vict. C. 28). There is no evidence that the number 9000 indicated that the goods marked with it were imported by the plaintiffs, nor have they been able to show that the use of the number by the defendants was likely to deceive the public in the market. It has not been proved that the user was calculated to deceive, or that there was actual intention to deceive. *Johnston* v. *Ewing* (L. R., 7 Ap. Ca., 219), *Singer Manufacturing Co.* v. *Loog* (L. R, 8 Ap. Ca., 15), *Leather Cloth Co.* v. *American Leather Cloth Co.* (11 H. L C, 523), *Robinson* v. *Finlay* (L. R., 9 Ch. D., 487).

Sale, J.—The plaintiffs in this suit claim to be entitled to the exclusive use of the number 9000 as a mark for distinguishing certain cloth known in the Calcutta market as black-beetled cloth which is imported by them into Calcutta, and they seek to restrain the defendants by the injunction of this Court from selling or dealing with any black-beetled cloth other than that imported by the plaintiffs, which is stamped or impressed or marked **[367]** with the number 9000, or any colourable imitation of such number. The defendants admit that they purchased and obtained delivery of, from Messrs. Hoare, Miller & Co., a consignment of five cases of black-beetled cloth marked with a certain design, a part of which design was the number 9000, and that they have since sold and disposed of the said goods in the Calcutta market. They, however, deny that the plaintiffs have a right to the exclusive use of the number 9000 as a distinguishing mark for the goods imported by them, and they also deny that in selling and disposing of the goods marked in the manner aforesaid they infringed any right to which the plaintiffs are entitled. The plaintiffs are merchants and importers carrying on business in Calcutta, and the defendants are cloth dealers who have been in the habit for some years of purchasing black-beetled cloth which is known in the Indian market as *kala kapra* from various firms in Calcutta (and among them from Messrs. Hoare, Miller & Co.), and of selling the cloth so obtained by them by retail in the Calcutta Market.

The plaintiffs have for many years imported black-beetled cloth into the country, and are by far the largest importers in Calcutta of this particular variety of cloth which is principally used to cover umbrellas. Formerly umbrellas were commonly imported into this country in the finished state. It is now very generally the practice to manufacture them locally, with the result that the demand for the cloth required in the manufacture has largely increased.

The plaintiffs adopted the practice generally followed in the piece-goods trade of distinguishing black-beetled cloth imported by them by various marks and designs, sometimes used in combination with numbers and sometimes without numbers. It does not appear that the plaintiffs have for the purpose

of distinguishing black-beetled cloth imported by them ever used numbers alone and independently of some object design. Mr. Sutcliffe, who is an assistant in the plaintiffs' firm, and who since he arrived in this country in December 1891 has been in charge of the piece-goods department, states in his evidence that the plaintiffs use some sixty different numbers for distinguishing black-beetled cloth imported by them; that all these numbers are used [368] in combination with some with distinctive object design, and that besides these numbers sometimes object designs are used to distinguish this cloth without any numbers at all A considerable portion of the business in black-beetled cloth done by the plaintiffs consists in importing cloth upon the orders or indents of native dealers or shopkeepers, who again sell the articles to purchasers in the market who frequently are the ultimate consumers, that is to say people who manufacture umbrellas, or are in some way engaged in that trade; sometimes the purchasers are up-country dealers or their agents. It is not, I gather from the evidence, the plaintiffs' practice in their business to distinguish a particular quality or description of cloth always by the same object design or combination of object design and number. Different numbers and different object designs are frequently used to distinguish importations of cloth which are identically the same in quality, kind and measurement. For example, when the plaintiffs are importing the same quality of cloth for different dealers, although the cloth so imported may be the same in every respect, it is the plaintiffs' rule to stamp or impress the different consignments with different numbers, and sometimes with different object designs. In this way the use of a particular number is confined to the importation made for a particular dealer. It is explained that this practice is adopted to prevent dealers who import cloth through the plaintiffs from competing with and underselling each other in the market.

The plaintiffs commenced to use the number 9000, which is the subject-matter of the present suit, as a distinguishing mark for cloth imported by them in November 1894, and the circumstances under which this number came to be so used are as follows: Amongst the native dealers for whom the plaintiffs have imported black-beetled cloth is a man named Gunput Dass, who carries on business as a cloth seller at Monohur Dass's Katra in Burra Bazaar under the name of Sookdeb Seetaram. In July 1894 Gunput Dass in his firm of Sookdeb Seetaram required the plaintiffs to supply him with fifteen cases of black-beetled cloth of the same quality and description as the cloth imported by them bearing the number 9015. As a matter-of-fact, the cloth bearing this number was imported at the instance of [369] another dealer, and accordingly Sookdeb Seetaram was informed that the cloth could not be supplied to him bearing the number 9015, but that he might have the same cloth marked with the number 9000. To this Sookdeb Seetaram agreed, and the usual contract was entered into, and in due course the cloth impressed with the number 9000, and bearing what is known as the balloon ticket, arrived and was delivered by the plaintiffs to Sookdeb Seetaram.

It appears that cloth of the same quality and description is also imported by the plaintiffs distinguished by the balloon ticket only and without any number, and that it is also imported and delivered to different dealers under the numbers 9510, 9010 and 9025 in combination with certain tickets bearing object designs. Mr. Sutcliffe is unable to say whether the balloon ticket is one of these. But it is certain that the balloon ticket is used by the plaintiffs in combination with three different numbers 9000, 9300 and 815 to distinguish different varieties of black-beetled cloth.

In the month of September 1895 the plaintiffs received information from the broker employed by them that the defendants were selling black-beetled

cloth in the market, bearing the number 9000 imported by the firm of Hoare, Miller & Co., and subsequently a piece of cloth was produced to the plaintiffs, which it was represented had been purchased at the defendants' shop by one Rambux who was employed for the purpose by Gunput Dass. The piece of cloth so produced to the plaintiffs bore not only the number 9000, though differing in colour and appearance from the number as stamped on the plaintiffs' cloth, but it also bore the plaintiffs' balloon ticket. Now, if the evidence in this case sufficiently established the tact that the defendants were selling black-beetled cloth stamped with the plaintiff' balloon ticket which bears on the face of it the design of a balloon and also the plaintiffs' name inscribed thereon, it would be strong to show that the defendants were endeavouring to pass off goods imported by Hoare, Miller &Co., as goods imported by the plaintiff. What the evidence is on this point, and what it proves, I shall have to consider presently. Meanwhile, inasmuch as the cloth which was being sold by the defendants undoubtedly bore the number 9000, and was undoubtedly imported by Messrs. Hoare, Miller [370] & Co., correspondence ensued on the subject of the use of the number 9000 by the latter firm, which resulted in Messrs. Hoare, Miller & Co, on being satisfied that the plaintiffs' user of the number 9000 was prior in time, giving an assurance to the plaintiffs that they would discontinue the use of the number without however admitting the plaintiffs' claim to the exclusive right of using that number.

On the 31st October 1895 the plaintiffs through their solicitors wrote to the defendants requiring them to desist from selling or otherwise dealing with black-beetled cloth bearing the number 9000, imported through firms other than themselves. No reply to this letter was received, and on the 29th of May 1896 the present suit was instituted.

It is to be observed that the only infringement complained of in this suit is the unauthorised use of the number 9000 in respect of cloth not imported by the plaintiffs. No reference is made in the plaint to any other mark or design used by them in combination with the number 9000, and no suggestion is made in the plaint that there has been any imitation by the defendants of the general combination of marks used by the plaintiffs to distinguish their goods.

It is necessary at the outset to see what the allegations in the plaint are on which the plaintiffs base their claim to the exclusive use of the number 9000 on black-beetled cloth imported by them.

These allegations are in substance two in number. The first is that the plaintiffs used the number to denote that the cloth which bore the number was of a certain quality, and that it was imported by them. This allegation shows the purpose and object the plaintiffs had in view in using this number.

The second proposition is that at the time of the infringement complained of, the number was recognized in the Calcutta market and by the dealers in different parts of India as representing that the cloth on which it was impressed had a particular reputation as to quality, and was imported by the plaintiffs.

In other words, what the plaintiffs say in the plaint is that the number was used by them to denote both the quality and the origin or importation of the cloth, and they go on to say that the [371] number is recognized in the market as representing the quality and importation of the cloth.

It is clear from the cases which have been referred to that both these propositions must be established as the foundation of the right of exclusive user.

In the Singer Manufacturing Company v. *Loog* (L. R., 8 Ap. Cal., 15) Lord WATSON at page 38 of the report says: "I think it is established by the evidence

that the name "Singer" as used by the appellant-company and their predecessor in business Isaac Merritt Singer has long been and still is generally understood to denote sewing machines of their manufacture," and again: "It is clearly proved that a customer desiring to purchase a Singer Sewing Machine invariably understood that he was buying and expected to get, not merely a machine made by Mr. Singer or the company, but a machine of the same shape and character with one or other of the classes which he or they were known to be making at the time."

The learned Judge then proceeds: "The legal consequence of these facts is that the appellant company have a right, an exclusive right, to use the name 'Singer' as denoting sewing machines of their manufacture." In the sentences which follow the learned Judge points out what is necessary to constitute an infringement of this right of exclusive user. He says: "No one has a right to use the word for the purpose of passing off his goods as theirs, or even when he is innocent of that purpose to use it in any way calculated to deceive or aid in deceiving the public. None of the numerous authorities cited at the bar by the appellants' Counsel carry the exclusive right of a trader to a particular name beyond that limit. There is no authority, and in my opinion no principle for giving the trader any higher right. If he cannot allege and prove that the public are deceived or that there is reasonable probability of deception he has no right to interfere with the use of the name by others."

And so again in *Somerville* v. *Schembri* (L. R., 12 Ap. Ca., 453), the same learned Judge in delivering the judgment of the Privy Council made use of the following observations at page 457 of the report:—

"In the first of these cases the interest which a merchant or **[372]** manufacturer has in the trade-mark which he uses was thus defined by Lord CRANWORTH. 'The right which a manufacturer has in his trade-mark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory the article to which it is affixed was manufactured.' As soon, therefore, as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes, to that extent, the exclusive property of the firm, and no one else has a right to copy it, or even to appropriate any part of it, if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the trade-marks belong."

And, again, in *Johnston* v *Orr Ewing* (L R., 7 Ap. Ca., 219) Lord SELBORNE in dealing with the question of the right of the respondent to the exclusive user of the *Two Elephant* mark, after stating the effect of the evidence says at page 221 of the report: "Hence it happened that many of the customers who desired to purchase the plaintiffs' yarn in Bombay and the markets supplied from thence, were in the habit of knowing it as, and calling it, '*bhe hathi*,' which in the Guzerati language means 'two elephants'; sometimes prefixing the word 'Graham's' and sometimes 'Sooneri,' which means 'golden.' It is in my opinion clear upon the evidence that these words '*bhe hathi*' so used (whether alone or not) had reference to the device upon the plaintiffs' ticket, that they were used to describe the plaintiffs' goods, and those only, and that any customer or native dealer in Bombay or the districts thence supplied, when he asked for '*bhe hathi*' yarn, would be asking for the yarn exported by the plaintiffs and bearing their trade-mark."

The learned Judge then adds: "The plaintiffs' title to their own trade-mark being clearly made out, the only question is whether the defendants have infringed it." The question then of the right to the exclusive user

of a trade name, or trade number is largely, if not entirely, a question of fact, and the question whether it exists in any given case must depend upon whether the evidence in that case is sufficient to show such a connection or association between the [373] name or the number and the firm which uses it as to indicate to the ordinary purchasers in the market into whose hands the goods marked with the name or number may come that the goods are the goods of that particular firm.

It is necessary, therefore, to turn to the evidence in this case to see whether such an association of the number 9000 with black-beetled cloth imported by the plaintiffs' firm has been made out so as to show that this number appearing on that cloth is in effect a representation to the ordinary purchaser that the cloth bearing that number belongs to or has been imported by the plaintiffs.

The evidence which has been given in respect of the right of exclusive user of the number 9000 claimed by the plaintiffs falls under two heads: First, there is the direct evidence bearing on the user of the number 9000 by the plaintiffs and the reputation it bears in the market as applied to black-beetled cloth, and next there is a very large body of evidence dealing with the practice as to the use of numbers and their signification in the piece-goods trade generally, and to the meaning and use of a variety of numbers used in that trade. All this body of evidence last mentioned seems to me to have but a very remote bearing on the points at issue in the case. Both sides, I regret to say, have insisted upon appealing to the practices and usages prevailing in the piece-goods trade generally, and the result has been that a great many side-issues and remote questions have been discussed and evidence given thereon, which has led to an unnecessarily protracted hearing. Indeed, much of the evidence which has been adduced in this case only serves to show and to emphasize the fact that no general rule as to the right of exclusive use of numbers can be established from particular instances applicable to all the various numbers used in the piece-goods trade Each case must depend upon its own particular facts, and it is impossible for the Court to form or to express any opinion as to rights of persons who are not parties to this suit, as regards particular numbers, when the facts and circumstances relative to the use of those numbers are not fully before the Court.

I propose therefore only dealing with the evidence so far as it bears directly on the use of the number 9000 and its reputation and meaning in the market in connection with the black-beetled [374] cloth. I turn first to the evidence of Mr. Sutcliffe and the broker Proladh Roy Both these witnesses say that between the months of November 1894 and September 1895 there was in their opinion a rapid sale of the plaintiffs' number 9000 black-beetled cloth in the market, and that an active demand for this particular cloth rose. They say that the purchasers of black-beetled cloth purchase usually by the number affixed to the cloth, and not from an examination of the quality of the cloth, and that the number 9000 quickly acquired a reputation in the market. Mr. Sutcliffe says that by September 1895, which is the date of the alleged infringement by the defendants, the number had acquired in his opinion a good reputation.

But to show that a particular number has acquired a reputation in the market, and that purchasers buy the cloth by the number and not from an examination of the nature or quality of the cloth, is not sufficient to establish the right of exclusive user of that number, as MARKBY, J., has pointed out in his judgment in the case of *Ralli* v. *Fleming* (I. L. R., 3 Cal., 417), see p. 433 of the report. It is consistent with this evidence that the reputation which the

number acquired was a reputation for quality only. It does not necessarily follow that the purchasing public showed a preference for the goods because the plaintiffs imported them, or that the number as understood by the public represented that the goods were in fact imported by the plaintiffs.

In cross-examination Mr. Sutcliffe was pressed as to the relative importance of the ticket bearing an object design and the number as used by the plaintiffs on their black-beetled cloth, and Mr. Sutcliffe in answer to a question said: "If the ticket were taken off I think a buyer would know our cloth from the number." I am sure that Mr. Sutcliffe was speaking particularly of the number 9000 when he gave this answer, but even if he did, it does not appear that Mr. Sutcliffe had any grounds for forming this opinion beyond that there seemed to him a demand for his firm's goods bearing that number.

So also the witness Proladh Roy says: "The number 9000 is well-known in the *Bazar*.

[375] "*Q*. What does the number indicate?

"*A*. It indicates that *the cloth is Barlow's*."

This again is the expression of an opinion only, and its value must depend upon the grounds on which it is based.

It does not appear that this witness had any better basis for his opinion than Mr. Sutcliffe. Moreover, the witness goes on to say that the other numbers used by the plaintiffs for precisely the same kind of cloth, *i.e.*, the numbers 9015, 9010, 9025 and 9001, acquired but little or no reputation, yet the cloth was the same in each case and the importers were the same. It seems, therefore, reasonable to infer that any reputation the number 9000 acquired must have been independent of any association between the number and the plaintiffs as the importers in the minds of the purchasers. I do not think that any of the other witnesses who have been called say that purchasers or general dealers in the market understood from the number 9000 that the cloth on which that number appeared was the plaintiffs'.

The other witnesses are witnesses who are unconnected with the plaintiffs' firm, and an examination of their evidence shows that none of them are prepared to say that purchasers or general dealers in the market understood, from the number 9000 and from that number alone, that the cloth was the plaintiffs'. I shall refer to the evidence of these witnesses shortly. I take the evidence first of Gunput Dass. This is the person to whom the plaintiffs exclusively delivered the cloth bearing the number 9000 up to the time at least of the alleged infringement. Gunput Dass says: "9000 cloth became known in the market. Two or three months after it came out I began selling it. All *beparis* began asking for this number."

This evidence so far only tends to show that this cloth was asked for and sold by him by the number, but then he adds: "Purchasers look to the quality of the cloth and also to the number," and that statement goes to show that purchasers rely on their own judgment as to the quality of the cloth, besides looking to the number imposed upon it.

The next witness I refer to is Ram Dutt. This witness is a broker. He says he gets orders for *kala kapra* 9000. "It has a good reputation," and then he adds: "If some one asks me for 9000 **[376]** cloth I would go to Sook Deb Seetaram and Jeebun Ram who take such cloth from Barlow & Co."

Nowhere does he say that the general reputation of the number 9000 in the market informs the purchaser that the cloth is the plaintiffs'.

The witness adds that on some cloth the name of the firm is written, and on others there is the ticket showing who the importers are. These facts, it

is obvious, are facts which would inform the purchaser who the importer was, apart altogether from the number used on the cloth.

The next witness Sabha Chand said he purchased a consignment of 9000 cloth direct from the broker Praladh Roy, and that he went to Praladh Roy in consequence of something said to him by some *beparis*. He again does not profess to say that purchasers generally understood from the number 9000 alone that the black-beetled cloth belongs to or is imported by the plaintiffs. Moreover, in answer to the Court he said that in purchasing cloth they look to the marks and also use their own judgment in selecting the cloth. That also is evidence which tends rather to show that the purchasers use their own judgment in selecting cloth, and certainly do not necessarily buy cloth marked with 9000 merely on the faith or belief that it is the plaintiffs'. Heralal Chowdbry, another broker, says that a *bepari* in purchasing cloth looks at the sample and gives his orders according to the opinion he forms of the quality of the cloth from the samples. He says he came to know of the cloth 9000 in September or October 1895, and he adds: "Barlow's 9000 has a good reputation in the market."

Towards the close of his examination he says, "the best known *kala kapra* in the market is Barlow's 9000," and I take him to mean that this particular variety of cloth is most in demand in the market, but he does not say that this is so because it is known as the plaintiffs' cloth, or that the number 9000 gives the purchasers that information or that purchasers buy under that belief. Moreover, in cross-examination, he seems as regards one point to support what the defendant Tikunchand has said. He says he does not consider that when offering a number of marks to a purchaser that the particular mark chosen [377] is of much importance. He says it does not make much difference to him which mark is chosen. and that even if the cloth comes out without any number at all it would not necessarily make any difference.

The witness Fakir Chand Dey represents an important class of witnesses, namely, those who are the actual consumers of this cloth. He says he does an umbrella business, and buys *kala kapra* to cover umbrellas with. He says he knows Barlow's *kala kapra* 9000, and all he knows is that Barlow's number 9000 is a superior quality of cloth. He adds that he does not know much about its reputation. He says he never bought number 9000, but only number 9015. The evidence of this witness and of others who follow him rather tends to show that there is in fact no reputation in the market as to number 9000 *kala kapra* being the plaintiffs' cloth, because it is difficult to believe that if any such general reputation existed as to the ownership or importation they would not have known of it.

Srinibash Geenka is a broker, and his evidence merely goes to show that when people want Barlow's cloth they ask for Barlow's cloth. His evidence does not tend to show that there is any such reputation in the market, which of itself supplies the information that the number 9000 belongs to Barlow & Co. He was not cross-examined.

Ram Kristo Dey is a dealer in umbrellas. He says he knows *kala kapra* 9000, and that he knows it is imported by Barlow. He says he gets it because it was selling largely in the market, and that it was of good quality.

In cross-examination it appears that his knowledge of this number 9000 being Barlow's was not derived from any reputation in the market but from information supplied by the broker direct. Punchanun Dutt, another umbrella dealer, speaks of the number 9000 being a well-known number in the market. This is the dealer who obtained a direct consignment of twenty-five cases of the number 9000 cloth from Barlow about or shortly before the institution of

this suit. This witness makes one statement, which at first sight seems to be of more importance than the statements of the witnesses I have referred to. He says: "When I go to purchase cloth I ask for number 9000. I make no [378] mention of the balloon ticket." If what he meant was that on going to a general dealer in the market and on asking for number 9000 he obtained the plaintiffs' goods that would be some evidence to show that there was a general understanding in the market that the number 9000 was the plaintiffs', but it turns out that he is only referring to a purchase made by him direct from Barlow and Company, and his evidence also shows that when he purchased in the open market he used, not the number only, but the name of the importer. He says he has only purchased in the *Bazar* once, and that was Messrs. Mitchell, Bardsley & Co.'s cloth, and on asking for it he asked for Mitchell, Bardsley & Co.'s cloth numbered so and so.

These are all the witnesses who speak to the reputation of number 9000 on black-beetled cloth in the market.

This evidence in my opinion fails to establish that there was any such association between the number 9000 and the plaintiffs' name as to indicate in the understanding of the public that black-beetled cloth bearing the number came from their firm. If so, then there is no right of exclusive user on the part of the plaintiffs as regards the number 9000, and this suit must fail on that ground. But it is desirable perhaps that I should express my opinion on the evidence bearing on the question of infringement, assuming for this purpose that the plaintiffs have the right of exclusive use which they claim. I do not wish to be understood as saying that a number and a name stand necessarily in the same position so far as the question of both being properly the subject-matter of a right of exclusive user is concerned. It has been said that the case of *Ralli* v. *Fleming* already referred to affords an instance where the right of exclusive user of a number has been recognised. But when this case is examined I do not think it can be regarded as an authority for the recognition of any such right.

The facts in that case showed that there had been an imitation of the general combination of marks used by the plaintiffs, and the learned Chief Justice appears to have based his opinion very largely on this circumstance. MARKBY, J., on the other hand, thought the only infringement the plaintiffs were entitled to complain of was the use by the defendants of the number 2008, and as regards this number he held that the plaintiffs had failed [379] to establish their claim to the right of exclusive user, and the injunction which was issued in accordance with the opinion of GARTH, C.J., was to the following effect: "Order, that the defendants be restrained from selling any cloth impressed with the combination of marks described in exhibit D annexed to the affidavit of Alexander Westerhout, or any other combination resembling that used by the plaintiffs, and especially from using the number 2008 in any such combination."

The right of exclusive user of a name, as has been pointed out in the case of *Singer* v. *Loog*, is not an absolute and unqualified right which would entitle the owner to prevent another person from using it under all circumstances. It is only when the use of the name deceives or is reasonably likely to deceive the public that it can be interfered with or prevented. The same limitation must apply to the right of exclusive user of a *number*.

The use therefore of the number 9000 on cloth sold by the defendants can only be an infringement of the plaintiffs' right, if it can be shown that such use was intended to deceive the ordinary or unwary purchaser into the belief that the goods were imported by the plaintiffs or that such use would

render it reasonably probable that the purchaser would be so deceived. It is said that there is evidence to show an actual intention to deceive on the part of the defendants.

As regards the alleged purchase of a piece of cloth from the defendants' shop bearing the plaintiffs' balloon ticket the evidence is of a very weak and unsatisfactory character. It is not denied that Rambux did purchase a piece of *kala kapra* from the shop of the defendants. The defendant Tikumchand has produced his books, and I think the evidence satisfactorily shows that the piece which was sold and delivered to the witness Rambux bore the usual combination of marks appearing on all the cloth obtained by the defendants from Messrs. Hoare, Miller & Co., and that the ticket on the cloth in this particular piece was not a balloon ticket, but Messrs. Hoare, Miller's *Butterfly* or *Projaputty* ticket. The manner in which the witnesses Gunput Dass and Rambux gave their evidence left little doubt in my mind that one or other of them caused the balloon ticket to be surreptitiously substituted for the butterfly ticket which they found on the cloth, and that it [380] was falsely represented to the plaintiffs that the cloth bearing the balloon ticket had been purchased from the shop of the defendants. I need hardly say, however, that I have no doubt that the plaintiffs honestly believed this representation and were deceived thereby. It appears that the defendants' shop and the shop of Gunput Dass are in the same building, and within a few feet of each other. It is contended that the adoption by the defendants of the number 9000, as the number to be stamped on the goods obtained by them from Messrs. Hoare, Miller & Co., was not accidental, and reliance is placed on the fact that the defendant Tikumchand in his cross-examination has stated that he considers the number to be of no importance. It is said that this statement is inconsistent with the fact that he is vigorously contesting the plaintiffs' claim to the exclusive use of the number, and inconsistent with the attempt that he made in October or November 1895 to obtain a consignment of *kala kapra* from Messrs. Ullman Hirschhorn marked with the number 9000.

I think I should be unduly straining this evidence against the defendants if I were to infer from it that the defendants were actuated by a desire to pass off the goods which they have obtained from Messrs. Hoare, Miller & Co., as goods imported by the plaintiffs. It may very well be that the number 9000 had obtained a certain reputation for quality in the market, and that the defendants thought that Gunput Dass, a rival trader, was doing a good business with his number 9000 cloth, and that the defendants desired to represent in the market that their cloth was in every respect the same in quality as the cloth sold by their neighbour. If this was the representation that the defendants desired to make by the use of the number 9000, and I do not think the evidence warrants that it was more than this, it was a representation which the defendants had a perfect right to make.

The cloth sold by the defendants bearing the number 9000 was imported by Messrs. Hoare, Miller & Co., under a contract entered into between that firm and the defendants, dated the 19th April 1894. Under this contract the defendants agreed to take five cases of cloth stamped with the number 7000, which was the number provided by a previous indent referred to in the contract as indent No. 244.

[381] The broker explained that the cloth previously stamped with the number 7000 was 45 inches in width, and that as the cloth by the new contract was required to be 48 inches, it was desirable that a new number should be chosen. Accordingly he suggested number 9000, and thereupon the defendants added the *nagri* writing to the contract to the effect that they would

take the cloth stamped with the number 9000 or any other number.' The five cases arrived in September 1895 and they were all sold off by the defendants between the end of that month and the early part of November 1895. On comparing a piece of the plaintiffs' number 9000 cloth with a piece of the defendants' cloth bearing that number the observer cannot fail to be at once struck by the total dissimilarity of the general combination of marks appearing on the respective pieces. Each piece bears a very distinctive object ticket. The plaintiffs' is a balloon ticket rectangular in shape. On the defendants' cloth is a butterfly ticket which is triangular in shape. The marks are arranged differently and even the number 9000 on the plaintiffs' cloth is very unlike in colouring and appearance from the 9000 which is impressed on the defendants' cloth. The plaintiffs' number is in very bright colouring and attracts the eye at once, whereas the number on the defendants' cloth is dull and faint in colouring and does not readily attract attention.

I am aware that a comparison of different combinations of marks side by side is not conclusive on the question of infringement. But I take it that the general dissimilarity of the marks is not a matter which can be disregarded.

When numbers are used in conjunction with striking object designs it is difficult to believe that goods are dealt with by the number alone without any reference to the object design. The evidence is that the balloon mark is well known in connection with the black-beetled cloth, and taking all the facts together, I cannot bring myself to think that the use of the number 9000 by the defendants under the circumstances and in conjunction with the other marks proved in this case is calculated to deceive purchasers into the belief that the cloth so stamped and sold by the defendants is cloth imported by the plaintiffs. To constitute an infringement it is not enough to show a mere possibility of deception. [382] There must be a reasonable probability of purchasers being deceived. There is not in this case in my opinion such a reasonable probability of deception; therefore there is no infringement of any right to which the plaintiffs may be entitled. The result is, the suit must be dismissed with costs on scale No. 2.

Attorneys for the Plaintiffs. Messrs. *Watkins & Co.*

Attorney for the Defendants Mr. *Chick.*

S. C B

NOTES.

[See *Sebastian* on *Trade Marks*, (1911) V Edn , pp. 78 and 94 ; see also (1900) 25 Bom., 433 ; (1904) 15 M.L.J , 45 ; (1912) 15 I C., 116]

[24 Cal 382]

APPELLATE CIVIL.

The 2nd February, 1897.

PRESENT

MR. JUSTICE BEVERLEY AND MR. JUSTICE AMEER ALI

Latifunnessa........ ....Defendant

versus

Dhan Kunwar and others. . . .. Plaintiffs *

Limitation Act (XV of 1877), Schedule II, Art 132—Suit for money lent on mortgage—Cause of Action—Bond, Construction of

In a mortgage bond, dated 14th June 1876, it was stipulated that the money advanced should be repaid "in the month of Jeyth 1289 Fusli, being a period of six years" The last day of Jeyth 1289 answered to the 1st June 1882 and the period of six years from the date of the bond ended on the 14th June 1882 In a suit brought upon the bond on the 12th June 1894

Held, (AMEER ALI, J , *dubitante*) that the money sued for became due on the 14th June 1882, and the suit was in time

Rungo Bujaji v *Babaji* (I L R , 6 Bom 83) *Almas Banee* v *Mahomed Raja* (I L R., 6 Cal., 239) and *Gnanasammanda Pandaram* v *Palaniyandi Pillai* (I L R , 17 Mad 61) referred to by BEVERLEY, J

THIS was a suit to recover Rs 21,392, principal and interest due upon a mortgage-bond, dated the 8th Asar 1283 Fusli (14th June 1876) The portions of the bond to which reference is necessary for the purposes of this report are as follows —

"The entire amount covered by the *zuripeshgi* lease and the bonds mentioned above has been found by calculation to amount to Co 's Rs 10,500 due to the *ticcadars* by the declarant, and at present I have taken for my necessary expenses the sum of Co 's Rs 1,500 from the said *ticcadars* through Syed Shah Ali Hossein, my husband and *ammokhtar* and have executed [383] a consolidated bond in respect of the former and present debts to the value of Co.'s Rs. 12,000 (half of which is Co 's Rs 6,000) bearing interest at the rate of 8 annas per cent. per mensem, stipulating to repay the same in the month of Jeyth 1289 Fusli, being a period of six years, in favour of Mussamut Dhan Kunwar, wife of Bhikari Sahu, and Khedu Sahu aforesaid, * * * *

"I do hereby declare and give in writing that I the declarant and my heirs shall pay to the aforesaid *mahajan* the interest of the sum of Rs 12 000 mentioned above amounting to Rs. 720 for 12 months year by year in the month of Jeyth up to the end of lease. For this I the declarant and my heirs have not nor shall have any objection whatever. I shall repay the aforesaid amount of principal of the loan to the aforesaid *mahajans* within the prescribed time without any objection."

The month of Jeyth 1289 Fusli, ended on the 1st June 1882, but the period of six years mentioned in the above extract ended on the 14th June 1882. The present suit was brought on the 12th June 1894. The defendant's plea of limitation, based on the date first given, was overruled by the lower Court.

* Appeal from Original Decree No 108 of 1895, against the decree of K S. M Fakhoruddin Hossein. Subordinate Judge of Patna, dated the 13th of December 1894.

The defendant appealed to the High Court.

Mr. *C. Gregory*, Moulvie *Mahomed Yusuf*, Babu *Saligram Singh* and Moulvie *Mahomud Mustafa Khan* for the Appellant:

Babu *Dasarathi Sanyal* and Babu *Debendra Chandra Mullick* for the Respondent.

The following **judgments** were delivered by the High Court (BEVERLEY and AMEER ALI, JJ.) :—

Beverley, J.—This is a suit upon a mortgage bond, and the only question raised in this appeal is whether or not the suit was instituted within twelve years from the date on which the money sued for became due.

The bond is dated the 8th Assar 1283 Fusli, corresponding with the 14th June 1876, and the suit was instituted on the 12th June 1894. The question turns upon the construction of the document as to what was the date upon which the money became payable. The stipulation in the bond was to repay the money "in the month of Jeyth 1289 Fusli, being a period of six years." The period of six years from the date of execution of the bond would carry us to the 14th June 1882, and the plaintiff contends that *that* should be regarded as the due date irrespective of all mention of the month of Jeyth 1289 Fusli. The defendant on the other hand pleads that the debtor bound himself to repay the **[384]** money on or before the 29th Jeyth 1289 Fusli (there being only twenty-nine days in the month of Jeyth in that year) which corresponded with 1st of June 1882, and that consequently this suit is barred.

The lower Court has held that the plaintiff's contention is correct, and accordingly the defendant has appealed.

The deed having been executed on the 8th Assar 1283, it is not improbable that it had been drafted some days previously, that is to say, in the month of Jeyth 1283, and that when the stipulation was inserted in the deed to the effect that the money would be repayable in six years, it was thought that that period would expire in the month of Jeyth 1289. The question before us is whether the parties intended that the money should be repaid six years after the execution of the bond, without reference to any particular date, or whether it was intended that the money should be repaid in Jeyth 1289, it being casually mentioned that that month was within the period of six years from the date of the execution of the deed. I am of opinion that the former is the more liberal and proper construction to place upon the deed, that is to say, that the debtor was to have a period of full six years from the date of the execution of the deed within which to repay the money. This was the view taken by the Bombay High Court in a precisely similar case, *i.e.*, the case of *Ranujo Bajaji* v. *Babaji* (I. L. R., 6 Bom., 83). That a liberal construction should be given in cases of doubt such as the present was also held in the case of *Almas Banee* v. *Mahomed Raja* (I. L. R., 6 Cal., 239) decided by this Court, in which it was held that in consequence of the mention of the 30th Pous in a deed it was intended that the debtor should have full thirty days in that month within which to repay the money, although as a matter of fact there were only twenty-nine days in that particular month of Pous. That decision was followed by the Madras High Court in the case of *Gnanasammanda Pandaram* v. *Palaniyandi Pillai* (I. L. R., 17 Mad., 61). Upon these authorities, and also upon the ground that in construing acts of limitation the Court is bound to give them a liberal interpretation, I am of opinion that the decision of the lower Court is correct, and that this appeal must be dismissed with costs.

[385] Ameer Ali, J.—I must say that the point is by no means clear to my mind. Section 25 of the Limitation Act does not apply to a case like

this, and I am not prepared to follow the ruling of the Bombay High Court. The question is one of intention. What was the intention of the parties with regard to the document which is before us? Whether the intention was to make the repayment in Jeyth 1289, or was it to be made within six years from the time of the execution of the document? There are indications in the document that Jeyth 1289 was to be taken as the time for the repayment of the loan, and the suits that were brought by the plaintiff also give grounds, as contended for by the defendant's pleader, for the view that the time for repayment was fixed in Jeyth 1289. But although I have a doubt on the question before us, my doubt is not so strong as to justify my differing from the view taken by my learned colleague. I therefore concur in dismissing the appeal with costs.

S. C. C. *Appeal dismissed.*

[24 Cal. 385]

The 4th February, 1897.

PRESENT:

MR. JUSTICE BEVERLEY AND MR. JUSTICE AMEER ALI.

Baiju Lal Parbatia and others............Plaintiffs

versus

Bulak Lal Pathuk............Defendant.*

Parties—Parties to suit—Persons having the same interest in one cause—Civil Procedure Code (Act XIV of 1882), sections 26 and 30.

In a suit for the removal of masonry structures raised by one member of a community of Hindu priests upon a certain platform, on which every member of the community had individual right to perform religious rites, praying also for a declaration and injunction in connection with such removal, the plaintiffs were seven persons claiming relief as the *panch* or committee representing the whole community, and also in their individual capacity. It was found by the Court that the plaintiffs did not constitute the *panch*, and that they did not in that character represent the community:

Held, that section 26 † of the Civil Procedure Code (1882) was only an enabling section; it allowed the plaintiffs to bring a joint action; and should not be read as though all persons of the community *must* be joined as plaintiffs.

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* Appeal from Appellate Decree No. 660 of 1895, agianst the decree of H. Holmwood, Esq., District Judge of Gya, dated the 17th of December 1894, reversing the decree of Babu Tej Chunder Mookerjee, Munsif of Gya, dated the 22nd of June 1894.

† [Sec. 26:—All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative, in respect of the same cause of action. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who is not found entitled to relief, unless the Court in disposing of the costs of the suit otherwise directs.]

Persons who may be joined as plaintiffs.

Held, also, that section 30 * of the Code is an enabling section and did not debar the plaintiffs from suing *in their own right* in this case.

The plaintiffs in this case alleged that they were members of a **[386]** priestly community called Gyawals of the town of Gya, and were the *panch*, or representative committee of their community, and that the defendant, also a Gyawal, having caused certain masonry structures to be raised for his own use on a platform upon which all Gyawals had a common right to perform religious rites and ceremonies, the plaintiffs, as the *panch* as well as Gyawals in their individual capacity, brought this suit for declaration of their right for removal of the structures and for a perpetual injunction against the defendant. The Munsif held that the plaintiffs were not entitled to represent the Gyawal community, but he held the suit to be maintainable on the ground that each of the plaintiffs had a right to sue the defendant for wrong done to him individually. The Judge on appeal dismissed the suit on the ground that the plaintiffs did not obtain the permission of the Court to sue on behalf of the community, and cited the following cases in support of his judgment: *Jan Ali* v. *Ram Nath Mundul* (I L. R., 8 Cal., 32); *The Oriental Bank Corporation* v. *Gobind Lall Seal* (I. L. R., 9 Cal., 604); *Lutifunnissa Bibi* v. *Nazirun Bibi* (I. L. R., 11 Cal., 33); *Dhanput Singh* v. *Paresh Nath Singh* (I. L. R., 21 Cal., 180) and the two unreported cases referred to therein.

The plaintiffs appealed to the High Court.

The facts sufficiently appear from the judgment of the High Court.

Babu *Sarada Charan Mitra* and Babu *Lakshmi Narayan Singha* for the Appellants.

Babu *Baidyanath Datta* for the Respondent.

Babu *Sarada Charan Mitra*.—Neither section 26 nor section 30 debars the present suit. That the law allows a suit like the present is clear from the provisions of section 13 of the Code of Civil Procedure, explanation 5, and section 42 of the Indian Evidence Act. The cases referred to by the learned Judge are different from this; here the plaintiffs have each the same cause of action. *Zafaryar Ali* v. *Bakhtawar Singh* (I. L. R., 5 All., 497); *Jawahra* v. *Akbar Hussein* (I. L. R., 7 All., 178); *Mohiuddin* v *Sayiuddin* (I. L R., 20 Cal., 810); *Sandes* v. *Wildsmith* [L. R. (1893) 1 Q. B. D., 771]; *Temperton* v. *Russell* [L. R. (1893) 1 Q. B. D., 435].

[387] Babu *Baidyanath Datta* for the respondent contended that the suit was really carried on by the plaintiffs as the *panch* of the Gyawals, and they should not be permitted to fall back upon individual right. The cases referred to by the Lower Appellate Court are authorities for the rule that permission of the Court must be taken under section 30. In the case of *Mohiuddin* v. *Sayiuddin* (I. L. R., 20 Cal., 810) this Court appears at p. 816 of the report to have approved of the Allahabad rulings on the supposition that there was a "material alteration" introduced by section 30 in the present Code of 1882. There had been no alteration of the law since 1877, and the cases of *Jan Ali* v. *Ramnath Mundal* (I. L R., 8 Cal., 32) and *Lutifunnissa Bibi* v. *Nazirun Bibi* (I. L. R., 11 Cal., 33) were under the same law as the present. But even

* [Sec. 30: —Where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court sue or be sued, or may defend, in such suit on behalf of all, parties so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable) by public advertisement, as the Court in each case may direct.]

(One party may sue or defend on behalf of all in same interest.)

if the claim be treated as one to enforce the individual right of each of these plaintiffs, the other Gyawals ought to have been made parties. *Kali Kanta Surma* v. *Gouri Prosad Surma Bardeuri* (I. L. R., 17 Cal., 906.)

The following **judgments** were delivered by the High Court (BEVERLEY and AMEER ALI, JJ.) :—

Beverley, J.—This was a suit brought by seven Gyawals to restrain the defendant from taking certain action in respect of a masonry platform round a sacred tree in the town of Gya, and the plaintiffs came into Court upon the allegation that they formed a *panch* or committee which represented the entire Gyawal community, and further that even if that should not be found to be the case, they had the right individually to restrain the defendant from the action complained of. Upon this statement of the case the Munsif says : "Plaintiffs accordingly on behalf of themselves and as *panch* of the Gyawals bring this suit for the removal of the encroachments." On the evidence the Munsif found that the plaintiffs did not constitute the *panch* which they allege in their plaint, and accordingly he held that they did not in that character represent the entire Gyawal community, and that they could not therefore sue on their behalf except by leave of the Court as provided by section 30 of the Code of Civil Procedure. But at the same time he held that they had individually the right to restrain the defendant from the acts complained of, and accordingly **[388]** having found for the plaintiffs on the merits, he decreed the suit.

The case then went up on appeal to the District Judge, and the District Judge has dismissed the suit on the ground that the plaintiffs, not having obtained the permission of the Court to sue on behalf of the entire Gyawal community, must be cast in the suit. He does not regard the suit and does not deal with it in any way as a suit brought by the plaintiffs in their individual and personal capacity, although in his judgment he admits that "each of the plaintiffs has a valuable pecuniary interest in the preservation of this platform, and each of them therefore could harass the defendant with a series of suits for damages," and he says that this fact, namely, that each of the plaintiffs has a cause of action, is a ground for holding that they are not entitled to bring separate suits against the defendant, but, according to his view of the law, must all combine in bringing one suit, and unless they are all named as plaintiffs they must apply to the Court for leave under section 30 of the Code of Civil Procedure.

We think that this is altogether a wrong view of the law It being admitted in this case (and this admission we take from the judgments of both the lower Courts) that each separate plaintiff had individually a cause of action, we think that there is no reason and no authority against their being allowed to bring a joint action against the defendant Section 26 of the Code of Civil Procedure clearly enables such persons to join as plaintiffs in the same suit. It says: "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly or severally, or in the alternative, in respect of the same cause of action " The learned District Judge would read that section as though all persons *must* be joined as plaintiffs when they have the same cause of action against the defendant ; but that is not so. It is only an enabling section allowing a number of plaintiffs, with the same right to relief to join in one suit instead of bringing separate suits.

Section 30 treats of a somewhat different matter. It says : "When there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued or may defend in such suit, on behalf **[389]** of all parties so interested." The purport

of that section is that with the permission of the Court a suit may be brought by one or more persons on behalf of all interested. This again is an enabling section, allowing a suit to be instituted under certain circumstances by some of the persons interested on behalf of all. But there are no words in the section to the effect that where persons have the same interest in a suit they are debarred from suing either jointly or severally unless they obtain the permission of the Court to sue on behalf of all the persons similarly interested. The section does not forbid them from suing in their own right; it merely says that if they desire to sue on behalf of others, they must obtain the permission of the Court.

We think, therefore, that the decision of the learned District Judge upon this point is erroneous, and must be reversed, but as the learned Judge has not come to any finding upon the merits, and as it appears that certain questions upon the merits were raised before him, and though not argued were left in the hands of the Court to decide after perusal and weighing of the evidence as to the facts, we think that the case must go back to the Judge in order that he may come to a decision on the merits.

The appellant is entitled to his costs in this Court.

Ameer Ali, J.--As the case of *Mohiuddin* v. *Sayiuddin* (I.L.R, 20 Cal., 810) to which I was a party is referred to by the District Judge in his judgment, I think I ought to add a few words to explain the view I take of section 30 of the Civil Procedure Code.

That section is, as has been already pointed out, an enabling section, and must be read, it seems to me, in conjunction with explanation 5 to section 13 of the Civil Procedure Code, which says: "Where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating." Section 30 provides that where there are a number of persons *having the same interest* in one suit, one or more of them may sue or be sued or may defend in such suit, with the leave of the Court so as to enable the judgment in that suit to be binding upon the others. The effect of section 30 therefore to my mind is, that unless such **[390]** permission is obtained by the person suing, or defending the suit, his action has no binding effect upon the persons whom he chooses to represent. The distinction between a joint right and right enjoyed in common with others has been pointed out by PETHERAM, C. J., in the case of *Jowahra* v. *Akbar Hussain* (I.L.R., 7 All., 178). Where there is a joint right it may be necessary for all persons jointly interested to be joined as parties, and if they are not joined the suit may be bad for misjoinder. In order to prevent the record from being unnecessarily encumbered by many names, section 30 allows one or more persons having a joint interest to sue or defend with the authorisation or permission of the Court on behalf of all. The section in fact embodies a rule of convenience based on reason and good policy, but in my opinion it was not intended to take away, nor does it take away, any right. To use the Chief Justice's words in the case just referred to: "Every one who has such a right is entitled to exercise it without hindrance, and has a right of action against any one who interferes with its exercise."

It seems to me that section 30 does not give any warrant for the contention, that because a person has a right in common with others he may not maintain an action for the establishment or enforcement of his own right. There is no obligation on him to sue or defend on behalf of the others; and if he does not seek any relief on behalf of those who have an interest in common with him or to bind them by his action, there is nothing in the section or in

any other law to debar him from maintaining the action. Even if he were to bring a suit on behalf of himself and the others, he may choose to go on with the action on his own behalf, and would be entitled to do so, if he makes the necessary amendment. The English cases on the point are collected in Daniell's Chancery Practice, 5th Edition, page 215, and tend to show that the plaintiff, if he has a right in himself to bring an action, or the defendant, if he has a right in himself to defend an action, is entitled to sue or to defend in any way he chooses without making any person a party to the action or to the defence, so long as the effect remains confined to himself. For these reasons I agree with the order made by my learned colleague.

S. C. C. *Appeal allowed.*

NOTES.

[See also (1901) P.R., 91, (1907) 1 S.L.R, 145, (1908) P.L.R., 78, (1910) 5 I.C. 547 where this was followed.]

[391] CRIMINAL REVISION.

The 5th February, 1897.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Kailash Chandra Pal and another............Petitioners

versus

Kunja Behari Poddar.... ....Opposite Party.

Criminal Procedure Code (Act X of 1882), section 145—Authority of District Magistrate—Sub-Divisional Magistrate.

In a case where a District Magistrate made an order stating that in his opinion it was the duty of the Sub-Divisional Magistrate to institute proceedings under section 145 of the Criminal Procedure Code,

Held, that the District Magistrate had no authority in law to direct the Sub Divisional Magistrate to institute such proceedings.

Queen-Empress v *Gobind Chandra Das* (I. L. R., 20 Cal, 520), followed.

IN 1894 a dispute arose between the petitioners and the opposite party concerning an orchard, situated in Pergunnah Sovargaon, in the district of Naraingunge. The opposite party alleged that they were in actual possession of a part of the garden by virtue of a deed of sale, dated 30th Joisto 1300 B S. (12th June 1893) executed in their favour by one Gopi Sardar, the other portion to the extent of one *kani* having been leased out to one Isaff, and that after the purchase they allowed Isaff, who was in occupation at the time, to remain on the portion belonging to him and look after the other portion on their behalf. The petitioners, on the other hand, of whom Isaff was one, alleged that they were in possession of the whole garden, it having been leased out to them by Gopi Sardar, and that the allegations of the opposite party were made in order to dislodge Isaff and turn him out of the garden

* Criminal Revision No. 478 of 1896 made against the order passed by L. P. Shirres, Esq., District Magistrate of Dacca, dated 15th May 1896, confirming the order passed by L. T. R. Lucas, Esq., Sub-divisional Officer of Naraingunge, dated 19th March 1896.

Subsequently on 3rd May 1894 there was a riot, and one of the persons present was killed. Kailash Pal absconded, and Isaff and Saber, two of the opposite party, were committed to the Court of Sessions, the former being sentenced to three years and the latter to seven years rigorous imprisonment. On appeal to the High Court Saber's sentence was **[392]** reduced, and Isaff's case was ordered to be re-tried. At the re-trial the jury acquitted Isaff, and on a reference to the High Court the acquittal was upheld. Kailash Pal appeared subsequently, and after being committed to the Court of Sessions was acquitted on 11th May 1895. In the meantime on 19th October 1894 an injunction was issued under section 144 of the Criminal Procedure Code against Isaff and Kailash Pal, two of the opposite party. On the reference to the High Court the verdict of the jury to the effect that Isaff was in possession of the garden was upheld, and thereupon a notice was issued under section 144 of the Criminal Procedure Code against the petitioner Kunja Poddar and his men restraining them from entering the garden of Isaff under penalty of prosecution. On the application of Kunja Poddar to the District Magistrate this order was modified by both parties being served with notices restraining them from entering the garden, and the Subordinate Magistrate was directed by the District Magistrate to institute proceedings under section 145 of the Criminal Procedure Code. In the course of these proceedings the Subordinate Magistrate, on 19th March 1896, held that the opposite party were in possession, and that the petitioners had, from the date of the riot, been attempting to take forcible possession. The petitioners thereupon appealed against this order to the District Magistrate, who stated that he saw no reason to interfere; and on 4th February 1897 the petitioners applied to the High Court for a rule to set aside the order of the Subordinate Magistrate.

Mr. *Donogh* for the Petitioners—Under section 145 of the Criminal Procedure Code the Magistrate must be satisfied, from the police report or otherwise, that there are good grounds for proceeding under this section. The District Magistrate cannot order him to take action under this section. If he does so, it does not leave the Deputy Magistrate any discretion in the matter. *Queen-Empress* v. *Gobind Chandra Das* (I. L. R, 20 Cal., 520), *Ram Chandra Das* v. *Monohur Roy* (I. L. R, 21 Cal., 29). The dispute has always been between Isaff and the opposite party Kunja Behari, and the petitioner Kailash Chandra Pal has always stated that he was not in possession at any time. He has been made a party to the proceedings against his will. The order could not be binding on Kailash Chandra Pal. *Queen-Empress* v. *Kupayyar* (I.L.R., 18 Mad., 51).

[393] Mr. *P. L. Roy* for the Opposite Party.—It is clear that, as far as the Subordinate Magistrate was concerned, he thought no proceedings should be taken under section 145, because on 9th October 1894 he made an order under section 144. As on 4th June 1895 he made another order under the same section (144) prohibiting Kunja Behari from interfering with the land, the Magistrate of the district was of opinion that it was the duty of the Subordinate Magistrate to institute proceedings under section 145, and he accordingly modified the order of 4th June 1895. Acting on this order the Subordinate Officer on 14th August 1895 instituted proceedings under section 145. The case cited of *Queen-Empress* v. *Gobind Chandra Das* (I.L.R., 20 Cal., 520), does not apply to the case of a District Magistrate. The District Magistrate merely stated that he was of opinion that it was the duty of the Sub-Divisional Officer to institute proceedings under section 145. He did not direct his Subordinate Officer to do so. There is nothing in the section of the Code or

in any other section preventing a District Magistrate from passing an order of the kind that he has made in this case.

The following **judgment** was delivered by the High Court (**Ghose** and **Gordon, JJ.**) :—

We think that this rule should be made absolute, upon the first ground mentioned in the order of this Court, dated the 27th July last.

It is quite clear that, so far as the Sub-Divisional Magistrate of Naraingunge is concerned, he thought that no proceedings should be taken under section 145 of the Code of Criminal Procedure, for the order that he made on the 19th October 1894 was an order under section 144 of the Code, prohibiting Isaff from interfering with the land which is the subject-matter of the dispute between the parties; and we further find that on the 4th June 1895 he made another order under the same section (144), similarly prohibiting Kunja Behari, the opposite party before us, from interfering with the land in question. The Magistrate of the district, however, on the 23rd July 1895, was of opinion that it was the duty of the Sub-Divisional Officer to institute proceedings under section 145, and he accordingly modified the said order of the 4th June 1895. **[394]** Acting upon this order of the Magistrate of the district, the Sub-Divisional Officer, on the 14th August 1895, instituted proceedings under section 145. That order runs thus: "Whereas it has been made to appear to me that a dispute likely to lead to a breach of the peace is likely to take place between Kunja Behari Poddar on one side and Kailash Chandra Pal and Isaff on the other, regarding possession to a garden bounded as follows: North by Khajobaigora khal, south by another khal, east by Gora khal of Bari Bedyananda and Isaff arable (Tangita) land, west by Bugmuchi khal, it is ordered that the above parties put in written statements in person or by pleader on the 30th August 1895 regarding their respective claims of actual possession about the said garden with any other evidence they may have to offer, and that until the Court orders what party is in possession, no party shall go to the said disputed land under penalty of prosecution." Now there was no police report or other information before the Sub-Divisional Officer at the time, upon which he could take proceedings under section 145; and, indeed, it is patent that his proceeding of the 14th August 1895 was entirely based (though he does not say so in so many words) upon the order of the District Magistrate of the 23rd July 1895. The question then arises whether the District Magistrate had authority in law to direct the Sub-Divisional Officer to institute proceedings under section 145. We think there is nothing in the Code of Criminal Procedure, or in any other law, authorizing the Magistrate of the District in this case to direct proceedings being taken under section 145. The officer to whom such direction was given was a Sub-Divisional Officer, and it was entirely discretionary with him either to take proceedings or not under that section as he thought proper. We have already said that, so far as he was concerned, he was of opinion that proceedings should be taken under section 144, and not under section 145; and we think that the District Magistrate had no authority over him in this respect. *Queen-Empress* v *Gobind Chandra Das* (I.L.R., 20 Cal., 520).

The rule will accordingly be made absolute.

C. E. G. *Rule made absolute.*

[395] *The 1st February, 1897.*

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Srinath Roy and others............Petitioners

versus

Ainaddi Halder............Opposite Party.*

Criminal Procedure Code (Act X of 1882), sections 133, 137, 437—Further enquiry—Ultrà vires—*Obstruction to public thoroughfare.*

In a complaint for alleged obstruction of a public thoroughfare, the Magistrate, after making preliminary enquiries, was of opinion that the alleged way was not a public thoroughfare, and refused to take action under section 133 of the Code of Criminal Procedure.

The Sessions Judge, being of opinion that the Magistrate should have gone on with the case, directed a further enquiry under section 133. Such enquiry was held, and the Magistrate, without taking evidence in support of the complaint, made his conditional order under section 133 absolute under section 137†.

Held, that the order of the Sessions Judge, directing a further enquiry, was *ultra vires*, there being no section of the Code under which an order for further enquiry could be made in the case; section 437‡ having no application.

Held, also, that the Magistrate, before whom the petitioner showed cause, should not have made his conditional order under section 133 absolute without taking evidence upon the matter of the complaint, the words "evidence in the matter" meaning "in the matter of the complaint," and not simply evidence which the opposite party might offer.

THE facts of this case were as follows: In 1891 the Police of Munshigunge reported that a certain road was a public one and had been obstructed. On 3rd December 1891 the Deputy Magistrate sent the matter to the Sub-Deputy Collector for a report, and on 1st April 1892 that officer, in his report, stated that the road was a public road which had been obstructed, and that orders should issue for the speedy removal of such obstruction. Notices were thereupon issued to the petitioner who denied that the road was a public one, and alleged that the application had been made out of spite. On 16th June 1892 the Deputy Magistrate recorded the following remark, namely: "The Raja

* Criminal Revision No. 5 of 1897, made against the order passed by S. J. Douglas, Esq., Sessions Judge of Dacca, dated 20th November 1896, confirming the order passed by Babu Gogan Chundra Dass, Deputy Magistrate of Munshigunge, dated the 8th of October 1896.

† [Sec. 137:—If he appears and shows cause against the order, the Magistrate shall take evidence in the matter. *(Procedure where he appears to show cause.)*

If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

If the Magistrate is not so satisfied, the order shall be made absolute.]

‡ [Sec. 437.—On examining any record, under section 435 or otherwise, the High Court or Court of Session may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make, or direct any Subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203, or into the case of any accused person who has been charged.] *(Power to order inquiry.)*

says that Babu Syama Kanta Banerjee wants to open a new road from his house"; but did not proceed in the manner laid down in Chapter X of the Code of Criminal Procedure. Nothing further having been [396] done, on 9th November 1895 the opposite party, Ainaddi Halder, moved the then Deputy Magistrate of Munshigunge to institute a case under section 133 of the Code of Criminal Procedure. He, however, refused to do so on the ground that he was satisfied, from certain preliminary enquiries that he had made, that the alleged way was not a public one. The complainant thereupon, on 19th December 1895, moved the Sessions Judge of Dacca against the order of the Deputy Magistrate of Munshigunge refusing to take up the complaint. He thereupon allowed the petition of the complainant, and directed that a further enquiry should be made under section 133 of the Code of Criminal Procedure. On 8th October 1896 the Deputy Magistrate, who had held a further enquiry and passed a conditional order under section 133 of the Code of Criminal Procedure, made the order absolute in the following terms:—

The second party has not established in the Civil Court that the claim of right asserted by him is well founded. I should therefore proceed with the case according to the provisions of law laid down in the Code of Criminal Procedure, and decide whether the conditional order passed by me is reasonable and proper. The *onus* of proving that it is not so lies on the second party showing cause, and it is incumbent on that party to apply for the appointment of a jury, or to produce evidence to-day in support of the contention. As this has not been done, I find no ground for holding that the order is not reasonable and proper. I therefore make the conditional order passed by me under section 133 of the Code of Criminal Procedure absolute, and direct the removal of the obstruction within fifteen days.

Against this order the petitioners, Srinath Roy and others, moved the Sessions Judge of Dacca, who, on 20th of November 1896, made the following order and declined to interfere:—

I decline to interfere, the lower Court has acted in accordance with the procedure laid down in the case of *Luckhee Narain Banerjee* v. *Ram Kumar Mukherjee* (I.L.R., 15 Cal., 564). The present petitioners were, as therein provided, allowed an opportunity to establish their alleged rights to this road, but they have failed to do so. The lower Court's order, under these circumstances, is quite just and proper. This application is rejected, and the lower Court's procedure and orders are confirmed.

Thereupon, on 1st February 1897, the petitioners, Srinath Roy and others, moved the High Court under section 439 of the Code of Criminal Procedure for the reversal of such order on the following grounds amongst others:—

[397] (1) That the Sessions Judge had acted *ultra vires* in remanding the case in the first instance for a further enquiry.

(2) That the conditional order of the Deputy Magistrate should have been discharged, as there was no evidence on the record against the petitioners.

(3) That the Deputy Magistrate should have given the petitioners an opportunity of producing their witnesses, which he failed to do.

Babu *Basanto Kumar Bose* and Babu *Jogendra Chunder Ghose* for the Petitioners.

Mr. *P. L. Roy* for the Opposite Party.

The following **judgment** was delivered by the High Court (**Ghose and Gordon, JJ.**):—

After hearing both sides in this matter, we think that the rule should be made absolute upon both the grounds on which it was granted.

The complaint was one for illegal obstruction of what the complainant described to be a public thoroughfare. The Magistrate, before whom the said complaint was instituted, after certain preliminary enquiries which he had

made, was of opinion that the alleged way was not a public thoroughfare; and he accordingly refused to take action under section 133 of the Code of Criminal Procedure. The complainant then went up to the Sessions Judge; and that Officer was of opinion that the Magistrate was bound to have proceeded with the case; and he directed that a further enquiry be made under section 133, and the following sections of the Code of Criminal Procedure. The Magistrate acted upon this order, as he was bound to do, made a conditional order under section 133, and called upon the petitioners before us to show cause why the obstruction complained of should not be removed.

They appeared and showed cause; but, as it would appear upon the record, they offered no evidence; and thereupon the Magistrate, without taking any evidence in support of the complaint, made the conditional order absolute under section 137 of the Code of Criminal Procedure.

Now, it appears to us that the Sessions Judge's order directing a further enquiry in this case was *ultra vires*. We suppose he meant to make this order under section 437 of the Code of **[398]** Criminal Procedure, there being no other section in the Code under which an order for further enquiry can be made. On referring to that section, however, and reading it by the light of the sections occurring in Chapter XVI which ends with section 203 of the Code, it will be found that it is only in the case of an offence that a superior Court is entitled to direct a further enquiry. The act of the petitioners complained of was not an offence; and in regard to such a complaint we do not think the provisions of section 137 of the Code can have any application. In this view of the matter, it seems to us that the subsequent order of the Magistrate making his conditional order absolute must fall through, the proceedings having been taken upon the authority of the order of the Sessions Judge, which we hold to be illegal. But apart from this consideration we are of opinion that, when the petitioners appeared before the Magistrate and showed cause, he was not competent to make his conditional order absolute without taking evidence upon the matter of the complaint before him under section 137 of the Code. That section says: "If he appears and shews cause against the order, the Magistrate shall take evidence in the matter. If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case. If the Magistrate is not so satisfied the order shall be made absolute." When the section says "the Magistrate shall take evidence in the matter," we read it to mean that he shall take evidence upon the matter of the complaint, and not simply the evidence which the opposite party might offer. It seems to us that, before the Magistrate in this case could make his conditional order absolute, he was bound to have taken evidence in the presence of the opposite party, and satisfied himself that the alleged way was a public thoroughfare; that there had been an unlawful obstruction thereof; and that his conditional order was reasonable and proper. The report, or other information which the Magistrate had received, or such evidence as he might have taken before making the conditional order, is no evidence against the opposite party, the proceeding under section 133 being entirely *ex parte*.

Upon these grounds we make the rule absolute.

C. E. G. *Rule made absolute.*

NOTES.

[This was followed in 31 All., 453. See also 25 Cal., 425.]

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[399] APPEAL FROM ORIGINAL CIVIL.

The 27th November, and 10th December, 1896.

PRESENT :

SIR FRANCIS MACLEAN, KT., CHIEF JUSTICE, MR. JUSTICE MACPHERSON AND MR. JUSTICE TREVELYAN.

Ismail Ariff..............Defendant

versus

S. J. Leslie...........Plaintiff.*

Costs—Presidency Small Cause Courts Act (XV of 1882), section 22—Presidency Small Cause Courts Act (I of 1895), section 11—Suit brought before, but determined after, the passing of Act I of 1895—Certificate for Costs—General Clauses Consolidation Act (I of 1868), section 6.

The plaintiff, before the passing of Act I of 1895, instituted in the High Court a suit to recover from the defendant a sum of over Rs. 2,000, which was reduced to a sum of less than Rs 2,000 before the hearing and therefore below the limit for suits cognizable by the Small Cause Court. At the time of its institution Act XV of 1882 was applicable, by section 22 † of which Act a plaintiff was deprived, in a suit cognizable by the Small Cause Court, of his costs if he obtained a decree "for less than 2,000 rupees" unless the Judge who tried it certified it was a fit case to be tried in the High Court. The suit was not determined until after the passing of Act I of 1895, by section 11 of which the deprivation of costs applied to cases in which the plaintiff obtained a decree for "less than 1,000 rupees." The Judge made a decree in favour of the plaintiff, and, without certifying that the case was one fit to be brought in the High Court, he allowed the plaintiff the costs of the suit.

Held, on appeal, that the case was governed by section 6 of the General Clauses Consolidation Act (I of 1868): Act I of 1895 was not applicable, and the plaintiff was not entitled to his costs of suit. The principle of *Deb Narain Dutt* v. *Narendra Krishna* (I. L. R., 16 Cal., 267) applied.

THE plaintiff, an attorney, brought a suit in the High Court in December 1894, to recover from the defendant a sum of over Rs. 2,100 due by way of costs. After the plaint had been filed, the plaintiff discovered that he had inadvertently omitted to credit the defendant with a payment of Rs. 300. He at once wrote to the defendant giving credit for that sum, and reducing the claim to Rs. 1,800 odd. When the suit was instituted section 22 of the

* Appeal from Original Decree No. 4 of 1896 against the decision of Mr. Justice AMEER ALI, in Suit No. 809 of 1894.

† [Sec. 22 :—If any suit cognizable by the Small Cause Court, other than a suit to which section twenty-one applies, is instituted in the High Court, and if in such suit the plaintiff obtains, in the case of a suit founded on contract, a decree for any matter of an amount or value less than two thousand rupees, and in the case of any other suit a decree for any matter of an amount or value of less than three hundred rupees, no costs shall be allowed to the plaintiff ;

Costs when plaintiff sues in High Court in other cases cognizable by Small Cause Court.

and if in any such suit the plaintiff does not obtain a decree, the defendant shall be entitled to his costs as between attorney and client.

The foregoing rules shall not apply to any suit in which the Judge who tries the same certifies that it was one fit to be brought in the High Court.]

Presidency Small Cause Court's Act (XV of 1882) was applicable to it: that section providing that if any suit cognizable [400] by the Small Cause Court is instituted in the High Court, and if in such suit the plaintiff obtains in the case of a suit founded on contract a decree for any matter of an amount or value less than 2,000 rupees, * * * no costs shall be allowed to the plaintiff; unless the Judge who tries it certifies that it was one fit to be tried in the High Court. The defendant pleaded limitation as to a large part of the sum claimed. After the passing of Act I of 1895, by section 11 of which Act the words "one thousand" are substituted for the words "two thousand" in section 22 of Act XV of 1882, a decree was made in favour of the plaintiff for the sum claimed; and the learned Judge, without certifying that the case was a fit one to be brought in the High Court, gave the plaintiff costs on scale No. 2. The defendant appealed.

Mr. *Dunne* and Mr. *Chowdhry*, for the Appellant, abandoned the plea of limitation; and the only question left for determination was the question of costs.

Mr. *T.A. Apcar* (with him Mr. *Pugh* and Mr. *Avetoom*) for the Respondent.—There is no vested right to costs in anybody. The plaintiff brought his suit in December 1894; and the moment Act I of 1895 was passed, he could have withdrawn his suit, with leave to bring a fresh suit, and then have brought the fresh suit in the High Court. The Act has a retrospective effect, because it is a matter of procedure that the Act has changed. At the time of bringing the suit, no one had any substantive right in the costs. That being so, this is purely a matter of procedure; and the procedure to be followed is that given by the later Act,—*Bhobo Sundari Debi* v. *Rakhal Chunder Bose* (I. L. R., 12 Cal., 583). [TREVELYAN, J.—Were you not under a disability to receive costs?] Yes, at the time the suit was brought; but before the time came for awarding the costs, the Legislature had removed that disability. [MACLEAN, C. J.—Then if the judgment had been delivered on the 31st March 1895, you would have been deprived of your costs?] Possibly, but that is a common result of legislation.

Mr. *Dunne* for the Appellant. –The Act is not retrospective. The Legislature intended that the defendant should have the right to be exempt from payment of costs in the event of the decree being against him for a sum smaller than a certain limit. [401] The terms of the Act show that it could not have been contemplated that suits instituted before the Act should come within a rule of jurisdiction prescribed by the new Act; for, after all, it is not a question of procedure, but of jurisdiction. The new Act must refer only to suits instituted after the 1st April 1895. [TREVELYAN, J., referred to the cases of *Wright* v. *Hale* (6 H. and N., 227), and *Republic of Costa Rica* v. *Erlanger* (L. R., 3 Ch. Div., 62).] Here there is an absolute prohibition of the plaintiff's getting his costs. In the case of *Wright* v. *Hale* (6 H. and N., 227) there was no stated rule declaring any right in respect of costs. But the Small Cause Court Act entitles the defendant to exemption from liability in a certain event. To give the plaintiff his costs would be giving him something he was deprived of by the Legislature, and giving it to him because he had done what the Legislature forbade him to do. [MACLEAN, C.J.—Does not section 6 of the General Clauses Act apply? TREVELYAN, J., referred to *Deb Narain Dutt* v. *Narendra Krishna* (I. L. R., 16 Cal., 267, (272).] Those principles apply here. The new section does not repeal the old one; it merely substitutes a new jurisdiction for an old one.

C. A. V.

The following **judgments** were delivered by the Court (MACLEAN, C.J., and MACPHERSON and TREVELYAN, JJ.) :—

Maclean, C.J.—The only question to be decided on this appeal is whether the plaintiffs are entitled to their costs of the suit.

The suit is one by a firm of attorneys against their client to recover the balance of their bill of costs. The amount recovered is under Rs. 2,000 but over Rs. 1,000. It is contended for the appellant, having regard to section 22 of the Small Cause Courts Act (No. XV of 1882), that the plaintiff's costs ought not to be allowed. That section, so far as is material, was as follows:—

"If any suit cognizable by the Small Cause Court other than a suit to which section 21 applies, is instituted in the High Court, and if in such suit the plaintiff obtains, in the case of a suit founded on contract, a decree for any matter of an amount of value less than Rs. 2,000, and in the case of any other suit a decree for any matter of an amount or value of less than Rs. 300, no costs shall be allowed to the plaintiff. The foregoing rules shall not apply **[402]** to any suit in which the Judge who tries the same certifies that it was one fit to be brought in the High Court."

In the Court below the learned Judge allowed the costs, but did not certify that the suit was one fit to be brought in the High Court. He treated the matter of costs as one for the exercise of his judicial discretion.

If the matter rested only on the above section, it would be clear that the plaintiff could not be allowed his costs in the absence of any such certificate.

The difficulty arises from section 11 of the Presidency Small Cause Courts' Amendment Act (No. I of 1895), which came into operation on the 1st April 1895. This substitutes the words "one thousand" for "two thousand" in section 22, above referred to. In the opinion of the learned Judge in the Court below, as the suit had been commenced before the amending Act, the plaintiffs could not be allowed their costs unless in his discretion he allowed them.

What is the effect of section 11 of the repealing Act upon section 22 of Act XV of 1882? It repeals *pro tanto* the provision as to amount in the old Act, but there is no provision that it should be retrospective in its operation. It is urged for the plaintiff that the repealing Act relates to procedure only, and does not interfere with any substantive right, and consequently that the new Act is retrospective in its operation.

I think, however, that the case comes within the third class of cases stated by Mr. Justice WILSON in delivering the judgment of the Full Bench in *Deb Narain Dutt* v. *Narendra Krishna* (I. L. R., 16 Cal., 272). He says: "The third class of cases consists of those in which the law is changed by a mere repeal of a previously existing law, and the repealing enactment contains no special rule for its own interpretation. Such cases are governed by section 6 of the General Clauses Act."

Section 6 of the General Clauses Act says: "The repeal of any Statute shall not affect any proceedings commenced before the repealing Act shall have come into operation." This suit—a "proceeding" within the meaning of that section—was instituted before the repealing Act came into operation. I **[403]** therefore think the provisions of the repealing Act do not apply to this case, that section 22 of the Small Cause Court Act does apply, and that, as the plaintiff has recovered less than Rs. 2,000 and the Judge has given no certificate, the plaintiff cannot be allowed the costs of the suit. The appeal therefore must be allowed. The appeal also dealt with a point as to the statute of Limitation, but that was abandoned by the appellant's Counsel.

As the appellant therefore has failed as to part of his appeal and succeeded as to the other, there will be no costs of the appeal.

Macpherson, J.—I agree with the learned Chief Justice. I think that section 22 of the Small Cause Court Act as it stood unamended by the Act of 1895 applied to this suit. The effect of the amendment was wholly to repeal section 22 as regards all suits in which the amount decreed was less than Rs. 2,000 and over Rs. 1,000, and by section 6 of the General Clauses Act the repeal did not affect the suit which was pending when the repealing Act came into operation. The learned Judge did not certify as required by section 22, and he had no discretion in the matter of costs.

Trevelyan, J.—The question of limitation having been abandoned by Mr. *Dunne*, the only question which we have to decide is as to the costs.

In my opinion section 11 of Act I of 1895 has no application to the present case.

At the time this suit was instituted Act I of 1895 had not been passed, so the alteration of Act XV of 1882, section 22, does not affect this suit. The matter is, I think, concluded by section 6 of the General Clauses Act, and the English cases as to the effect of an alteration in the law of procedure upon pending proceedings have no application.

Under section 22 of Act XV of 1882, the discretion which a Judge possesses as to costs has been taken away. In case of a decree for a sum under Rs. 2,000 the plaintiff is expressly prevented from obtaining his costs, except the Judge who tries the suit "certifies that it was one fit to be brought in the High Court."

I do not understand that in this case the learned Judge has certified in terms of the section. He has treated the cases as one **[404]** governed by his ordinary discretion, and has given reasons which would be equally applicable to any case whether tried in the High Court or in the Small Cause Court.

Having regard to the objects of the Act, I think that a certificate can only be given in a case where a Judge considers that the case was not one which ought to be brought in the Small Cause Court. So strictly has this section been construed, that I have never known a certificate given under it. It is not necessary to determine in what class of cases a certificate should be given; but I doubt very much whether the Legislature by the terms of section 22 intended much to extend the powers which they gave to the Judge under section 9 of Act XXIV of 1864, viz., that he could only certify when "by the reason of the difficulty, novelty or general importance of the case or of some erroneous course of decisions in like cases in the Court of Small Causes, the action was fit to be brought in the High Court."

I would hold that the plaintiffs were entitled to no costs in the Court below, and that each party should pay his own costs of this appeal.

Appeal allowed.

Attorney for the Appellant: Babu *Kedar Nath Mitter.*

Attorney for the Respondent: Mr. *F. M. Leslie.*

H. W.

NOTES.

[This was not followed in (1897) 21 Bom., 779 on the ground of retrospectivity of laws regulating procedure.]

[24 Cal. 405]

APPELLATE CIVIL.

The 17th February, 1897.

PRESENT :

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Sukurullah Kazi and others............Principal Defendants

versus

Bama Sundari Dasi...........Plaintiff.[1]

Land Registration Act (Bengal Act VII of 1876), sections 38 and 78—Suit for rent—Whether it is necessary, to enable him to sue for rent, that a putnidar should be registered under the Act.

A *putnidar* is not a proprietor within the meaning of sections 38 † and 78 ‡ of the Land Registration Act.

[405] THIS appeal arose out of an action for rent. The plaintiff's allegation was that she was the proprietress of a share of a zemindari, and she also held other shares as *putnidar* and *durputnidar*. She further alleged that she got her name registered in respect of those shares under the Land Registration Act. The principal defendants denied the relationship of landlord and tenant, and also pleaded that, inasmuch as the name of the plaintiff was not registered under the Act, the suit was not maintainable. The Court of First Instance

* Appeal from Appellate Decree No. 252 of 1895, against the decree of Babu Nuffer Chundra Bhutta, Subordinate Judge of Hooghly, dated the 30th of November 1894, reversing the decree of Babu Haro Kumar Rai, Munsif of Serampur, dated 26th of January 1894.

Proprietor and manager to register within specified time.

† [Sec. 38 :—Every proprietor of an estate or revenue-free property, or of any interest therein, respectively, being in possession of such estate, property, or interest, at the commencement of this Act, *i.e.*, the 23rd August 1876,

every joint proprietor of an estate or revenue-free property being in charge of such estate or property, or of any interest therein, respectively, on behalf of the other proprietors thereof, at the commencement of this Act,

and every person being manager of an estate or revenue-free property, or of any interest therein, respectively, on behalf of a proprietor thereof, at the commencement of this Act,

shall, if his name and the character and extent of his interest have not already been registered, make application in the manner hereinafter provided for the registration of his name and of the character and extent of his interest as such proprietor or manager, to the Collector of the district on the general register of which such estate or property is borne, or to any other officer who may have been empowered by the Collector to receive such application, within such time as the Lieutenant-Governor may fix as hereinafter provided]

No person bound to pay rent to claimant not registered.

‡ [Sec. 78 :—No person shall be bound to pay rent to any person claiming such rent as proprietor or manager of an estate or revenue-free property in respect of which he is required by this Act to cause his name to be registered, or as mortgagee, unless the name of such claimant shall have been registered under this Act ;

Payment to each of several proprietors, etc., holding in common tenancy.

and no person being liable to pay rent to two or more such proprietors, managers, or mortgagees holding in common tenancy, shall be bound to pay to any one such proprietor, manager, or mortgagee more than the amount which bears the same proportion to the whole of such rent as the extent of the interest in respect of which such proprietor, manager, or mortgagee is registered bears to the entire estate or revenue-free property.]

dismissed the suit, holding that the plaintiff failed to prove the relationship of landlord and tenant; and also holding that, as the plaintiff did not get her name registered in respect of the share of one Mongola Dasi, whose *putni* right she had purchased, the suit was not maintainable. On appeal the learned Subordinate Judge decreed the suit, holding that it was not necessary under the Land Registration Act to register the name of the *putnidar* in order to enable her to bring and maintain a suit for rent; but he did not decide the point whether there existed the relationship of landlord and tenant between the parties.

From this decision the defendants appealed to the High Court.

Dr. *Asutosh Mookerjee* and Babu *Gyanendra Nath Basu* for the Appellants.

Babu *Saroda Churn Mitter* and Babu *Haro Kumar Mitter* for the Respondent.

The **judgment** of the High Court (MACLEAN, C.J., and BANERJEE, J.) (so far as it is material for the purposes of this report) was as follows:—

Maclean, C.J.:—The first point taken in this appeal was, that inasmuch as the plaintiff was not registered, the suit was not maintainable, having regard to sections 78 and 38 of Bengal Act VII of 1876. The question is, whether the plaintiff is a proprietor within the meaning of the term as used in those sections. I think that the purview of the Act is shown by the preamble which runs as follows:-

"Whereas it is expedient to make better provision for the preparation and maintenance of registers of revenue-paying and revenue-free lands, and of proprietors and managers thereof." Looking at the sections to which I have referred and to the preamble **[406]** of the Act, I think the term "proprietor" was intended to be confined to a zemindar and not to a *putnidar*; the first objection therefore fails.

Another preliminary objection was taken that an appeal would not lie having regard to section 153 of the Bengal Tenancy Act. Having regard to sub-section (*b*) of that section, it seems to me that the decree in this case has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto, and therefore in my opinion an appeal lies.

This further question consequently arises. The Munsif found as a matter of fact that the relation of landlord and tenant did not subsist between the plaintiff and the defendant from whom she is claiming rent. The Subordinate Judge did not go into that matter at all. His judgment is absolutely silent upon the point. I am therefore of opinion that, as regards this point, which is the foundation of the plaintiff's claim, the case must be remanded to the Subordinate Judge for him to go into that question, and as the whole case is remanded, it will not prevent him from going into any other points which may have been raised, or from deciding, if he thinks fit, that a decree for the entire rent might be made, instead of a decree for a share only.

Upon these grounds the appeal will be allowed and the case remanded to the Lower Appellate Court for retrial. The costs of this appeal will abide and follow the result.

S. C. G. *Appeal allowed. Case remanded.*

[24 Cal. 406]

The 18th February, 1897.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Lala Ramjewan Lal............Defendant

versus

Dal Koer............Plaintiff in Appeal No. 87.*

Hindu Law—Will—Construction of Will—"Malik," *Meaning of, as applied to female legatees—Contingent bequest—Gift absolute—Life estate—Indian Succession Act (X of 1865), sections 111 and 125—Direction against alienation—Costs.*

A Hindu, survivor of two brothers in a joint family under the Mitakshara law, died, leaving a widow and two daughters, a brother's widow, and [407] three daughters of his brother. In his will it was provided *inter alia* that his daughters and brother's daughters "shall be *maliks* and come in possession in equal shares of all the moveable and immoveable properties." It was also provided that in the event of any of the daughters of the testator or of his brother dying childless her share "shall devolve in equal shares on the surviving daughters," "but such share shall have no connection with her husband's family." The will made a further provision that the daughters should not have on any account the right to sell or alienate their shares. *Held,*

(1) The expression *maliks* ordinarily implies an absolute gift, and there is no authority for introducing into the will the idea that a female ought not to obtain anything beyond an estate for her lifetime.

(2) Having regard to section 111† of the Indian Succession Act [applicable under the Hindu Wills Act (1870)] and the Privy Council case of *Norendra Nath Sircar* v. *Kamalbasini Dasi* (I. L. R., 23 Cal., 563), the provision of survivorship applied only to the case of a daughter dying during the lifetime of the testator, and did not take effect in the present case, the daughter whose share was in question having died several years after the testator's death.

(3) As to the direction against alienation, section 125 ‡ of the Indian Succession Act provides for a case like this, and the daughters receive their shares as if there was no such direction.

(4) The will was not open to the construction that there was a life estate only conferred by it on the daughters.

ON these appeals, questions were raised on the construction of the will of one Sunder Lal, sole surviving male member of a joint Hindu family under the

* Appeals from Original Decrees Nos. 87, 91 and 92 of 1895 against the decree of Babu Upendra Chunder Mallick, Subordinate Judge of Patna, dated the 28th of December 1894.

Bequest contingent upon a specified uncertain event, no time being mentioned for its occurrence.

† [Sec. 111:—Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the Will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable.]

Direction that funds be employed in a particular manner following an absolute bequest of the same to or for the benefit of any person.

‡ [Sec. 125:—Where a fund is bequeathed absolutely to or for the benefit of any person, but the Will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.]

Mitakshara law. The will was executed on the 25th May 1883, and Sunder Lal died on the 7th September of the same year, leaving a family consisting of a widow and two daughters, a brother's widow, and three daughters of the said brother. The principal point argued in the appeals was the nature of the estate conferred by the will upon Jiu Koer, one of the daughters of the testator's brother and the succession to that estate upon her death which occurred on the 28th July 1888.

The material parts of the will were as follow:—

Para. 10. "After giving Rs. 50 per mensem to the widow of my deceased elder brother and Rs. 50 per mensem to my fourth wife, the three daughters of my deceased elder brother and the two daughters born of the womb of my second wife as well as that daughter or daughters who may be born of the womb of my fourth wife, shall be the *maliks* and come in possession in equal shares of all the moveable and immoveable properties. Perchance any of the above daughters die and she leaves any male child, then such **[408]** male child shall be the representative of his mother and get the share left by her. But in case any of the daughters die childless, then in that case the share left by such deceased daughter shall devolve in equal shares on the surviving daughters of my elder brother and of me the declarant. But such share shall have no connection with her husband's family."

Para. 11. "Perchance any of the daughters of my elder brother or the daughters of me the declarant give birth to no son, on the contrary she or they give birth to daughter or daughters, then in the place of a son, such daughter or daughters who will be born from her own womb shall inherit the properties of the daughter (who may not give birth to a son) which she might have inherited from me the declarant, and will succeed her mother as her representative. No other person shall have any claim to it."

Para. 17. "The daughters of my elder brother or their children succeeding them will be entitled to get equal shares in the properties which exist at the present moment, or which may be acquired hereafter, and they will be at liberty to remain in possession of the properties jointly, being on good terms with one another, and after joint management take their respective equal shares of the properties and appropriate the proceeds thereof, or after separately managing their respective shares appropriate the proceeds thereof, separately to their own respective use. But my daughters or the daughters of my elder brother shall not have on any account the rights to sell or alienate, directly or indirectly, the shares of the properties or of the houses which may fall to their respective shares. In case any of them does so, it will be held null and void in the Courts of Justice."

The plaintiffs in the three cases were, respectively, Dal Koer and Jhamela Koer (the two daughters of the testator) and Birja Koer (one of the daughters of his brother). The defendant in all the suits was Ram Jowan Lal, husband of Jiu Koer, deceased. The Subordinate Judge held that the will did not confer an absolute estate on the daughters, and that the defendant was not entitled to succeed to Jiu Koer's estate.

The defendant appealed to the High Court.

Dr. *Rash Behary Ghose*, Babu *Saligram Singh*, Babu *Mahabir Sahay*, and Mr. *H. E. Mendies* for the Appellant.

Moulvie *Mahomed Yusuf* and Babu *Tarit Mohan Das* for the Respondent in Appeal No. 87.

Moulvie *Mahomed Ishfak* for the Respondent in No. 91.

Babu *Jogendra Chandra Ghose* for the Respondent in No. 92.

The **judgment** of the High Court (**Trevelyan** and **Beverley**, **JJ.**) was as follows:—

These three appeals are against decrees made in three several **[409]** suits which were tried together; and the only question before us is as to the construction of the will of one Lala Sunder Lal made on the 25th May 1882.

Before referring to the terms of the will it will be well to mention that the point is shortly whether, having regard to the terms of the will, the husband of a daughter who survived the testator is entitled to obtain the share given by the will to that daughter, or whether he is to be excluded from any rights under the terms of the will. It is not disputed that if an absolute estate was given to the daughter by this will, and there was nothing in the will giving the share to some one else on her death, the husband as her *stridhan* heir would be entitled to it. The important parts of the will are referred to by the learned Judge in the Court below. The testator begins by expressing a hope that the family will continue to live jointly, but in the event of disputes he makes certain provisions. Paragraphs 10 and 11 are the two first which we have to consider. Paragraph 9 first of all gives Rs. 50 a month to the widow of the testator's brother, and Rs. 50 a month to the testator's fourth wife, and then paragraph 10 provides that the three daughters of his elder brother and the two daughters of the testator's second wife as well as the daughter or daughters who may be born of the testator's fourth wife, shall be *maliks* and come in possession in equal shares of all the moveable and immoveable properties. *Prima facie* there can be no question but that a gift, when there are no controlling words, is an absolute gift, and the expression "*maliks*" used here would ordinarily imply an absolute gift. But it is contended that we must introduce into this will what is said to be the prevalent Hindu idea that a female ought not to obtain anything beyond an estate for her lifetime, and, therefore, although the word "*maliks*" is used, we must cut down the estate to the extent of an estate given to a Hindu daughter. There is no authority for such a proposition. The words are absolute, and if they stood by themselves without anything to the contrary it would be impossible for us to say that they did not give an absolute estate. The following are the words upon which the lower Court has acted and upon which reliance has been placed in this Court: "Perchance any of the above daughters die, and she leaves any male child, then such male child shall be the representative of his mother and get the share left by her. But in case any of **[410]** the daughters die childless, then in that case the share left by such deceased daughter shall devolve in equal shares on the surviving daughters of my elder brother and of me the declarant. But such share shall have no connection with her husband's family. Perchance any of the daughters of my elder brother or the daughters of me the declarant give birth to no son, on the contrary she or they give birth to daughter, or daughters, then in the place of a son, such daughter or daughters who will be born from her own womb shall inherit the properties of the daughter (who may not give birth to a son) which she might have inherited from me the declarant and will succeed her mother as her representative. No other person shall have any claim to it."

We think that having regard to the provisions of section 111 of the Indian Succession Act, which is made applicable to Hindus by the Hindu Wills Act, and having regard also to the recent case of *Norendra Nath Sircar* v. *Kamalbasini Dasi* (I.L.R., 23 Cal., 563), these provisions can apply only to the case of a daughter dying during the lifetime of the testator. "Perchance any of the above daughters die," as has been pointed out, must refer to their death at some particular time. No other time is pointed at by the will except the time when the share would be distributable, namely, the time of the death of the testator, and quite apart from section 111 and the case to which we have referred, it is clear that the scheme of this portion of the will provides for all events which might happen before the testator's death. If the daughter dies leaving a male child, the male child is to become the representative of his

mother and to get the share left by her, that is to say, the share which she would have obtained if she had survived the testator. It is not disputed that a male child would obtain an absolute estate in this property. If the construction sought to be put upon this will by the respondent is correct, although the daughter would succeed to a life-estate, yet a son who succeeded her would get a very much greater interest in the estate than that of his mother, whereas the will provides that he is to get the very share left by her. Similarly, if the daughter dies childless, the share which she would have acquired goes over to the other daughters. If she dies leaving a daughter, then the daughter will also succeed her mother as her representative in the same way as the son.

[411] Much reliance was placed upon the words "but such share shall have no connection with the husband's family." That expression, it is true, is somewhat vague. The husband's family would of course include his son, etc. But assuming that it was intended to apply to the husband and persons of the family other than those related by blood to the testator, we think it was only intended so to apply where the daughter dies during the testator's lifetime. One can well understand that a man leaving property and wishing to provide for his daughter would not desire to provide for his son-in-law on the death of the daughter, as a son-in-law's relationship to the father-in-law would necessarily be altered by the death of the daughter, and the father-in-law would not have the same interest in providing for him, though he would not necessarily wish to exclude him entirely, in case his daughter was alive. He would not contemplate events happening so long after his own death. It is not to be supposed, in the absence of anything more definite, that the exclusion was to be for ever and ever, whatever events might happen, of any person connected with the husband. There is nothing on the face of the will to suggest such an exclusion. In our opinion the testator in this case intended to exclude his son-in-law only in the event of the daughter dying before his own death.

The only remaining question is, whether there is anything in the will to cut down the absolute gift in the 10th paragraph. There is nothing in any of the paragraphs in any way affecting this question, unless it be paragraph 17; and the only portion of that paragraph which may be said to deal with it is at the end: "But my daughter or the daughters of my elder brother shall not have on any account the right to sell or alienate directly or indirectly the shares of the properties or of the houses which may fall to their respective shares. In case any of them does so, it will be held null and void in the Courts of Justice." It is said that the effect of that is to give a life-estate to the daughter, that is, that the effect of giving an absolute estate *plus* a restriction on its sale or alienation is to give a life-estate. There is nothing in the will about a life-estate being given to the daughters, and if they had a life-estate given to them, there is no reason why there should be any provision restricting them from selling or alienating. **[412]** Having a life-estate, they would have no right to sell or alienate. This case is not different from any other case where a testator makes an absolute gift, and in some other part of his will puts in a provision against sale or alienation. It is a case provided for by section 125 of the Indian Succession Act. That section says: "When a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction." That embodies a well known principle of law. Moreover, regarding this question as to whether there was a life-estate, one would expect, having regard to the express gifts to the legatees as *maliks*, to find that there have been

some gifts over after the deaths of the daughters. Paragraphs 10 and 11 refer only to events happening during their life, and there is no provision in the will as to who should enjoy the property after their deaths. We think that this will is not open to the construction that there was a life-estate. Giving a reasonable construction to the will, and taking the whole of it into consideration, we are unable to say that the estate should in any way be limited. It follows that the appeals must be allowed, the decrees of the lower Court set aside, and the suits dismissed.

Regarding the question of costs, this is, we think, a case where the defendant is entitled to his costs. This is not an ordinary case of a suit brought for the construction of a will. It is a case in which an attempt has been made to oust from his property a person who has been enjoying possession of it, although the title of the plaintiff depends upon the construction of a will. He took his risk as to whether the Court would take his view of the construction, and, having failed, he must pay for the litigation. The defendant (appellant) is, in our opinion, entitled to costs against the plaintiffs-respondents in each case, and the order we make is that the appellant do recover in each of the appeals one-third of the highest set of costs, in respect to the hearing fee, that he is entitled to in any one of these three appeals. This concerns the hearing fee in this Court alone. He is also entitled to all other costs in these appeals, and to the costs, in the lower Court.

S. C. C. *Appeal allowed.*

NOTES.

[" The expression 'heir' or '*malik*' or 'heir and *malik*' would, except in the case of women [(1886) 11 Bom., 69; (1889) 14 Bom., 1] ordinarily indicate an absolute estate [(1897) 24 Cal., 834 at 849; (1885) 9 Bom., 491; (1897) 24 Cal., 406; (1907) 30 All., 84 P. C.; (1909) 14 C.W.N., 458] but the context might show that a restricted estate [(1874) 2 I.A., 7; in (1896) 19 All., 16 at p. 21 the Court said, 'The use of the word *malik* (owner) is consistent both with an intention to bestow on her a widow's estate and also the estate of an absolute owner'] or a right of management was intended:—(1868) 3 B.L.R., O.C., 85." —Phillips and Trevelyan on Hindu Wills, II Edn. (1914) p. 85; 92. See also (1900) 5 C.W.N., 300, (1906) 33 Cal., 947; (1906) 29 All., 217; (1899) 27 Cal., 44; (1908) 35 Cal., 896 P.C; 13 Bom. L.R., 141.

As regards sec. 111, see also, (1912) 40 Cal., 274 P.C; (1896) 23 Cal., 563.]

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[413] APPELLATE CIVIL.

The 15th March, 1897.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Abbas and another............Defendants Nos. 2 and 3

versus

Fassih-ud-din and another (plaintiffs) and others............Defendants 4 and 5.

Mesne profits—Limitation Act (XV of 1877), Schedule II, Article 109—Wrong-doers independent of the defendant—Civil Procedure Code (1882), section 211.

In a suit brought on 26th September 1893 for mesne profits of land, for the possession of which a decree had been previously obtained against the defendant, the plaintiff claimed damages in respect of the Fusli years 1297—1300, the year 1297 F. ending on the 28th September 1890. The defendant objected *inter alia* that the claim in respect of the period

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* Appeal from Original Decree No. 176 of 1895, against the decree of Babu Karuna Das Bose, Subordinate Judge of Tirhoot, dated 15th of March 1895.

beyond three years before the date of suit was barred by limitation, and that she was not liable for profits of the lands from which she had been dispossessed by others. *Held* :—

(1) Under Article 109 *, Schedule II of the Limitation Act, the defendant is liable for the mesne profits received by her or which she might have with due diligence received *during* the three years before the date of suit, and not *before*. The period of three years fixed has no reference to the time when rents fall due. *Byjnath Pershad* v. *Badhoo Singh* (10 W. R., 486); *Thakoor Dass Acharjee Chuckerbutty* v. *Shoshee Bhoosun Chatterjee* (17 W. R., 208), and *Thakoor Dass Roy Chowdhry* v. *Nobin Kristo Ghose* (22 W. R., 126) distinguished.

(2) In the case of every wrong the liability of the defendant is limited to damages for the wrong which he has himself done. With reference to the definition of mesne profits in section 211 † of the Civil Procedure Code, if the defendant was excluded from possession, she could not be said to have actually or even impliedly received the profits, nor could she with ordinary or extraordinary diligence have received them. The case was remanded to determine what mesne profits were payable between the 26th September 1890 and the date, if any, when dispossession was proved.

THE facts and arguments in this case sufficiently appear from the judgment of the High Court. The defendants Nos. 2 and 3, the legal representatives of Imambandi Begum, the original defendant, appealed to the High Court.

Mr. *C. Gregory*, Dr. *Rash Behary Ghose* and Moulvie *Mahomed Mustapha Khan* for the Appellants.

Babu *Umakali Mukerjee*, Babu *Karuna Sindhu Mukerjee*, Babu *Dwarkanath Chakrabarti* and Babu *Lal Mohan Ganguli* for the Respondent.

[414] The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ.**) was as follows :—

The plaintiffs, having obtained in another suit a decree for possession of property from which they had been ousted, have brought this suit for mesne profits.

This suit was originally brought only against Imambandi Begum, who was the principal defendant in the other suit, but in consequence of her alleging in her written statement that she had been dispossessed by other persons of a portion of the land in respect of which mesne profits were sought, those other persons, viz., Dulhin Golab Kunwar and Awadh Behari Narain Singh, who had also been parties to the suit for possession, were, at the instance of the plaintiffs, added as defendants in this suit.

Imambandi Begum died pending this suit.

* [Art. 109 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years ...	When the profits are received, or where the plaintiff has been dispossessed by a decree afterwards set aside on appeal when he recovers possession.]

† [Sec. 211 :—When the suit is for the recovery of possession of immoveable property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree whichever event first occurs), with interest thereupon at such rate as the Court thinks fit.

In suits for land, Court may decree payment of mesne profits with interest.

Explanation :—' Mesne profits ' of property mean those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received, therefrom, together with interest on such profits.]

The learned Subordinate Judge has given to the plaintiffs a decree against the heirs of Imambandi Begum, and has declined to adjudicate on the liability of the added defendants, considering it to be a question between the defendants themselves.

The heirs of Imambandi have alone appealed to this Court, so that their liability to the plaintiffs can alone be determined in this appeal, and in whatever way we may alter the decree against them, we cannot in this appeal fix any liability upon the added defendants.

The two questions argued before us were: (1) Whether the plaintiffs can recover mesne profits for more than three years before suit? and (2) whether the liability of Imambandi for mesne profits continued after she had been herself ousted from the property?

The learned Subordinate Judge has given a decree for more than three years before suit. His judgment on this question is as follows: "1st Issue—The mesne profits are claimed from 1297; and I have to determine whether the claim for 1297 and 1298 is barred by limitation. The present suit was filed on the 26th September 1893, and the plaintiffs' cause of action for the mesne profits of 1297 arose at the beginning of 1298. The Fusli year 1297 ended on the 28th September 1890; and the plaint in this case having been filed on the 26th September 1893, the claim [416] for the mesne profits of 1297 was just within time; and the claim for 1298 is *à fortiori* not barred by time."

The appropriate article of the Limitation Act is Article 109, which allows three years from the time when the mesne profits are received, *i.e.*, the defendant is liable for all mesne profits received by him (or to use the words of section 211 of the Civil Procedure Code, which he might with ordinary diligence have received) during the three years before suit, and not before. There is nothing in the Act to fix the period with reference to the time when rents fall due. It is the actual receipt of the rents, whenever they may have fallen due, which creates the liability. The rents long since due or rents not yet due would, when received, equally fall within the expression mesne profits, as much as rents which are at the moment accruing due. This interpretation is that which, as far as we know, has been always placed upon this article of the Limitation Act and we know of no authority to the contrary under the present Limitation Law. In the case of *Mahomed Riasat Ali* v. *Hasin Banu* (I. L. R., 21 Cal., 157) a decree for more than the three years was admitted by Counsel to be incorrect and was accordingly varied by Her Majesty in Council. The decisions in *Byjnath Pershad* v. *Badhoo Singh* (10 W. R., 486), *Thakoor Dass Acharjee Chuckerbutty* v. *Shoshee Bhoosun Chatterjee* (17 W. R., 208), and *Thakoor Das Roy* v. *Nobin Kristo Ghose* (22 W. R., 127) are under a different law, and are not therefore binding upon us. In our opinion the plaintiffs cannot in any event recover mesne profits received by Imambandi, or which might have been received by her, before the 26th September 1890.

The second question arises as follows: In her written statement Imambandi alleged that she had been excluded from occupation of a part of the land by an order of the Criminal Court obtained at the instance of the added defendants. The second issue is wide enough to include this question. The learned Subordinate Judge treats the question as one arising between the defendants themselves, not as arising between the plaintiffs and Imambandi. It is true, he says, that if the evidence taken by the Amin be not looked into, there is no reliable evidence whatsoever to show, that Dulhin Golab Kunwar and Awadh Behari [416] ever held any of the lands in dispute. But it is clear from his judgment that he declined to allow this question to be entered into.

It remains to be seen whether the Subordinate Judge's view is justified by the law. To use the words of Mr. Justice PHEAR in *Indurjeet Singh* v. *Radhey Singh* (21 W. R., 269): "Generally from the nature of the claim to mesne profits, mesne profits ought not to be estimated for any period during which the defendant who is to be made responsible for them was not active in keeping the plaintiff out of possession." In that case the property was in the hands of a receiver appointed by the Court, and the same learned Judge pointed out that the defendant could not be answerable for damages for mesne profits in respect of those years during which an officer of the Court and not the defendant was keeping the plaintiff out of possession.

On this question the circumstance that an officer of the Court was keeping the plaintiff out of possession cannot differentiate it from the case where any person other than the defendant and not acting under or in collusion with the defendant was keeping the plaintiff out of possession.

Mesne profits are defined by section 211 of the Code of Civil Procedure as meaning those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received therefrom together with interest on such profits. If the defendant was excluded from possession, she can scarcely be said to have been in wrongful or any possession. She cannot be said to have actually or even impliedly received the profits, nor could she, with ordinary or extraordinary diligence, have received them. This view of the law was also taken in the case of *Haradhun Dutt* v. *Joy Kisto Banerjee* (11 W. R., 444).

It is complained that it would be hard upon a plaintiff to expect him to be continually enquiring whether a wrong-doer had ceased to be in possession, but in the case of every wrong, the liability of the defendant is limited to damages for the wrong which he himself has done. He is not a surety for damages resulting from the acts of other wrong-doers who are independent of him.

[417] In the case of *Doe* v. *Harlow* (12 A. & E., 40) the action was brought against a wrong-doer, his tenant, and the tenant's under-tenant. Lord DENMAN left the case to the Jury to say on the case against all the defendants how long the three had been jointly keeping out the rightful proprietors. On the application by the tenant for a new trial Lord DENMAN said: "If there had been no evidence here but that the under-tenant remained in possession I should have left the case differently." The evidence on which the Court relied was that the tenant had received rent from the under-tenant, and was therefore in possession through him. This case, we think, assumes that a wrong-doer is not responsible for the acts of another wrong-doer, who is independent of him. In Mayne on Damages, 4th Edition, p. 418, it is said that in an action for mesne profits when the ground of action is the bare fact of possession, damages can only be recovered for the time the possession was actually retained. The case must go back to the lower Court, in order that the appellants may have an opportunity of proving that Imambandi Begum was dispossessed. Inasmuch as her possession has been determined by the decree in the previous suit, the *onus* of proving dispossession must lie upon her representatives the appellants. They will not be liable for mesne profits for any time after her dispossession, or before the 26th of September 1890. The Court below must determine what mesne profits are payable between the 26th of September 1890 and the date, if any, when dispossession is proved. If dispossession be not proved, then the plaintiffs will be entitled to mesne profits up to date of suit. It will be necessary that an opportunity for giving evidence should be afforded to the parties.

We allow no costs of this appeal except to the added defendants who are entitled to their costs, as no case was or could have been made against them in this appeal.

Appeal allowed. Case remanded.

S. C. C.

NOTES.

[See also (1901) 5 C.W.N., 720; (1903) 32 Cal., 118; (1914) 24 I.C., 866 (Nag.); and (1910) 8 I.C., 162(Mad.).]

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[418] APPELLATE CIVIL.

The 26th January, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR.* JUSTICE RAMPINI.

Sajedur Raja Chowdhuri............One of the Defendants

versus

Gour Mohun Das Baishnav and another............Plaintiffs.

Civil Procedure Code (Act XIV of 1882), section 539—Suit to remove a trustee and to recover possession of trust property in the hands of a third party—Right of suit—Limitation Act (XV of 1877), Sch. II Art. 134—Statute 52 Geo. III, Cap. 101—Civil Procedure Code Amendment Act (VII of 1888)—Act XX of 1863, section 14—Duty of Collector in sanctioning suit—Irregularity not affecting merits of suit—Civil Procedure Code, section 578.

A suit for the dismissal of a trustee and for the recovery of trust property from the hands of a third party to whom the same has been improperly alienated is within the scope of section 539 † of the Civil Procedure Code.

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* Appeal from Original Decree No. 165 of 1895 against the decree of R. H. Greaves, Esq., District Judge of Sylhet, dated the 29th of December 1894.

† [Sec. 539:—In a case of any alleged breach of any express or constructive trust created for public charitable or religious purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General acting *ex officio*, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

When suits relating to public charities may be brought.

(a) appointing new trustees under the trust;

(b) vesting any property in the trustees under the trust;

(c) declaring the proportions in which its objects are entitled;

(d) authorizing the whole or any part of its property to be let, sold, mortgaged or exchanged;

(e) settling a scheme for its management;

or granting such further or other relief as the nature of the case may require.

The powers conferred by this section on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

Act No. X of 1840, section 2, is hereby repealed.]

Subbayya v. *Krishna* (I. L. R., 14 Mad., 186) followed.

Lakshmandas Parashram v. *Ganpatrav Krishna* (I. L. R., 8 Bom., 365) distinguished.

Article 134 * of the second schedule of the Indian Limitation Act (XV of 1877) applies to such a suit.

The difference between the provisions of section 539 of the Civil Procedure Code and those of 52 George III, cap. 101 (Romilly's Act), pointed out.

Persons having a right to worship in a temple are within the scope of section 539. Under that section, as originally enacted, the words were " having a direct interest in the trust, " and the word " direct " has been taken out by Act VII of 1888. The inference is that the Legislature intended to allow persons having the same sort of interest that is sufficient under section 14 of Act XX of 1863 to maintain a suit under section 539.

The Collector in giving his consent to the institution of a suit under section 539 has to exercise his judgment in the matter, and see not only whether the persons suing are persons having an interest in the trust, but also whether the trust is a public trust of the kind contemplated by the section, and whether there are *primâ facie* grounds for thinking that there has been a breach of trust. But where the form of the permission showed that he had omitted to exercise his judgment in the matter of the interest of the plaintiffs in the trust such omission was held to be a mere irregularity and within the scope of section 578 of the Civil Procedure Code.

THE plaintiffs brought a suit under section 539 of the Civil [419] Procedure Code against defendant No. 1, the *mohunt* of the *akra* of the idol Sri Sri Narsingh, and against defendant No. 2, to whom defendant No. 1 had alienated certain immoveable properties of the idol, on the allegation that the *akra* was a public place of worship for Hindus in general. The plaint alleged that plaintiff No. 1 had for some time been discharging the duties of the *mohunt* of that *akra*, and that plaintiff No. 2 was the *pujari* of the idol; that the properties described in the schedules to the plaint constituted the *debutter* property of the idol; that of those certain portions had been wrongfully alienated by defendant No. 1 in favour of defendant No. 2, and that defendant No. 1 had by various acts committed by him in breach of trust, disqualified himself for holding the office of *mohunt*. The plaintiffs prayed that the properties in dispute might be declared to be the *debutter* property of the idol; that the alienations in favour of defendant No. 2 might be declared to be inoperative as against the rights of the idol; that defendant No. 1 might be removed from the office of *mohunt;* that some competent person might be appointed *mohunt* in his place; and that the properties in dispute might be taken from the possession of the defendants and be delivered to the custody of the person who might be appointed. Defendant No. 2 in his written statement alleged, *inter alia*, that the suit was not maintainable under section 539 of the Code of Civil Procedure, and that the properties in dispute did not belong to the idol. Defendant No. 1 did not appear. At the hearing a further objection was taken that the suit was barred by limitation.

The plaintiffs obtained a decree in the Court below, and defendant No. 2 brought this appeal on the grounds, *inter alia*, *firstly*, that section 539 of the

* [Art. 134 : -

Description of suit.	Period of limitation.	Time from which period begins to run.
To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration.	Twelve years ...	The date of the purchase.

Code did not apply to the facts of this case; *secondly*, that the consent of the Collector given in this case was not such as that section required; *thirdly*, that the plaintiffs had no such interest in the trust within the meaning of section 539 as would authorize them to maintain a suit under that section; and, *fourthly*, that the suit was barred by limitation.

Dr. *Rash Behari Ghose*, Babu *Tara Kishore Chowdhry*, and Babu *Mohini Mohun Chuckerbutty*, for the Appellant.

Babu *Lal Mohun Das*, and Babu *Prosano Gopal Roy*, for the Respondents.

[420] Dr. *Rash Behari Ghose*.—The suit purports to be brought under section 539 of the Civil Procedure Code for the removal of the trustee and for a decree for possession against defendant No. 2, who is a third party. Such a suit is not contemplated by the section which only authorizes suits to obtain certain specified reliefs —See *Rangasami Naickan* v. *Varadappa Naickan* (I. L. R., 17 Mad., 462). In his judgment in that case COLLINS, C.J., says: "It appears to me that section 539 of the Civil Procedure Code was drafted on the lines of 52 George III, cap. 101, commonly called Romilly's Act, and the draftsman must have been well aware that it had been held that the Act did not apply when the question arose as to whether a trustee should be adversely dismissed for misconduct. Is it probable, therefore, that if the Legislature intended the section to apply to a case where the removal of a trustee was in question that specific relief would not have been mentioned? The section enumerates the specific reliefs that are given, and the first is appointment of new trustees under the trust. We are however asked to add words to the section, and to say that the Legislature intended to give the power to remove adversely a trustee although the Legislature refrained from saying so. The words 'granting such further or other relief as the nature of the case may require' cannot under the recognized rules of construction be said to give the Court the power to remove a trustee." See also the judgment of AYYAR, J., in *Subbayya* v. *Krishna* [I.L.R., 14 Mad., 186 (188)]. In *Mohiuddin* v. *Sayiduddin* (I. L. R., 20 Cal., 810) it was decided that section 539 applied both to contentious and non-contentious cases. "A jurisdiction to remove trustees has always been exercised by the Mofussil Courts. The remedy is not wanting altogether; but except in this section of the Code there is no provision of law empowering any public official to take action"—*per* SHEPHARD, J., in *Rangasami Naickan* v. *Varadappa Naickan* (I. L. R., 17 Mad., 462). See also *Sheoratan Kunwari* v. *Ram Pargash* (I. L. R, 18 All., 227) and *Lakshmandas Parashram* v. *Ganpatrav Krishna* (I.L.R., 8 Bom, 365). The cases upon Romilly's Act are collected in "Lewin on Trusts, 9th Ed., 1061, 1062. Although the Act authorises any two or more persons to present the petition, the words must be understood **[421]** to mean any persons having an interest: and the Court is bound to see, not only that the petitioners are possessed of a clear interest, but that they prove themselves to be possessed of the interest they allege in their petition. The words 'an interest' in section 539 were substituted for the words 'a direct interest, by Act VII of 1888, section 44; but the cases show the two expressions to be the same. I submit also that the sanction given was no sanction, and refer to *Ex parte Skinner* (2 Mer., 456). In that case Lord ELDON says: "The intention of the Legislature in framing the Act (Romilly's) was to guard charitable trusts against abuse, and for that purpose to prevent such proceedings from being instituted as are too frequently instituted for no other reason than because it is known that the costs will be payable out of the charity funds. It was with this view that the Legislature provided for the signature of the Attorney-General, or in case of there being no Attorney, of the Solicitor-General; and I desire to have it understood that no petition

under the Act ought to receive that signature, except upon the same deliberation that it would be thought fit to afford to the case if it were presented in the shape of an information." As to limitation, article 120 of Schedule II of the Limitation Act applies. Mitra on Limitation, 3rd Ed., pp. 765—767. The plaintiffs had no such interest as to authorise them to bring a suit under section 539. See *Jan Ali* v. *Ram Nath Mundul* (I. L. R., 8 Cal., 32).

Babu *Tara Kishore Chowdhry* on the same side.

Babu *Lal Mohun Das* for the Respondents.—It has been held both in Calcutta and Bombay that section 539 applies to suits for the removal of trustees and also to suits brought against third parties. The clauses of that section are not exhaustive, and the words "appointing new trustees" includes removing old trustees. It has been held by the Madras High Court that a suit will lie for the removal of a trustee. *Subbayya* v. *Krishna* (I. L. R., 14 Mad., 186). That decision was followed in *Tricumdass Mulji* v. *Khimji Vullabhdass* (I. L. R., 16 Bom., 627). The cases of *Lutifunnissa* v. *Nazirun Bibi* (I. L. R., 11 Cal., 33), *Dhurrum Singh* v. *Kissen Singh* (I. L. R., 7 Cal., 767), *Sajedur Raja* v. *Baidya* **[422]** *Nath Deb* (I. L. R., 20 Cal., 397), *Raghubar Dial* v. *Kesho Ramanuj Das* (I. L. R., 11 All., 18), *Chukkun Lal Roy* v. *Lohit Mohun Roy* (I. L. R., 20 Cal., 906), *Kalishunkur Doss* v. *Gopal Chunder Dutt* (I. L. R., 6 Cal., 49), *Commissioners of Sewers of the City of London* v. *Gellatly* (L. R., 3 Ch. D., 610) were also referred to.

Babu *Tara Kishore Chowdhry* in reply.

The **judgment** of the Court (**Banerjee** and **Rampini, JJ.**) after setting out the facts continued as follows:—

Upon the first point, the contention on behalf of the appellant is two-fold, viz., that section 539 does not contemplate a suit for the removal of any trustee; nor does it contemplate a suit against a third party, the object of the section according to the appellant being only to authorize suits for obtaining certain reliefs specified in it when such suits are not brought adversely to the trustees for the time being; and it is urged that the section is drawn upon the lines on which the English Statute known as Sir Samuel Romilly's Act, 52 George III, cap. 101, is drawn. In support of this argument the decision of a Full Bench of the Madras Court in the case of *Rangasami Naickan* v. *Varadappa Naickan* (I. L. R., 17 Mad., 462), and the cases of *Sheoratan Kunwari* v. *Ram Pargash* (I. L. R., 18 All., 227) and *Lakshmandas Parashram* v. *Ganpatrav Krishna* (I. L. R., 8 Bom., 365) are relied upon.

On the other hand it is argued on behalf of the respondents that section 539 is very different in its terms and in its scope from Sir Samuel Romilly's Act; and that both in this Court and in the Bombay High Court it has been held that it applies to suits brought for the removal of trustees, and also to suits brought against third parties in whose hands trust property may have passed under improper alienations by the trustee; and in support of this argument, the cases of *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (I. L. R., 15 Bom., 612), *Mohiuddin* v. *Sayiduddin* (I. L. R., 20 Cal., 810), *Lutifunnissa Bibi* v. *Nazirun Bibi* (I. L. R., 11 Cal., 33) and *Sajedur Raja* v. *Baidya Nath Deb* (I. L. R., 20 Cal., 397) are cited.

[423] Upon the question whether section 539 should have the limited scope contended for by the learned Vakils for the appellant, or whether it should have the wider scope that the other side contends for, the arguments on both sides have been fully set out in the judgment of Mr. Justice SHEPHARD in *Rangasami Naickan* v. *Varadappa Naickan* (I.L.R., 17 Mad., 462), and also in the judgments of Mr. Justice MUTTUSAMI AYYAR and Mr. Justice WEIR in *Subbayya* v. *Krishna* (I. L. R., 14 Mad., 186). We do not think it necessary to notice in

detail all these arguments. It will be enough to say that though section 539 does not expressly specify the dismissal of a trustee, or the taking possession of trust property from the hands of any third party, amongst the reliefs that are specifically mentioned, still, having regard to the fact that the cases to which the section is made applicable are cases of alleged breach of trust, that amongst the reliefs expressly mentioned are included the appointment of new trustees under the trust and the vesting of any property in the trustees under the trust, and that these specified reliefs are followed by the general clause, "such further or other relief as the nature of the case may require," we think the terms of the section include a case like the present. For the case being one of alleged breach of trust, and the section expressly authorizing the appointment of new trustees, there can be no good reason for limiting the expression, "appointment of new trustees" to cases of appointment of new trustees in addition to old trustees, to the exclusion of cases in which the appointment is in supersession of them. Moreover, where, as in this case, the alleged breach of trust consists mainly in improper alienations of the trust property by the trustee, the vesting of any property in the trustees to be newly appointed, coupled with "such further or other relief as the nature of the case may require," may well include the taking possession of the trust property from the hands of a third party, to whom the same may be shown to have been improperly alienated.

We are therefore of opinion that looking to the terms of the section, there is no good reason for thinking that it should be limited in its scope in the manner contended for on behalf of the appellant.

[424] But then it is further urged that if we look to the source from which this provision of the law (section 539) is derived, we shall find that there is a reason why its scope should be limited in the manner contended for. It is said that this section is taken from the English Statute known as Sir Samuel Romilly's Act. Now, although there may be some similarity between the provisions of section 539 of the Code and those of Romilly's Act, a comparison of the two enactments will show that they differ in many material respects.

In the first place, whereas the procedure in Romilly's Act is expressly stated to be summary, the proceedings being initiated by a petition, the procedure under section 539 is the ordinary procedure applicable to suits, the proceedings being initiated by a plaint.

In the second place, while Romilly's Act contains no qualification as to who the persons are that are authorized to file the petition therein contemplated, section 539 expressly enacts that the persons who are authorized to institute a suit under it are persons who have an interest in the trust. It is said, that this, if not taken from the Act, is taken from decisions upon Romilly's Act. That is true. The decision from which this qualification, that the persons authorized to sue must have an interest in the trust, is taken, is that in the case of the *Corporation of Ludlow* v. *Greenhouse* [1 Bligh. N. S. 17 (66) 93]; but though this one qualification is taken from that decision, other qualifications such as these—that the enactment is not to apply to cases which are brought adversely to the trustees, and that it is not to apply where any stranger is interested, which are laid down in that very case—have not been expressly incorporated in the section. And what is the inference to be drawn from this? To our minds the inference is clear that these restrictions were not intended to be imposed upon the scope and operation of the section. And the reason for this appears to be clear. Romilly's Act was held to be inapplicable to cases brought adversely against trustees, and to cases in which third parties were interested, because as we gather from the case of the *Corporation of Ludlow* v.

Greenhouse [1 Bligh. N. S. 17 (66) 93] the procedure prescribed by that Act, [425] viz., that by petition, was considered inapplicable to cases of those descriptions.

Nor can we accept as correct the argument that section 539 created a new and special jurisdiction.

The real object of the special provisions of section 539 seems to us to be clear. Persons interested in any trust were, if they could all join, always competent to maintain a suit against any trustee for his removal for breach of trust, but where the joining of all of them was inconvenient or impracticable, it was considered desirable that some of them might sue without joining the others, provided they obtained the consent of the Advocate-General or of the Collector of the District, and this condition was imposed to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in the trust. Where this condition is fulfilled, and the risk of harassing suits being brought against trustees is thus guarded against, there is no reason why suits brought under the section should be restricted in any other way.

It is argued that if a suit under this section is allowed to be brought against a defaulting trustee and a third party, the suit may be open to the objecton of misjoinder. Where a suit under section 539 is open to that objection, the objection will no doubt have effect given to it, but it does not follow that a suit against a trustee guilty of breach of trust and a third party who has puchased any trust property from him can, in no case, be brought under the section, even though the objection as to misjoinder does not apply In the present case we are of opinion that no objection on the ground of misjoinder can apply, the suit so far as any such objection is concerned being properly framed within the meaning of section 28 of the Code.

Then as to the cases cited, with all respect for the learned Judges who decided the case of *Rangasami Naickan* v. *Varadappa Naickan* (I. L. R., 17 Mad., 462), we must say that the reasons given in the judgments of Mr. Justice WEIR and Mr. Justice BEST in *Subbayya* v. *Krishna* (I.L.R., 14 Mad., 186) commend themselves for our acceptance, and we follow the view taken by them with reference to the meaning and construction of [426] section 539. The case of *Sheoratan Kunwari* v. *Ram Pargash* (I. L. R., 18 All., 227) does not call for any detailed examination, as the reasons for the decision that section 539 of the Code was inapplicable to it are not set out in the judgment very explicitly. And as for the case of *Lakshmandas Parashram* v. *Ganpatrav Krishna* (I.L.R., 8 Bom., 365) that case is quite distinguishable from the present, as the object of the plaintiff in that case, to use the words of the learned Chief Justice, was "merely to recover the trust property from outsiders" whereas in the present case the suit is brought against a trustee who is guilty of breach of trust, and a third party is added as a defendant, because part of the trust property has passed into his hands by improper alienation from the trustee. On the other hand, the view we take is supported by the decision of the Bombay High Court in *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (I.L.R., 15 Bom., 612), and of this Court in *Mohiuddin* v. *Sayiduddin* (I.L R., 20 Cal., 816), in which it was held that a suit for the dismissal of a trustee comes within the scope of section 539, and also by the *dicta* of the learned Judges of this Court in *Latifunnissa Bibi* v. *Nazirun Bibi* (I L.R., 11 Cal., 33), and in *Sajedur Raja* v. *Baidyanath Deb* (I.L R , 20 Cal , 397), which are to the effect, that a suit brought against a trustee and a person claiming under an alienation from him comes within the scope of section 539 We may add that the case of *Sajedur Raja* v. *Baidyanath Deb* (I.L.R., 20 Cal., 397) is of special importance, as that was a case against the present defendants with reference to this very endowment on account of

same breach of trust that is alleged in this case, the only difference between the two cases being that the plaintiffs there were different from those who have instituted this suit; and in that case the present appellant successfully contended that the suit which was for the dismissal of the trustee, and for vesting in new trustees the trust property, part of which had passed to him, was one which came within the scope of section 539.

For all these reasons we are of opinion that the first contention of the appellant must fail.

Then as to the second, it was argued upon the authority of the case of *Jan Ali* v. *Ram Nath Mundul* (I. L. R., 8 Cal., 32) that persons in the posi-[427]tion of the plaintiffs in this case who were only entitled to worship in a public temple, are not persons having an "interest" within the meaning of section 539, so as to be authorized to maintain a suit under that section.

It was further argued that a comparison of section 539 of the Code with sections 14 and 15 of Act XX of 1863 would go to show that the interest required in the first mentioned provision of law must be different from a mere right to worship.

Now, it should be borne in mind that under section 539, as originally enacted, the words were "having a direct interest in the trust," and the word "direct" has been taken out by Act VII of 1888. The inference, therefore, is that the Legislature intended to allow persons having the same sort of interest that is sufficient under section 14 of Act XX of 1863 to maintain a suit under section 539, and this change in the law is, in our opinion, sufficient to distinguish the present case from that of *Jan Ali* v *Ram Nath Mundul* (I. L. R., 8 Cal., 32) which was decided before section 539 had been amended by the omission of the word "direct"

On the other hand, we may refer to the case of *Monohar Ganesh Tambekar* v. *Lakhmiram Govindram* (I. L R, 12 Bom, 247) to show that persons having a right to worship in a temple are within the scope of section 539 We may add that the two plaintiffs in the present case have a somewhat larger interest than that of mere worshippers, plaintiff No 1 alleging that he has for some time been performing some of the duties of the *mohunt*, and plaintiff No 2, that he has been performing the *poojah* in the temple These allegations have been supported by some evidence which is not contradicted.

In support of the third contention, that the consent of the Collector is not such as section 539 contemplates, our attention has been drawn to the terms of the permission, Exhibit 7, p 47 of the Paper Book This is what the Deputy Commissioner, who is also the Collector, says "Assuming that petitioners are persons interested I accord my consent to the institution by them of a suit for the purpose of obtaining the relief directed in the petition"

[428] No doubt the language of this permission is in one respect not such as it ought to be. When the law directs that the consent of the Collector should be obtained as a necessary preliminary to the maintaining of a suit under section 539, the Collector is required to exercise his judgment in the matter before giving his consent This view is borne out by the observations of Lord ELDON in *Ex parte Skinner* (2 Mer, 453) But though the consent of the Collector is thus defective in language in this one respect, we do not think that the defect is fatal to the case The Collector in giving his consent has to exercise his judgment in the matter, and see, not only whether the persons suing are persons who have an interest in the trust, but also whether the trust is a public trust of the kind contemplated by the section, and whether there are *prima facie* grounds for thinking that there has been a breach of trust, and, as was pointed out in the course of the argument, there is nothing to show that the Collector has not exercised his judgment as to the last two points. It is only

in regard to one matter, namely, that relating to the interest of the petitioners in the trust that the language of the permission may be taken to indicate that the Collector did not exercise his judgment. Though that is so, we think it is after all an irregularity in an order which the law requires should form a necessary preliminary to the institution of a suit, and such an irregularity in our opinion comes within the scope of section 578 which protects judgments and decrees from interference in appeal on mere technical grounds.

The next point for consideration is whether the suit is barred by limitation. As against defendant No. 1, no question of limitation can arise, the suit coming within the scope of section 10 of the Limitation Act; and as against defendant No. 2, the provision of the Limitation Act applicable is, we think, article 134 of the second schedule. It was urged for the appellant that that article does not apply to this suit, as it is not a suit for possession; that the article applicable is 120; and that as the suit has been brought more than six years after the date of the latest of the alienations in favour of defendant No. 2, it is barred notwithstanding that it is brought within twelve years from the date of the earliest alienation.

[429] Article 120 can apply only if article 134 is not applicable to the case. The question, therefore, is whether the suit can be treated as one for possession within the meaning of article 134. That article provides for suits to recover possession of immoveable property conveyed or bequeathed in trust or mortgage and afterwards purchased from the trustee or mortgagee for a valuable consideration. The limitation is twelve years, and it runs from the date of the purchase.

The fifth prayer in the plaint is, "that the property may be taken from the possession of the defendants and delivered to the possession and custody of the person who may be appointed *mohunt* and trustee for the management of the idol's properties;" and section 539, as we have already observed, does contemplate a suit of this nature as coming within its scope.

That being so, we do not think that it would be any undue straining of language to say that a suit for such a purpose is a suit to recover possession of property which had been bequeathed in trust and afterwards purchased from the trustee. Article 134 therefore applies to this suit, and it is not barred by limitation.

The grounds urged before us therefore all fail and the appeal must be dismissed with costs.

F. K. D. —————— *Appeal dismissed.*

NOTES.

[RELIGIOUS ENDOWMENTS ACT—

1. As regards the object of sec. 92, C.P.C., 1908 (C.P.C., 1882, sec. 539) see also (1906) 33 Cal., 789; (1909) 32 Mad., 131.

2. In the C.P.C., 1908, sec. 92, clause (1) there is inserted sub-clause (*a*) to provide for *the removal of any trustee* which sets at rest the previous conflict between decisions of the Madras High Court in (1894) 17 Mad., 462 (see also (1900) 23 Mad., 537) and of the High Courts of Calcutta, Bombay and Allahabad, (1897) 24 Cal., 418; (1905) 2 C.L.J., 460; (1897) 21 Bom., 48; (1899) 21 All., 200; (1898) 20 All., 46.

3. In (1914) 41 Cal., 749 it was held that a suit for the removal of a *trespasser* in possession of trust property was not a suit within sec. 92, C.P.C., 1908.

4. The interest sufficient to maintain a suit need not be direct:—(1899) 23 Bom., 659; (1900) 24 Bom., 50; (1912) 24 I.C., 712 (Sind); (1905) 2 C.L.J., 460; (1905) 2 C.L.J., 481; see also (1904) 32 Cal., 273.

5. Where there is a suit for the administration of a trust, a claim to eject a transferee may be joined with it:—24 Cal., 418. This was dissented from in (1905) 2 C.L.J., 431; (1906) 33 Cal., 789. See also (1911) 33 All., 752; (1905) 28 All., 112; (1897) 20 All., 46; (1914) 26 M.L.J., 537;

6. As regards limitation Art, 134, Limitation Act, 1908, has been applied:—(1899) 23 Bom., 614 at 619; (1903) 27 Bom., 500; (1911) 36 Bom., 135; (1913) 37 Bom., 224; (1911) 38 Cal., 526; (1908) P.R., 127; (1912) P.R., 124; (1909) 13 C.W.N., 805; (1914) M.W.N., 692.]

[24 Cal. 429]

CRIMINAL REFERENCE.

The 6th April, 1897.

PRESENT:

MR. JUSTICE RAMPINI AND MR. JUSTICE STEVENS.

Queen-Empress

versus

Kayemullah Mandal and others *

Magistrate, Jurisdiction of—Power of Commitment to Sessions Judge—Code of Criminal Procedure (Act X of 1882), sections 28, 207, 245, 254—Penal Code (Act XLV of 1860), section 147—Circular order No. 9 of 6th September 1869—Rioting.

The commitment of a case under section 147† of the Penal Code to the Court of Session by a Deputy Magistrate is not necessarily illegal.

Although the case is shown to be triable only by a Magistrate under the second schedule of the Criminal Procedure Code there is nothing in section 254 of the Criminal Procedure Code which prevents a Magistrate commit-[430]ting a case under section 147 of the Penal Code to the Court of Session, provided he finds that the accused has committed an offence, which in his opinion cannot be adequately punished by him

The instructions contained in Circular No. 9 of 6th September 1869 are to be read subject to the provisions of the Criminal Procedure Code.

THE accused were charged before a Deputy Magistrate with the offence of rioting under section 147 of the Penal Code, with respect to the cutting of certain crops. From the evidence it appeared that one of the men concerned in the riot, who was on the side of the person cutting the crops, died from effects of injury alleged to have been inflicted by an axe by some one connected with the affray. The Deputy Magistrate was of opinion that, following the orders contained in Circular No. 9 of 6th September 1869, it was his duty to commit the accused to the Court of Sessions. The Officiating Sessions Judge of Rungpur, Mr. Ahmad, to whom the accused was committed, being of opinion that the commitment of the accused under section 147 of the Penal Code was illegal, such offence being one exclusively triable by a Magistrate according to Schedule II of the Criminal Procedure Code, referred it to this Court for the purpose of getting the commitment quashed.

Babu *Hem Chunder Mitter* for the accused. - The Deputy Magistrate states that he has committed the case to the Sessions Court, because of the Circular Order of the High Court No. 9 of 6th September 1869 (1) That Circular does not apply to this case as "death has not resulted in this case from injuries voluntarily inflicted by the party accused." The Deputy Magistrate has not understood the true meaning of the Circular. Under section 206 of the Criminal Procedure Code the Magistrate can commit any person for trial to the Court of Session for any offence triable by such Court, and under section 28 of

* Criminal Reference No. 55 of 1897, made by A. Ahmad, Esq., Sessions Judge of Rungpur, dated the 23rd of March 1897.

† [Sec. 147 :—Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both]
Punishment for rioting.

the Criminal Procedure Code the Court of Session, subject to the other provisions of the Code, may try any offence under the Penal Code. Section 254 requires that the Magistrate shall try the accused in a warrant case, if in the opinion of the Magistrate the accused could be adequately punished by him. In the present case the Magistrate does not say that the accused could not be adequately punished by him, and therefore he had no power under the law to com- [431] mit this case to the Sessions Court. The commitment should be quashed.

The **judgment** of the High Court (**Rampini** and **Stevens, JJ.**) was as follows:—

This is a reference by the Officiating Sessions Judge of Rungpur inviting us to quash the commitment of Kayemullah Mandal and others committed to his Court by the Sub-Divisional Officer of Gaibanda for trial of an offence under section 147 of the Penal Code

The Sessions Judge considers that the commitment of the accused in this case is illegal, inasmuch as the offence with which the accused are charged is one "exclusively triable by Magistrates." But this is not the case. The Sessions Judge has looked only at the schedule appended to the Criminal Procedure Code, but this schedule must be read along with the Code itself. Now one of the sections of the Code is section 28, under which the Court of Sessions has "subject to the other provisions of the Code" power to try an accused person for any offence Then under section 207 a Magistrate, who is competent to commit to the Court of Sessions, can commit to that Court both cases triable exclusively by that Court, and cases which in his opinion ought to be tried by that Court. The commitment of a case under section 147 to the Court of Sessions therefore is not necessarily illegal On the other hand, there are sections which limit a Magistrate's power of commitment In a summons case he is bound to proceed under section 245 of the Criminal Procedure Code. In a warrant case, he is bound by the provisions of section 254.

This section prescribes that, when a Magistrate is of opinion that there is ground for presuming that an accused has committed an offence triable under Chapter XXI, which such Magistrate is competent to try, and which in his opinion can be adequately punished by him, he *shall* frame in writing a charge against him. This section therefore would seem to leave the Magistrate in these circumstances no option But if, on the other hand, the Magistrate finds that the accused has committed an offence which in his opinion cannot be adequately punished by him, there would seem to be nothing to prevent his committing [432] the case to the Court of Sessions, notwithstanding the fact that in the schedule appended to the Code the case may be shown as triable by a Magistrate

The learned pleader, who appears in support of this reference, however, argues (1) that the Magistrate was not of this opinion in this case; and (2) that he could not be of this opinion, as the maximum punishment for an offence under section 147 of the Penal Code is two years, and the Magistrate was himself competent to pass such a sentence But an offence under section 147 of the Penal Code is also punishable with fine of an unlimited amount, while the Magistrate could impose a fine of Rs 1,000 only. The Magistrate might therefore have committed this case to the Court of Sessions, if he had considered that the fine which he could impose would not be an adequate punishment of the accused's offence.

It is, however, true that in this case the Magistrate did not commit the accused to the Court of Sessions for this reason. His proceedings were peculiar. He first drew up a charge against the accused under section 147 of the Penal Code for trial before himself. This was on the 9th January last. Then, on the

13th March, he drew up another charge against the accused for the same offence and committed them for trial to the Court of Sessions, his reason for doing so being that a man was said to have been killed in the rioting, and he thought that in consequence of the instructions of this Court, conveyed in its Circular No. 9 of 6th September 1869, he could not try the case himself. He, of course, misapprehended the meaning of this Court's Circular, which was never intended to direct Mgistrates to commit cases to the Sessions Court otherwise than in accordance with the provisions of the law And we think that as he does not say that he considered this case to be one in which he was not competent to inflict an adequate punishment, he could not under section 254* of the Criminal Procedure Code commit the case to the Court of Sessions

We accordingly quash the commitment of the accused in this case, and direct that the Sub-Divisional Magistrate of Gaibanda do proceed with the trial of the accused without delay and complete it accordingly to law

C. E. G

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[433] APPELLATE CIVIL

The 18th February, 1897

PRESENT

MR JUSTICE TREVELYAN AND MR JUSTICE BEVERLEY

Rash Dhary Gope . .Defendant

versus

Khakon Singh . . Plaintiff †

Decree—Form of decree—Suit for arrears of rent—Failure of plaintiff to prove alleged rate of rent—Ascertainment of proper rate—Duty of Court

In a suit for arrears of rent at certain alleged rates in which the plaintiff fails to prove the rates alleged by him, it is not the duty of the Court to ascertain what were the fair rates unless it is asked to do so

The case of *Punnoo Singh* v *Nirghun Singh* (I L R, 7 Cal 298) does not lay down a contrary rule.

THE facts and pleadings in this case sufficiently appear from the judgment of the High Court

Moulvie *Mahomed Yusuf* and Moulvie *Mahomed Habibulla* for the Appellant.

Babu *Saligram Singh* and Babu *Mahabir Sahoy* for the Respondent.

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* [Sec. 254 —If, when such evidence and examination have been taken and made, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused]

Charge to be framed when offence appears proved

† Appeal from Appellate Decree No 1372 of 1895, against the decree of H Holmwood, Esq., District Judge of Gya, dated the 18th of May 1895, modifying the decree of Babu Tej Chunder Mookerjee, Munsif of Gya, dated the 4th of December 1894.

The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ.**) was as follows:—

The plaintiff alleges that he holds a *thika* of *mouzah* Makbulpore Denga from 1294 to 1300 F. The defendant was a former *thikadar* of this village, and it is admitted that he still occupies lands in it.

In 1889 the plaintiff sued the defendant for rent for the years 1294, 1295 and a part of 1296 F, on the allegation that he held 8 bighas 14 cottahs odd at a money rent of Rs. 41-7-9 per annum (including cesses), and some 50 or 60 bighas of other land at a corn rent, the total claim being for Rs. 2,016. The defendant, on the other hand, alleged that he held 118 bighas odd, and that he held it all at a money rent of Rs. 131-14.

The Courts found that the plaintiff had failed to prove his allegations, and they accordingly gave him a decree for the amount of **[434]** rent admitted by the defendant. It was expressly stated in that case that the question as to the nature and rental of the defendant's tenure was left open.

In June 1894 the plaintiff brought the present suit upon the same allegations for the rent of the years 1298, 1299 and 1300 F., the total claim being laid at Rs. 1,633 odd.

The defence was also the same as in the former suit, and it was pleaded in addition that the decision in the former suit operated as *res judicata*. The Munsif held that the plea of *res judicata* could not be maintained; but on the merits after an exhaustive review of the evidence he came to the conclusion that neither party had succeeded in proving his case, and he therefore gave the plaintiff a decree at the rental admitted by the defendant.

The plaintiff appealed. The judgment of the District Judge is so involved that it is difficult to distinguish between what is intended to be his own findings and what was merely the argument addressed to him, but at the end of his judgment he says that he finds certain propositions clearly established, which for our present purpose may be summarised as follows: (1) That the plaintiff had not succeeded in proving that any portion of the land paid a corn rent, and therefore it must all be taken to be *nakdi* land. (2) That the plaintiff not having proved his case as to the area the defendant's allegation of the holding 118 bighas odd must be accepted. (3) That the average rate of *nakdi* lands in the village is not less than Rs. 3-8 per bigha. And he accordingly gave the plaintiff a decree for *nakdi* rent on 118 bighas odd at Rs. 3-8 a bigha, with damages and costs.

In second appeal to this Court the defendant presses his contention that the decision in the former suit operates as *res judicata*, and he also objects that the suit not having been brought for that purpose it was not open to the District Judge to assess a rent at rates not alleged by either party and of which there was no legal evidence.

We entirely agree with the Courts below that the decision in the former suit determined nothing whatever as to the nature or rent of the defendant's holding, those questions being expressly left open between the parties. As regards the contention that the Court was not asked to assess a rent of the defendant's holding, the respondent relies on the case of *Punnoo Singh* v. *Nirghi* **[435]** *Singh* (I. L. R., 7 Cal., 298) in which GARTH, C.J., is supposed to have laid down (as stated in the headnote to the report) that "in a suit for arrears of rent where the plaintiff fails to prove the rate of rent claimed in the plaint, it is the duty of the Court to find the proper rate of rent payable by the tenant to his landlord and not to give a decree merely for the rent admitted by the tenant."

We are of opinion that this broad proposition is scarcely borne out by the language of the judgment referred to. The report does not show what were

the pleadings in the cases that came before this Court, but we have referred to the paper books of those cases, and it is clear that the issue which had to be tried was, what was the proper rent payable to the plaintiff for the land admittedly held by the defendant. That we think would be a proper issue in a suit brought to have the rate of rent determined where the parties are not agreed as to what would be a fair and reasonable rate. We can hardly suppose that the learned Chief Justice intended to lay down that in *every* suit brought for arrears of rent in which the plaintiff failed to prove that the defendant held at the rate alleged, it was the duty of the Court to ascertain what was a fair rate, even though it was not asked to do so. It is a general principle of law that suits must be decided with reference to the pleadings of the parties, and unless the Court is specially asked to determine a particular question as between the parties, we think that it is not only not bound to do so, but it would not be justified in so doing.

In the present case the effect of the decision of the lower Appellate Court is that the defendant is found to hold under the plaintiff a tenancy wholly different, in its nature, its area and its rental, from that alleged by the plaintiff, and in one important respect from that alleged by the defendant. The defendant, it is true, alleged that he held 118 bighas odd at a *nakdi* rent, but he further pleaded that that *nakdi* rent was a consolidated sum of Rs. 131-14. It was scarcely fair to him to take a part of his allegation as an admission wholly irrespective of the other part.

The judgment, moreover, apparently leaves it wholly undetermined where the defendant's holding is situated. From section 148 (*b*) of the Bengal Tenancy Act it would seem to be necessary that in a suit for the recovery of rent the land in respect [436] of which that rent is payable should be clearly defined. Now, the learned District Judge does not distinctly find that the defendant holds the lands specified by him in his written statement, but if that is the meaning and intention of his judgment, it is clear that as these lands do not agree with those specified in the schedules to the plaint, he has given the plaintiffs a decree for the rent of lands that were not the subject-matter of the suit.

A further objection is pressed upon us that the learned District Judge in fixing Rs. 3-8 a bigha as the rate of rent has acted upon what is not legal evidence in the cause. The Judge says: "The average rate of *nakdi* rent throughout the village is Rs. 3-8 from the roadcess paper." This paper appears to be a road-cess return for the years 1281 and 1282 alleged to have been filed in the Collector's office by the defendant at the time when he held a *thika* of the village. The Munsif says that the defendant denied on oath that he ever filed it; and there is apparently no evidence on the record that he did so. Moreover, only a copy has been filed, and the Munsif says that no one was called to prove that the original had been destroyed. The learned Judge remarks that "it was exhibited as secondary evidence, and must be given its full weight." But if no foundation was laid for the admission of secondary evidence, the copy was clearly inadmissible.

For all these reasons we are of opinion that the decree of the lower Appellate Court cannot stand, and we accordingly set it aside. The case must go back to the District Judge in order that he may try the appeal according to law. What he has to consider in the case is whether the plaintiff has upon the evidence on the record proved the allegations made in his plaint, that is to say, that the defendant holds the land specified in the two schedules annexed to the plaint; that those lands are *nakdi* and *bhaoli*, respectively, as alleged, and that the defendant contracted expressly or impliedly to hold them at the rates

claimed. If, as the first Court found, the plaintiff has failed to prove these allegations, the Judge will then consider whether, there being no cross appeal to his Court, the appeal should not be dismissed and the decree of the first Court affirmed. The costs of this appeal will abide the result.

S. C. C. *Appeal allowed. Case remanded.*

NOTES.

[In (1898) 5 C. W. N., 121 it was pointed out that in a rent suit, it was enough if a description sufficient for identification were given; it was not necessary in every case to determine the extent and boundaries of the holding.]

[437] ORIGINAL CIVIL.

The 8th April, 1897.

PRESENT:

MR. JUSTICE SALE.

Lutchmee Narain and others

versus

Byjanauth Lahia and others.*

Practice—Exceptions to report—Notice—Rule 565 of Belchambers' Rules and Orders of the High Court, Original Side.

In making an application to discharge or vary a report, it is necessary that notice should be given within the time required by Rule 565 of the Rules and Orders of the High Court, Original Side, and that such notice should be accompanied with the grounds of exceptions relied on by the party objecting to the report.

THE facts of the case necessary for the purpose of this report appear from the judgment.

Mr. *R. Mitra* for the Plaintiffs.

Mr. *A. Chaudhuri* for the Defendants.

Sale, J.—This case was placed in the peremptory list for further directions on the report of the Second Assistant Registrar to whom it had been referred to take an account.

The report is dated the 1st day of February 1896, and was filed on the 8th day of July 1896. On the 17th of July, on an application by summons, the defendants obtained three weeks' further time to file exceptions to the report. Exceptions were filed on the 10th of August, that is, within the extended period, but no further steps were taken till the 15th of March, when the case was placed on the peremptory list for further directions on the report.

No notice of motion was given by the defendants to discharge or to vary the report and at the hearing for further directions the plaintiff took the objection that under the terms of Rule 565, which is to be found at page 230 of Belchambers' Rules and Orders, the exceptions could not be heard. Rule 565 is as follows:—

"An application to discharge or vary a certificate or report shall be made by motion upon notice to be given within fourteen days from the date of the filing

* Original Civil Suit No. 591 of 1892.

thereof, or within such further [438] time as may be obtained for that purpose, but in that case the notice shall mention that it has been given with the leave of the Court. An application for further time may be made by petition in Chambers, without notice."

It was said that, though the rule expressly provides that notice to discharge or vary a report shall be given within the time mentioned in the rule, or such further time as the Court may allow, the practice has not been uniformly in conformity with that provision, and that the Court has in some cases allowed exceptions which had been filed within the period mentioned in the rule to be heard and disposed of, although no notice had been given as required by the rule.

Under these circumstances I thought it desirable that an enquiry should be made as to the practice which has prevailed in this Court in regard to this matter. A note * has been [439] furnished by the Registrar, which shows that there has been no uniform course of practice; that in some cases exceptions have been heard on notice of motion to vary or discharge the report, and that in other cases exceptions have been set down for disposal on requisition, and heard, although no notice to vary or discharge had been given under Rule 565. As it is desirable that there should be a uniform practice, I thought it right to consult my learned colleague, Mr. Justice JENKINS, and our opinion is that the procedure laid down in Rule 565 and followed in suits Nos. 197 of 1887 and 221 of 1893 should be strictly adhered to. It is necessary that notice should be given within the time required by the Rule, or such further time as the Court may allow, and that such notice should be accompanied with the grounds of exception relied on by the party objecting to the report.

In the absence of any such notice, given in the manner now indicated, the report will be regarded as confirmed by effluxion of time. The Rule should not be applied strictly to exceptions already filed. As regards such exceptions the alternative course may, I think, be permitted, namely, the hearing and disposing of them merely on the requisition of the parties.

Attorneys for the Plaintiffs: Messrs. *G C. Chunder & Co.*

Attorney for the Defendant: Babu *G. C. Dhur.*

S. C. B.

NOTES.

[See also (1901) 28 Cal., 272 at 277.]

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* Note by Mr. Belchambers, Registrar of the High Court, Original Side, dated 26th March 1893.

"Rule 565 at page 230 of Belchambers' Rules and Orders was passed with effect from 1st May 1875. The practice previously was that exceptions to a report were filed and were set down for argument on requisition. The course prescribed by Rule 565 is that, instead of filing exceptions, an application to discharge or vary a report should be made by motion upon notice. An application under this rule would require that the grounds should be stated. This may be done in the notice itself or separately.

"Appended is a note of cases from which it will appear that, notwithstanding Rule 565, the practice which previously existed has been followed in some cases, and that in other cases, in which application has been made under Rule 565, the grounds have been stated in the form of exceptions.

"The following are the cases to which I have referred.

[440] *The 12th February, 1897.*

PRESENT :

MR. JUSTICE JENKINS.

Kally Dass Ahiri
versus
Monmohini Dassee.*

Landlord and tenant—Denial of title—Permanent Lease—Forfeiture—Transfer of Property Act (IV of 1882), sections 105, 108, 111.

A lease notwithstanding that it is permanent is liable to forfeiture under the provisions of the Transfer of Property Act if the tenant denies the title of the landlord.

Leases which are permanent and which came into existence before the passing of the Transfer of Property Act are governed by the general rule that a tenant who impugns his landlord's title renders his lease liable to forfeiture, which rule is only a particular application of the general principle of law that a man cannot approbate and reprobate.

THE plaintiff, in his own right as heir and as executor and *shebait* under the will of his ancestor Sumbhoo Chunder Aheeri, sued the defendant for a declaration that he was entitled to possession of the premises No. 173, Aheereetolah Street in Calcutta as against the defendant, for ejectment and for mesne profits. The plaintiff set out his title to the said premises and alleged that when he became entitled thereto the said premises had been for some twenty-five or thirty years and were still let out to the members of the joint family of one Ram Chunder Dey, deceased, who through their *kurta* or managing member for the

"*Suit No. 197 of 1887.*

"Exceptions were filed by the defendant, and on the same day notice of an application to discharge or vary the report was given under Rule 565, the fact that exceptions had been filed being stated at foot of the notice.

"*Suit No. 397 of 1889.*

"Exceptions were first filed by a defendant, and exceptions were then also filed by the plaintiff. Both sets of exceptions were set down for argument on requisition, and were heard and disposed of without notice of an application to discharge or vary the report being given under Rule 565.

"*Suit No. 544 of 1891.*

"Exceptions were filed by one of the parties and were set down for argument on requisition, and were heard and disposed of without notice of an application to discharge or vary the report being given under rule 565.

"*Suit No. 591 of 1892.*

"In this case further time to file exceptions was obtained, on summons, and the exceptions were set down for argument on requisition, and were heard and disposed of without notice of an application to discharge or vary the report being given under Rule 565.

"*Suit No. 221 of 1893.*

"Exceptions were filed, and notice of an application to vary the report" on the ground set forth in the exceptions, was given under Rule 565.

"*Suit No. 374 of 1894.*

"Exceptions were filed and were set down for argument on requisition and were heard and disposed of without notice of an application to discharge or vary the report being given under Rule 565."

* Original Civil Suit No. 260 of 1894.

time being, regularly paid rent and municipal taxes in respect of the premises to the plaintiff and his predecessors in title down to some time in the month of April 1888. In or about the month of August 1888 the lease of the said premises was amongst other property allotted on partition to the defendant as one of the members of the said joint family, and the defendant became tenant of the said premises under the plaintiff. It was further alleged that the defendant regularly paid the rent and taxes in respect of the premises down to May or June 1889, but that thereafter she failed to pay the said rent and taxes, and a suit was brought for arrears on the 31st of March 1892 by the plaintiff and his mother, who acted as his guardian during his minority, in the Presidency Small Cause Court. The defendant appeared in that suit, and for the first time asserted that the premises belonged to her and that the plaintiff had no title thereto, and in consequence of such defence the plaintiff with-[441]drew the said Small Cause Court suit with liberty to institute such further suit as he might be advised. The plaintiff submitted that the lease of the said premises had determined by forfeiture at and from the date of the defendant's denial of the plaintiff's title, and her possession had become adverse, and she ought accordingly to be ejected from the said premises. The plaintiff further prayed for the recovery of the arrears of rent and taxes and for mesne profits from the date of denial until delivery of possession.

The defendant alleged in her written statement that she had never asserted that the plaintiff had no title to the said premises, and that she had done nothing to forfeit the lease, and she offered to pay the arrears of rent and taxes due to the plaintiff. With the leave of the Court she filed a supplemental written statement, in which she raised various pleas, all of which were abandoned at the hearing, except that she had received no notice to quit. At the trial the issues as stated in the judgment were raised.

The records in the Small Cause Court suit and the defendants' evidence taken on commission therein were put in on behalf of the plaintiff. On behalf of the defendant the pleadings and decree in suit No. 410 of 1869, brought by the plaintiff's predecessor in title against the defendant's predecessor, for arrears of rent alleging a monthly tenancy, in which the then defendant had asserted a *mourasi mokurari* lease, were put in.

Mr. *Garth* and Mr. *Chaudhuri* for the Plaintiff.

Mr. *Pugh* and Mr. *Evans Pugh* for the Defendant.

Mr. *Garth*.—The defendant having denied the landlord's title, whatever the character of the lease, has forfeited it and ought to be ejected.

Mr. *Pugh* for the Defendant.—The plaintiff has not proved satisfactorily that the defendant knew or understood the meaning of the plea put forward on her behalf in the Small Cause Court. It must be strictly proved that a Hindu lady knew and understood the nature and meaning of a document executed by her—*Sudisht Lal* v. *Sheobarat Koer* (I. L. R., 7 Cal., 245; L. R., 8 I. A., 39) and *Ramratan Sukal* v. *Nandu* (I. L. R., 19 Cal., 249; L. R., 19 I. A., 1.)

The plaintiff has not done anything showing his intention to [442] determine the lease. The lease being a permanent one is not liable to forfeiture. In suit No. 410 of 1869 the defendant's predecessor in title asserted a *mourasi mokurari* lease. The plaintiff cannot now say that there was not any such lease. The defendant has acquired the right of a *mourasi mokuraridar* adversely to the plaintiff. The defendant holds under a permanent lease, but, if she is unable to show that, she has, by declaring that it was permanent in 1869, converted it into a permanent lease by adverse possession under the operation of the Statute of Limitation. The doctrine of forfeiture is not applicable to a case of this kind. The lease having come into existence before the passing

of the Transfer of Property Act the provisions of that Act do not apply—see section 2 of the Act. Even under that Act a permanent lease is not liable to forfeiture. Sections 105 and 111 of the Act do not apply to permanent leases.

The following cases were cited :— *Sonet Kooer* v. *Himmut Bahadoor* (I. L. R., 1 Cal., 391), *Nil Madhab Sikdar* v. *Narattam Sikdar* (I. L. R., 17 Cal., 826), *Kali Krishna Tagore* v. *Golam Ally* (I. L. R., 13 Cal., 248), *Drobomoyi Gupta* v. *Davis* (I. L. R., 14 Cal., 323), *Bejoy Chunder Banerjee* v. *Kally Prossonno Mookerjee* (I. L. R., 4 Cal., 327), *Tekaetnee Goura Coomaree* v. *Saroo Coomaree* (19 W. R., 252), *Dinomoney Dabea* v. *Doorgaprasad Mozoomdar* (12 B. L. R., 274), *Maidin Saiba* v. *Nagapa* (I. L. R., 7 Bom., 96), *Pitambar Baboo* v. *Nilmoni Singh* (I. L. R., 3 Cal., 793).

Mr. *Garth* in reply.—We have shown that the defendant instructed her *am-mukhtear* as to what her plea should be, and the *am-mukhtear* instructed her pleader; over and above that she gave her evidence, and she asserted on oath that she had no landlord and paid rent to no one. There was a clear denial of the plaintiff's title.

The provisions of the Transfer of Property Act as to forfeiture do apply to permanent leases. The case of *Kali Krishna Tagore* v. *Golam Ally* (I. L. R., 13 Cal., 248) supports my contention. In that case the tenant questioned the landlord's right to enhance, which was held to be not such a disclaimer as resulted in forfeiture. The **[443]** tenant did not in any sense repudiate the landlord's title. It has not been suggested that before the passing of the Transfer of Property Act a lease of this character was exempt from forfeiture for renunciation. The general rule that a tenant who impugns his landlord's title renders his lease liable to forfeiture has always obtained in this country.

Jenkins, J.—This is a suit for the recovery of certain premises in Calcutta known as 173, Aheereetolah Street, and to enforce payment of certain arrears of rent and mesne profits. The plaintiff was at the date of the Small Cause Court suit, to which I will later refer, the owner of these premises, subject to a subordinate tenure vested in the defendant at a monthly rent of Rs. 15-8. The rent having fallen into arrear the plaintiff, in conjunction with his mother, sued the defendant for these arrears in the Small Cause Court, and by way of defence the following pleas were raised :—

"Denies tenancy under the plaintiff or any one else, and admits occupation as owner of the land. Denies payment of any rent to the plaintiffs. Never indebted. Misjoinder of parties. Denies jurisdiction."

The oral evidence is to the effect that the denial of tenancy, and the claim of occupation as owner, were set up at the first hearing on the 28th April 1892, and there can be no doubt that at any rate they were in existence on the 10th of August 1892. On the 21st August 1892 the defendant was examined on commission, and in the course of her evidence she stated as follows: "I do not pay any rent for the premises No. 173, Ahereetolah Street, to anybody; never paid any rent for it to Katyani Dassi or her ancestors or predecessors; nor did I promise to pay rent to Katyani Dassi or her ancestors or predecessors. I never paid rent through Upendronath Dey or Sarodaproshad Dey to Katyani Dassi or her receiver. This land is rent free. I am the owner of this land, and I have to pay rent to no one." After numerous adjournments the case came before Mr. MacEwen, one of the Judges of the Small Cause Court on the 8th of March 1893, when the suit was withdrawn with leave to sue again.

The judgment delivered on that occasion has been tendered by Mr. *Pugh*, and on Mr. *Garth* waiving all objections I have admitted it in evidence. From that judgment it appears that **[444]** a *bonâ fide* question of title was still

raised in that suit; that the defendant denied the tenancy under the plaintiffs and claimed the land as her own property. Nothing more was apparently done on either side until the 13th April 1894, when the present plaint was filed asking for possession on the ground that the defendant had by claiming a title in herself forfeited her lease. A written statement was filed on the 2nd of August 1894, and the case came on for hearing before the Christmas vacation, but Counsel who then appeared for the defendant applied for an adjournment, on the ground that the case would be settled subject to the defendant's approval, and I accordingly allowed the adjournment, as Counsel for the plaintiff did not oppose.

It seems, however, that the result of the adjournment was not a settlement, but an application for leave to file a supplemental written statement, which was subsequently put in.

On the trial before me the following issues were raised:—

1. Whether the defendant did by her pleading of the 28th of April 1892, or the 10th August 1892, deny the plaintiff's title?

2. If so, whether the forfeiture (if any) thereby caused has been waived by subsequent proceedings in the Small Cause Court action?

3. Whether the defendant did by her evidence given on the 21st August 1892 deny the title?

4. If so, whether the forfeiture (if any) thereby caused had been waived by subsequent proceedings in the Small Cause Court action?

5. Whether the plaintiff has done any act showing his intention to determine the lease.

6. Whether the lease is not forfeitable by reason of its being a permanent lease?

And there were three further issues which have since been dropped, and with which it is unnecessary for me to deal.

I will take these issues in order. Now, there can be no question that in the defence in the Small Cause Court suit there is a clear denial of the plaintiff's title, and the only question is whether it can be treated as a denial by the defendant, and [446] for that proposition it becomes necessary to see what the facts are as to the introduction of these pleas. I am satisfied on the evidence that they were formulated by the defendant's pleaders on instructions received from Meghnad Srimani, the defendant's brother, and her *am-mukhtear*, and that these pleaders were appointed by the defendant under a document which was explained to her.

A defence *primâ fâcie* at any rate may be taken to express the contentions of the person on whose behalf it is framed; though it may be open to that person, especially if a *purdanashin* lady, to repudiate that defence. In the present case, however, I find that the plea raised by the defence was never repudiated, but on the contrary was sought to be established by the lady's own evidence, was persisted in to the last, and is corroborated by her failure to pay the rent due in respect of her tenure. The defendant is not called to say that she did not know of this plea, and not a word of cross-examination on this point is put to her *am-mukhtear* or her pleader, though they have both been called by the plaintiff. Indeed when a question was put to the defendant's pleader involving the disclosure of communications protected under section 126 of the Evidence Act, Mr. *Pugh* in exercise of his undoubted right refused to give the requisite consent mentioned in that section.

Under the circumstances I hold that the denial in the defence was made by the defendant, and on the second issue, that the forfeiture (if any) thereby

caused has not been waived by any subsequent proceedings in the Small Cause Court action. I will next deal with the third issue on the supposition that the first and second issues should have been otherwise decided.

If words are to have their natural meaning, then it seems to me impossible to say that the defendant did not in her evidence deny the plaintiff's title. It seems that immediately before she gave her evidence, she had an interview through the medium of her *am-mukhtear* with her pleader, who says that he was taken to the defendant to receive her instructions and that he did get instructions from her. The pleader was then asked by Mr. *Garth* what those instructions were, but as Mr. *Pugh* would not waive his privilege the question could not be answered. After her **[446]** evidence was taken down it was explained to her both by the Commissioner and her pleader, and she then affixed her seal to the document. I, therefore, hold that the defendant did by her evidence given on the 21st of August 1892 deny the plaintiff's title, and my opinion on the 4th issue is that there has been no such waiver as is thereby suggested. The 5th issue is intended to raise the question whether the terms of section 111 (*g*) of the Transfer of Property Act have been complied with. I have not the slightest doubt that by bringing this action and proceeding with it against the defendant the plaintiff has shown his intention to determine the lease.

The last issue with which I need deal is whether the lease is not forfeitable by reason of its being a permanent lease. This issue inferentially raises the issue whether the defendant holds under a permanent lease, and the burden of establishing the affirmative of this would lie on the defendant.

The lease itself is not produced, and the ordinary inference as to a lease of buildings in Calcutta at a monthly rent would appear to be that the tenancy is from month to month (see Transfer of Property Act, section 106, and *Nocoordass Mullick* v. *Jewraj* (12 B. L. R,, 263). Mr. *Pugh*, however, relies on an allegation in a written statement filed by his predecessor in title, that the plaintiff's predecessor had granted a *maurasi mokurari pottah* as amounting to a claim by him, which afterwards by the lapse of time ripened into a right, and in confirmation of this he points to the fact that the present plaintiff did in the Small Cause Court describe the defendant as holding under a permanent lease. But the plaintiff, while disputing the defendant's conclusion as to the character of her tenure, contends that even if she be correct, still the lease would be none the less forfeitable, and I will accordingly deal with that point.

In the first place, I must point out that to draw any analogy from the English law of real property is wholly misleading. It has been said that the effect of a grant by a *maurasi mokurari* lease is similar to a conveyance in fee simple, but though there may be some correspondence in the practical results, it appears to me that any argument as to the legal effect based on this resemblance is wholly fallacious.

[447] Because at the present day a conveyance in fee simple leaves nothing in the grantor, it does not follow that a lease in perpetuity here has any such result. As a matter of fact this effect of an English grant dates from the Statute of Westminster III known as *Quia Emptores* (Statute 18 Edw. I., Cap. 1), which for reasons stated in its preamble forbade the system of subinfeudation that up to that time had prevailed; for at common law a feoffment made by *A* to *B* of a portion of his lands would create the relation of lord and tenant with all the incidents attaching to that relation including the right of forfeiture.

Now, the law of this country does undoubtedly allow of a lease in perpetuity, and we learn from section 105 of the Transfer of Property Act that it is the

transfer of a right to enjoy property in perpetuity, and at the same time it is provided by section 111 of the same Act that a lease determines by forfeiture.

It is urged, however, by the defendant, that though the words of the provision are wide enough to authorize the forfeiture of a lease in perpetuity, still in fact that result is impossible, and next that in any case it would not apply to a lease such as this which came into existence before the passing of the Act. I will deal with these points in order.

The impossibility on which the defendant relies is based upon the assumption that a lessor has no reversion. There seems to me to lurk in this assumption a fallacy based on the theories of English real property law.

A man who being owner of land grants a lease in perpetuity carves a subordinate interest out of his own and does not annihilate his own interest This result is to be inferred by the use of the word "lease," which implies an interest still remaining in the lessor. Before the lease the owner had the right to enjoy the possession of the land, and by the lease he excludes himself during its currency from that right, but the determination of the lease is a removal of that barrier, and there is nothing to prevent the enjoyment from which he had been excluded by the lease. Logically the case of *Kali Krishna Tagore* v. *Goolam Ally* (I. L. R., 13 Cal., 248) to which I was referred by Mr. *Pugh*, appears to demand the same conclusion, for it proceeds on [448] the ground that one who sets up a permanent tenancy does not repudiate any title or interest which would have been in his landlord had the tenancy not been permanent.

I may further point out that section 105 of the Transfer of Property Act provides that a lease should either be for a certain time or in perpetuity, while section 108 (*i*) contemplates the determination of a lease of uncertain duration by the fault of the lessee, and though too great stress should not be laid on this, still it is at least consistent with the view that a lease in perpetuity is forfeitable.

Mr. *Pugh* himself admitted that a perpetual lease would be forfeitable, if there were a right of re-entry, and then if that view is correct, it implies that the lessor has still a superior estate in the land, for I imagine that an unlimited right of entry not incident to an estate but simply creative of a fresh estate would be an infringement of the rule against perpetuity.

I, therefore, come to the conclusion that if the lease set up by the defendant be one to which the Transfer of Property Act is applicable, it is forfeitable, notwithstanding that it is permanent.

But there still remains the question whether having regard to section 2 (*b*) and (*c*) of the Act this alleged lease is forfeitable. Now, it has not been suggested that there is any authority which exempts a lease of this character from forfeiture for renunciation, or which establishes that the lessee is entitled to be relieved from forfeiture, nor has any alleged principle been urged which I have not already disposed of. If the relationship be one of landlord and tenant, then there is the general rule which obtained in this country before the Transfer of Property Act that a tenant who impugns his landlord's title renders his lease liable to forfeiture, and this rule is only a particular application of the general principle of law that a man cannot approbate and reprobate, or, as it is more familiarly expressed, he cannot blow hot and cold.

I therefore hold that the lease has been determined, and that its determination dates as from the date of the pleas in the Small Cause Court. There is the possibility of a doubt whether those pleas were framed on the 28th of April, or the 10th of August, and giving the defendant the benefit of that doubt, I hold that the lease was determined as from the later date.

[449] It is admitted that rent is in arrear, and the only question is how far back, having regard to the statute of limitation, the plaintiff can claim. The point has not been argued before me, but Article 110 of the Indian Limitation Act of 1877 imposes a limit of three years. The only question is whether section 14 applies. The plaintiff has made no attempt to satisfy me on this point, nor do I know why his suit in the Small Cause Court was withdrawn. I therefore see no reason for allowing him to carry back his claim more than three years from the institution of this suit.

There will also be judgment for mesne profits, the amount of which must be determined by a reference to the Registrar, and the defendant must pay the costs of the action.

Attorneys for the Plaintiff: Messrs. *Kally Nath Mitter & Sarbadhicary.*

Attorney for the Defendant: Babu *S. K. Deb.*

S. C. B.

NOTES.

[In (1909) 36 Cal., 1003 the Privy Council reversing (1906) 33 Cal., 511, held that for art. 134 Limitation Act, 'purchase' meant "conveyance of the absolute title" and in support of the distinction between the absolute title and the Mokurari title, their Lordships quoted with approval the distinction drawn between them by JENKINS, J. in this decision at p. 447.

See also (1906) 34 Cal., 358 : 11 C. W. N., 527 ; (1905) 9 C. W. N., 928 : 2 C. L. J., 389.]

[24 Cal. 449]

APPELLATE CIVIL.

The 17th February, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Shibu Haldar and another............Defendants

versus

Gupi Sundari Dasya............Plaintiff.*

Jurisdiction—Suit for rent of a fishery —Uncertainty as to jurisdiction—Code of Civil Procedure (Act XIV of 1882), section 16A—Immoveable property—Right of fishery.

A suit for rent of a fishery is a suit for immoveable property within the meaning of section 16A of the Code of Civil Procedure. *Fadu Jhala* v. *Gour Mohun Jhala* (I. L. R., 19 Cal., 544) referred to.

A suit for rent of a fishery was brought in a certain Court, and there was reasonable ground of uncertainty as to the jurisdiction of that Court to entertain the suit. On an objection that the suit ought to fail for want of jurisdiction :—

Held, that the conditions required by section 16A of the Civil Procedure Code had been satisfied in the case, and that the objection as to jurisdiction ought not to be entertained.

* Appeal from Appellate Decree No. 70 of 1895 against the decree of J. Posford, Esq., District Judge of Faridpur, dated the 28th of August 1894, affirming the decree of Babu Beni Madhub Roy, Munsif of Goalundo, dated the 11th of December 1893.

[450] THESE appeals arose out of suits brought by the plaintiff for the recovery of rent of a fishery. The allegation of the plaintiff was that the fishery was situated in *mehal* No. 104 on the *towzi* of the Collectorate of Zillah Pubna in Perganna Islampore appertaining to Zillah Pubna and Faridpur, and that, according to the custom prevailing in respect of the said *jalkar*, the first season for plying nets was in the months of Baisak, Joisto and Assar, and the second season was in the months of Magh, Falgoon and Chait, and that the defendants who plied nets in these seasons were liable for the rents thereof. These suits were instituted in the Court of the Munsif at Goalundo within whose jurisdiction the plaintiff alleged the *jalkar* lay. The defendants *inter alia* pleaded that the *jalkar* did not lie within the district of Faridpur, therefore the Munsif had no jurisdiction to try the suit.

The Munsif disallowed the objection, and decreed the suit of the plaintiff. An appeal was preferred, but the District Judge of Faridpur dismissed it, holding that as the plaintiff would be entitled to institute the suit either in the Pubna or in the Goalundo Court, therefore under section 16A of the Code of Civil Procedure, the Munsif had jurisdiction to try the suit.

The material portion of his judgment was as follows:—

"The cause of action was fishing in the Pudma. In what Court's jurisdiction does that river lie from the Chandra to Goalundo? Appellants are dissatisfied because the Munsif did not let them refer to the *Calcutta Gazette* of September 16th, 1874. I have referred to it, and on page, 417 it says, 'Zillah Faridpur. The north and north-eastern boundary of this Zillah shall be the river Ganges or Pudma.' That river is a strip of water half a mile or more wide, at times miles in width. The notification may, I think, be read as indicating that the river between this district and Pubna is within the jurisdiction of the Courts in Faridpur. Section 16A of the Code would allow of the suit being brought in either a Pubna or a Goalundo Court. It is, moreover, in evidence that fish is landed at Belgachi and consigned to Calcutta. Everybody knows that any amount of fish caught in the river is sent to Calcutta from Goalundo. Thus I think there is no fault to be found with a Goalundo Munsif trying these suits. No notification is known of as laying down the Pubna boundary. If the river is also considered as the boundary of that district, a suit such as those now in hand may be brought either in Pubna or in Goalundo, or else a tract extending over thirty or more square miles is outside the jurisdiction of any Court."

From this decision the defendants appealed to the High Court.

[451] The *Advocate-General* (Sir *Charles Paul*) and Babu *Haru Chunder Chuckerbutty* for the Appellants.

Mr. *Jackson* and Babu *Jasoda Nundun Pramanick* for the Respondents.

The *Advocate-General*. —The suit should have been brought in the Munsif's Court at Pubna where the defendants reside The *jalkar* appertains to the zemindary of Islampore, which is also within the jurisdiction of the Pubna Court. Under such circumstances the suit not having been brought in the Munsif's Court at Pubna, it ought to have been dismissed. Section 16A of the Code of Civil Procedure does not apply. There is no question of doubt in the present case.

Mr. *Jackson* for the Respondent.—Section 16A of the Code of Civil Procedure applies, as there is reasonable ground of uncertainty as to which Court has jurisdiction. The boundary is to be ascertained from the circumstances of each case. See *Sreemutty Dossee* v. *Lalunmonee* [12 Moo. I. A., 470 (473)].

The *Advocate-General* in reply.—Section 16A of the Code does not apply, as it refers to cases for recovery of immoveable property, and *jalkar* is not immoveable property within the meaning of that section. See *Fadu Jhala* v. *Gour Mohun Jhala* (I. L. R., 19 Cal., 544).

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.):—

Maclean, C.J.—There are three points raised in this appeal. The first and the principal one is the question whether the Court below had jurisdiction to entertain the suit. The appellants contend that the suit ought to have been brought in the Pubna Court, whilst in fact it was brought in the Goalundo Court. The respondents, however, urge that, be that as it may, if there be any reasonable ground for uncertainty as to the Court having jurisdiction with respect to the subject-matter of the suit, then it is open to this Court, under section 16*A* of the Code of Civil Procedure, not to allow that objection to be raised. What we really have to consider then first is, whether there was any reasonable ground for uncertainty as to which Court had jurisdiction. I am by no means satisfied that the District Judge was not right **[452]** in finding that the Goalundo Court had jurisdiction to try the suit: but, if not, I think upon the facts that there is a reasonable ground for uncertainty as to which Court had jurisdiction, and, if so, I think we ought not to allow the objection to be raised. The mere fact that a serious argument has been addressed to us as to which was the proper Court in which to bring the suit shows *per se* that there is reasonable ground for uncertainty on the matter. When two Courts have held that they have jurisdiction to try the case, a third Court, as the *Advocate-General* frankly admitted, is not likely to look with a very favourable eye upon an appeal on that point, and I think the section I have referred to was expressly framed to meet objections of this class, if there be any reasonable ground for uncertainty upon the question of jurisdiction. I think we ought not to allow this question to be now raised. So much then for the first and main ground of appeal.

The second question is as to the amount of the rent which both Judges below had found to be payable. The appellants say that, although the Munsif had arrived at his decision upon evidence, apparently oral evidence, in addition to a particular document which was put in, namely, a decree in another suit, in which one of the co-sharers was the plaintiff, but to which the defendants were not parties, the District Judge relied upon this decree alone as evidence as to the amount of rent. But I think it is clear that the District Judge did not arrive at his conclusion upon the evidence afforded by the decree alone. He apparently considered the other evidence which had been adduced before the Munsif, and he arrived at his conclusion upon a consideration of all the evidence. I think that the appeal on this point also fails.

The only other point urged before us was as to the question of damages. That was not raised in the Court below, and it is not one of the grounds stated in the memorandum of appeal, and under the circumstances I do not think that we ought to give special leave to appeal upon this point. Looking at the amount of damages allowed I do not think the defendants are likely to suffer by our not allowing this point to be now raised. I think, therefore, that on these grounds the appeal fails, and that it ought to be dismissed with costs.

[453] Banerjee, J.—I am of the same opinion. I only wish to add a few words on the question of jurisdiction.

It was contended for the appellants that the Faridpur Court had no jurisdiction to try the case, and that the suit ought to have been brought in the Pubna Court; and the ground of this contention is two-fold.

In the first place, it was argued that the suit being one for rent of a fishery, it ought to have been brought in the Court within whose jurisdiction the defendant was residing, the suit not being one for immoveable property in any sense.

And it was in the second place contended that, even if the suit lay properly in the Court which had jurisdiction over the fishery, still the objection as to jurisdiction should prevail, as a fishery was not immoveable property within the meaning of section 16A of the Code of Civil Procedure, relied upon for the respondent, and as the other requirements of the section had not been satisfied in this case, there being no uncertainty in the matter of jurisdiction.

The suit being one for arrears of rent of a fishery, the provisions of the Bengal Tenancy Act applicable to suits for the recovery of arrears of rent are made applicable to it by section 193 of that Act; and one of the provisions of the Act applicable to suits for arrears of rent is to be found in section 144, which enacts that "the cause of action in all suits between landlord and tenant as such shall, for the purposes of the Code of Civil Procedure, be deemed to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the suit is brought." That Court, therefore, had jurisdiction to try this suit for arrears of rent, which has jurisdiction to try a suit for possession of the fishery; and if a fishery is immoveable property within the meaning of section 16A, section 16A would be applicable to this case, and would be a complete answer to the appellant's contention, provided the other requirements of the section have been satisfied.

I am of opinion that a fishery comes within the definition of "immoveable property" in the General Clauses Act (I of 1868), section 2, clause 5. That clause says: "Immoveable property **[464]** shall include land, benefits to arise out of land," etc, etc., and a right of fishery comes within the description, "benefits arising out of land covered with water" The view I take is in accordance with the observations of the majority of the Full Bench in the case of *Fadu Jhala* v. *Gour Mohun Jhala* (I. L. R., 19 Cal., 544). Though a majority of the Full Bench were of opinion that a fishery does not come within the meaning of the term "immoveable property" as used in section 9 of the Specific Relief Act, still four of the five learned Judges who composed the Full Bench say that a fishery comes within the definition of "immoveable property" as given in the General Clauses Act. And there is nothing repugnant in the subject or context of section 16A of the Code to make the definition of "immoveable property" in the General Clauses Act inapplicable to the term as used in that section.

It remains then to see whether the other conditions required by section 16A of the Code of Civil Procedure have been satisfied. That section in sub-section (2) provides that where there has been no statement, such as the first sub-section contemplates, recorded in the Court below, a Court of Appeal or Revision shall nevertheless disallow the objection on the ground of want of jurisdiction, if it appears to such Court that there was a reasonable ground for uncertainty as to the Court having jurisdiction with respect to the subject-matter.

In this case it is impossible to say that there was no reasonable ground of uncertainty upon the question. The Appellate Court, in its judgment, observes, after referring to the boundaries, as declared in the *Calcutta Gazette*, of the District of Faridpur that "no notification is known of as laying down the Pubna boundaries." That, at any rate, creates a reasonable uncertainty in the matter. I think that the conditions required by section 16A have been satisfied in this case, and that the objection as to jurisdiction ought not to be entertained.

Macleau, C. J.—I should like to add that I entirely agree with Mr. Justice BANERJEE that a right of fishery such as this is "immoveable

property" within the meaning of section 16A of the Code of Civil Procedure. I do not think there can be any doubt about it.

[455] It is admitted that the appeal numbered 71 will be governed by this decision. That appeal, therefore, will also be dismissed with costs.

S. C. G *Appeal dismissed.*

NOTES.

[It was similarly held that there was jurisdiction in respect of money payable for forest rights:—(1914) 20 C. L. J., 227.

See also (1907) 7 C. L. J., 152 as regards entertaining objections to jurisdiction at a late stage when there is uncertainty concerning it.]

[24 Cal. 455]

ORIGINAL CIVIL

The 4th September, 1896.

PRESENT:

MR. JUSTICE SALE.

E. D. Sassoon and others............Plaintiffs

versus

Hurry Das Bhukut............Defendants.

Presidency Small Cause Court Act (I of 1895), sections 37 and 38—New trial—Jurisdiction—Powers of Bench sitting on application for new trial—ground for new trial—Question of Evidence.

The Fourth Judge of the Presidency Small Cause Court, in a suit tried by him, delivered judgment for the plaintiff. The defendant applied under section 38 of the Presidency Small Cause Court Act (I of 1895) for a new trial, and the Judges (the First and Fourth) on such application set aside the judgment and dismissed the plaintiff's suit with costs, and on the plaintiff's application the Full Bench of the Small Cause Court refused to interfere.

Held, by the High Court that the Judges exercised the powers of an Appellate Court in setting aside the original decree, and exceeded the jurisdiction vested in them by section 38 of the Act, such jurisdiction being a reversional jurisdiction only.

Held, also that, where the question is one of evidence, the judgment of the Original Court could be reversed, and a new trial directed, only when such judgment is manifestly against the weight of evidence.

Sadasook Gambir Chund v. *Kannayya* (I. L. R., 19 Mad., 90), followed.

IN this case the defendant entered into a contract with the plaintiffs on the 17th September 1894 for the purchase of certain bales of *dhooties* to arrive by November and December shipment. The vessel containing the *dhooties* arrived, and was entered at the Custom House on Saturday, the 22nd December 1894. The plaintiffs, belonging to the Jewish faith, transacted no business on Saturday. The 23rd December being a Sunday the Custom House was closed, and remained so until the 28th of December, upon which date the plaintiffs applied for delivery of the goods. The goods, however, in the meantime became liable to duty; the Indian Tariff Act (III of 1896) having [456] come into operation on the 27th; and the plaintiffs had to pay duty on the goods to the extent of Rs. 154-2-6 before delivery thereof from the vessel could be obtained by them. The defendant took delivery of and paid

the contract price of the said goods, but denied their liability to pay the sum of Rs. 154-2-6.

The plaintiffs filed a suit in the Court of Small Causes on the 8th July 1895, praying for the recovery of the said sum and costs, and on the 1st of November 1895 judgment was delivered by the Fourth Judge of the said Court in favour of the plaintiffs The defendant then applied under section 38 of the Act amending the Presidency Small Cause Court Act (Act I of 1895) to have the judgment set aside and for a new trial. This application was heard by the Officiating Chief Judge and the Fourth Judge on the 17th April 1896, and they set aside the judgment and dismissed the plaintiffs' suit with costs. Thereupon the plaintiffs applied under section 38 of the said Act for an order to set aside the decree dismissing the suit. This application was dealt with, and dismissed with costs on the 10th July 1896 by a Full Bench, consisting of the Chief Judge, and the Second and Fourth Judges of the Court. The plaintiff thereupon moved the High Court under section 622 of the Code of Civil Procedure, and obtained a rule calling upon the defendant to show cause why the judgment and decree, dated respectively the 17th of April and the 10th of July 1896, should not be set aside.

Mr. *Avetoom* for the defendant showed cause.—In this case the Bench under section 38, Act I of 1895, had power to hear the application of the defendant, and to reverse the decree against him, and to non-suit the plaintiffs, which was what they had done. See *Sadasook Gambir Chund* v. *Kannayya* (I. L. R., 19 Mad., 96). It was there held by BEST, J., that the language of section 37 of Act XV of 1882 (sections 37 and 38 of Act I of 1895) seemed to indicate that, though a party was not entitled to appeal as of right, the Court might, if it thought fit, reconsider any decree or order with all the powers of an ordinary Appellate Court. The High Court of Bombay in *Hassanbhoy Visram* v. *The British India* [457] *Steam Navigation Company* (I. L. R., 12 Bom., 579) refused to interfere upon an application for a rehearing of a suit which had already been decided by a Judge of the Small Cause Court, where the evidence was of a conflicting character and not such as to justify a distinct opinion that the Small Cause Court Judge was wrong in his decision.

Mr. *Jackson* for the plaintiffs in support of the rule.—The application in this case was made on behalf of the defendant, against whom a decree had been passed. It was made in the form of an appeal against the decision of the fourth Judge and on grounds which related to the question of appreciation of evidence. In their judgment the Full Bench dealt with the case exactly as an Appellate Court might have treated it. This the Full Bench could not do. See *Sadasook Gambir Chund* v. *Kannayya* (I. L. R, 19 Mad., 96) The view taken by the majority of the Judges in that case was that the Full Bench of the Presidency Small Cause Court had transgressed the limits of the jurisdiction given by Act XV of 1882, section 37, as the case was one on which different minds might not unreasonably have come to different conclusions An order for a new trial is unnecessary, as upon the admitted facts the plaintiffs are entitled to judgment. *Johnson* v *The Credit Lyonnais* (L. R, 3 C. P. D., 32).

Sale, J.—This application raises the question whether a decree by two Judges of the Small Cause Court, dated the 17th of April 1896, was made in excess of the jurisdiction of the Court, and, if so, what other order ought now to be made.

The plaintiffs in this suit are Messrs. Sassoon & Co., and the object of the suit was to recover a sum paid by them as duty on goods sold to the defendant,

The cause of action is thus stated in the plaint: –

(1) That the defendant entered into a contract in Calcutta with plaintiffs on the 17th September 1894 for purchase of certain bales of *dhooties*.

(2) That the defendant have taken delivery of the goods and paid plaintiffs the contract value of the goods, but have failed to pay the amount of duty on the goods which was legally payable by defendant, and which the plaintiffs are entitled to recover back from defendant having [468] to meet the same to get the *dhooties* delivered and passed out from the Custom House authorities.

The defence set up was as follows:—

Admit contract, deny that the defendant is liable to pay any duty, if the plaintiffs had exercised ordinary diligence.

The goods arrived before the Indian Tariff Act came into operation.

The payment of the money claimed in the suit seems never to have been disputed, but the defence in substance was that by the exercise of ordinary diligence the payment of the tariff duty might have been avoided, and that therefore the plaintiffs were not entitled to recover the same from the defendant. At the first hearing, which took place before the learned Fourth Judge of the Small Cause Court, only one witness was called, and that was by the plaintiffs.

The defendant adduced no evidence in support of their defence, and the Fourth Judge made a decree in favour of the plaintiffs for the full amount of their claim. The defendant then filed an application for a new trial on the grounds therein set forth relating chiefly to the questions of evidence. On the 17th April 1896 a Bench was formed for the hearing of the new trial, consisting of the learned Officiating Chief Judge and the learned Fourth Judge, who set aside the decree and dismissed the suit. The next proceeding was an application by the plaintiffs for a new trial in respect of the decree made on the 17th April 1896. That application was dismissed.

The main question which has been discussed before me is whether the learned Judges of the Small Cause Court exercised a jurisdiction, which was not vested in them, in reversing the original decree and dismissing the suit; the ground alleged being that in so doing they exercised the powers of an Appellate Court and exceeded the powers given them by section 38 of the Small Cause Court Act.

The facts as set forth in the judgment of the learned Chief Judge delivered on the occasion of the last application for a new trial are as follows: "The plaintiffs entered into a contract for the sale to the defendant of goods to arrive, delivery to be taken within ninety days from the date of arrival, *i.e.*, the [469] date when the vessel is entered at the Custom House. The goods arrived and the vessel was entered at the Custom House on Saturday, 22nd December 1894."

Section 38 of the Presidency Small Cause Court Act provides that "where a suit has been contested the Small Cause Court may, on the application of either party made within eight days from the date of the decree or order in the suit (not being a decree passed under section 522 of the Code of Civil Procedure), order a new trial to be held, or alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable, and may in the meantime stay the proceedings."

It is clear this section must be read with the preceding section 37, which provides that "save as otherwise provided by this chapter or by any other enactment for the time being in force, every decree and order of the Small Cause Court in a suit shall be final and conclusive."

The only reasonable meaning to be deduced from these sections taken together is, that the Legislature did not intend that each and every decree and order of the Small Cause Court should be subject to appeal.

A similar view was taken by the majority of the Bench of the Madras Court in the case of *Sadasook Gambir Chund* v *Kannayya* (I. L. R., 19 Mad., 96). And turning to page 113 of MacEwen's Small Cause Court Practice it would appear that it has not been the practice of the Small Cause Court to deal with applications for a new trial except under the powers ordinarily exercised by a Revisional Court. The learned author of the "Small Cause Court Practice" states various grounds upon which the Small Cause Court have granted new trials, all showing that the jurisdiction exercised has been that of a Revisional Court.

Where the question is one of evidence the judgment of the Original Court could be reversed, and a new trial directed only when such judgment is manifestly against the weight of evidence.

Now turning to the facts of the case which are exceedingly simple, there can be no doubt that in setting aside the original decree made in this suit, the learned Judges proceeded on the supposition that the first Court had taken an incorrect view of **[460]** the evidence or had wrongly construed the contract in suit. It is, I think, obvious that on the evidence as given in the first trial it would be impossible for any Court to disturb the judgment upon any ground which would be open to a Revisional Court, and there can, I think, be no doubt that the learned Judges exercised the functions of an Appeal Court in setting aside the original decree and dismissing the suit. It would therefore follow that in so doing they had exceeded the jurisdiction vested in them by section 38 of the Act.

The next question is as to the proper order which under the circumstances this Court should make.

There is, as I have already pointed out, no dispute as to the facts. The ground upon which the learned Officiating Chief Judge thought that the original decree was wrong is thus stated by him in his judgment in the last application: "But here I think there was a duty cast on the plaintiff under the contract to clear the goods on arrival, for the defendant was entitled to take delivery at any time within ninety days from the date of arrival, and therefore the plaintiff should have had the goods cleared and ready for delivery all that time.

The learned Second Judge also thought that the plaintiffs ought to have cleared the goods on the day when the steamer was entered at the Custom House; but, so far as it appears, he does not regard this as a duty arising on a construction of the contract. At page 6 he says: "If the sellers had cared to do so the goods would have been cleared on the day of their arrival and the payment of duty avoided;" and in a later portion of his judgment there is this passage: "It was obviously the duty of the plaintiffs in the first instance to take charge of the goods and clear them from the Custom House. It was all the more necessary therefore that as ordinary men of business they ought to have cleared the goods on the day of their arrival."

A good deal is said by both the learned Judges with reference to the admission made by the witness called by the plaintiffs that the members of the plaintiffs' firm being of the Jewish faith, their business was closed on a Saturday, there being no evidence that the defendant had any notice of this practice on the part of the plaintiffs.

[461] It appears to me that this is a matter of very small importance; it is only one of the circumstances which had to be taken into consideration in

determining the question as to whether the plaintiffs in failing to clear the goods on the first day of their arrival in port had failed to exercise due diligence in discharging their duty under the contract. It seems to me that the learned Judges in dealing with the case overlooked the fact that the plaintiffs would be entitled to a reasonable time for the purpose of clearing the goods from the Custom House.

Nor would there be any duty cast upon the plaintiffs to clear the goods on the first day of their arrival, unless there was an express agreement to that effect, or the evidence showed that in failing to do so, they had been guilty of unreasonable delay.

There was nothing in the evidence upon which there could be any finding that there had been any improper or unreasonable delay in clearing the goods. Nor do I think that the provision that the defendant had ninety days from the arrival to take delivery of the goods necessarily implies that the plaintiffs had undertaken to clear the goods on the first day of their arrival in port. To hold that there is such a duty cast upon importers, apart from an express agreement, would, I think, be doing a serious injustice; and in the absence of any evidence as to what is or is not a reasonable time within which the goods should be cleared from the Custom House, I should have thought in common experience that it would be extremely improbable under any circumstances that the goods could be cleared from the Custom House on the first day of their arrival. On the evidence it seems to me that the original decree was quite correct, and that, having regard to the fact that there is no dispute as to facts, no good purpose would be served by now ordering a new trial. I think the order which I ought to make is that the decree of the learned Officiating Chief Judge and the learned Fourth Judge of the Small Cause Court of the 17th April 1896 be set aside, and that the original decree of the learned Fourth Judge be restored. The costs in the suit, including the present application, will abide the result, and will be dealt with by the lower Court.

Attorneys for the Plaintiffs : Messrs. *Orr, Robertson & Burton.*

Attorneys for the Defendants : Messrs. *Manuel & Sen.*

C. E. G.

NOTES.

[See also (1898) 23 Bom., 414; (1903) 27 Bom., 565; (1908) 31 Mad., 490; (1902) 29 Cal., 498; (1911) 38 Cal., 425.]

[462] FULL BENCH.

The 5th February, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, MR. JUSTICE O'KINEALY, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN AND MR. JUSTICE BANERJEE.

Dengu Kazi............Plaintiff

versus

Nobin Kissori Chowdhrani, widow of the late Issur Chundor Roy Chowdhry............Defendant.

Second Appeal—Bengal Tenancy Act (VIII of 1885), sections 105, 106, 108 (3) -Record of rights, Dispute prior to completion of—Dispute about proposed entry or omission in the record.

The respondent, in the course of proceedings for the record of rights in the village of which he was the landlord, applied for the settlement of fair rents The appellant claimed to be a *raiyat* holding at a fixed rent. The respondent denied the validity of the claim. This dispute gave rise to a case between them which was decided by the Revenue Officer against the appellant, who then appealed to the Special Judge, with the result that the decision on that question was confirmed At the time of the Revenue Officer's decision no record of rights had been completed under section 105 (1) of the Bengal Tenancy Act On appeal to the High Court the respondent took the preliminary objection that no appeal lay under section 108 (3), as the case was not one under section 106.

Held, that the decision of the Revenue Officer was a decision in a proceeding under section 106 of the Bengal Tenancy Act, and that a second appeal lay from the decision of the Special Judge to the High Court

Gopi Nath Masant v. *Adorta Naik* (I L R., 21 Cal., 776) and *Anand Lal Parua* v. *Shib Chunder Mukerjee* (I L R., 22 Cal., 477), so far as they decide that a second appeal would not lie in such a case, overruled.

THIS case was referred to a Full Bench by MACPHERSON and HILL, J.J., on the 10th August 1896. The reference was in the following terms —

"This appeal, in which the tenant is appellant and the landlord respondent, arises out of proceedings under Chapter X of the Bengal Tenancy Act. We have not gone into the various questions raised as to the jurisdiction of the Revenue Officer and the [463] legality and regularity of the proceedings, as the respondent takes a preliminary objection that no appeal lies.

"It appears from the judgment of the Special Judge that there were proceedings for the record of rights in the village of which the respondent is the landlord; that the latter in the course of the proceedings applied for the settlement of fair rents; that the appellant claimed to be a *raiyat* holding at a fixed rent, and that the respondent denied the validity of the claim. This dispute gave rise to a case between them, which is described in the judgment of the Revenue Officer as a case under section 106 of the Tenancy Act. The issue tried was whether the appellant held at a fixed rate of rent or was merely an occupancy *raiyat*. This was decided against the appellant, who then

* Full Bench Reference in appeal from Appellate Decree No. 573 of 1895 against the decree of F. H. Harding, Esq., Judge of Zillah Mymensingh, dated the 31st October 1894, modifying the decree of Babu Lalit Kumar Das, Settlement Officer of that district, dated the 31st of July 1893.

appealed to the Special Judge, with the result that the decision on that question was confirmed. The tenant now appeals to this Court under section 108 (3) of the Tenancy Act against the decisions of the Special Judge.

"Admittedly at the time of the Revenue Officer's decision no record of rights had been completed or published under section 105 (1) of the Act. It is on that ground contended that no second appeal lies under section 108 (3) as the case was not a case under section 106, and in support of the contention the cases of *Gopi Nath Masant* v. *Adoita Naik* (I.L.R., 21 Cal., 776) and *Anand Lal Paria* v. *Shib Chunder Mukerjee* (I.L.R., 22 Cal., 477) are cited. If the decision appealed against is not a decision under section 106, there is, by the express words of section 108 (3), no right of second appeal. The question therefore is whether it is a decision under section 106 notwithstanding that the record of rights had not at the time been completed and published under section 105 (1).

"The cases cited seem to us directly in point. It was held in each that the case having been decided by the Revenue Officer before the record of rights was prepared and published there was no dispute, and no decision of a dispute, under section 106, and therefore no second appeal. The reason given was that before the record was framed there could be no dispute, and no decision of a dispute regarding the correctness of any entry in it. The effect of those decisions is to limit the application of section 106 to a dispute arising after the record of rights has been [464] completed and published under section 105 (1) with reference to entries or omission in that record and to exclude from its operation all other cases.

"The question is one of great importance, affecting not merely a right of second appeal, but also the validity of all decisions passed by a Revenue Officer, before the record of rights is prepared and published, on any disputed question other than the amount of rent settled under section 104 (2). The construction put upon the section, if right, deprives all such decisions of any legal validity, and the true ground for holding that there is no right of second appeal is that there is no decree to appeal against. Sections 106 and 107 read together make this clear. Section 106 is the only section in Chapter X relating to the decision of disputes by Revenue Officers acting under that chapter, and section 107 gives to their decisions the force of a decree in all proceedings for the settlement of rent under Chapter X [see section 104 (2)] and in all proceedings under section 106. To decisions not coming under section 106, no validity or force of any kind is given.

"We must respectfully dissent from the construction which has been put upon section 106 in the cases cited. It admits of a construction much wider than the one adopted and more consistent with what we consider to have been the intention of the Legislature.

"Section 105 provides first that when the Revenue Officer has completed a record made under Chapter X, he shall cause a draft of it to be published for the prescribed period (one month) and shall receive and consider any objection which may be made to any entry in it during such period; second, that after the expiration of that period he shall finally frame and publish the record, and the publication is to be conclusive proof that the record was duly made under the chapter.

"Section 106 may be grammatically read thus: 'If at any time before the final publication of the record under section 105 a dispute arises as to the correctness of any entry (not being an entry of a rent settled under Chapter X) or as to the propriety of any omission which the Revenue Officer *proposes to make therein or therefrom*, he shall hear and decide the dispute. If at

[465] any time before such publication a dispute arises as to the correctness of any entry (not being an entry of a rent settled under Chapter X) or as to the propriety of any omission which the Revenue Officer *has made therein or therefrom*, he shall hear and decide the dispute.'

"The section therefore provides, first, for the decision of disputes about proposed entries or omissions in the uncompleted record, for the words imply something to be done or omitted, and the time is 'any time before the final publication of the record under section 105.' Those words, although controlled and limited in their scope by subsequent words denoting something which has been done or omitted, cannot be so controlled or limited by words denoting something to be done or omitted. Secondly, for the decisions of disputes about entries or omissions which have been made in the record, and this must necessarily mean the completed record under section 105.

"The question is, what is meant by a dispute about a proposed entry or omission in the record. Obviously some meaning must be given to the words, and the meaning, and the difficulty, whatever it is, of ascertaining it, is the same whether the proposed entry or omission is to be in the completed or the uncompleted record. In either case the Revenue Officer proposes to enter or omit something, and there is a dispute about it.

"Possibly every entry is in the position of a proposed entry until the draft record is published, for obviously the process of preparing the record must be a gradual one, and Rule 33 in Chapter VI of the rules framed by the Bengal Government clearly contemplates, as might be expected, that all known disputes should be decided before the draft record is published. But it does not seem to us necessary that there should be any actual entry. It is enough if the Revenue Officer proposes to make one. When in the course of the proceedings a dispute arises about any matter which must be recorded or about the particulars with reference to which any such matter must be determined, and there is on the one side an assertion and on the other a denial of a right or of a material fact, the Revenue Officer must decide the dispute in order to make the necessary entry, and it must be presumed that he proposes to make the entry which he would be [466] bound to make or to decide the fact as he would be bound to decide it, if the party upon whom the burden of proof rests as regards the particular matter in dispute failed to discharge it. It seems to us quite immaterial under either the Act or the Rules at what particular stage of the proceedings the dispute arises or is decided. Section 107 provides that in proceedings under section 106, the Revenue Officer shall, subject to rules made by the local Government, adopt the procedure laid down in the Code of Civil Procedure for the trial of suits. This means that the parties are to be arranged as plaintiffs and defendants, and the rules, although not perhaps exhaustive, provide in many cases for the position which they are to occupy.

"We cannot suppose that the Legislature intended that no disputes were to be settled until after the draft record was completed and published, or that it contemplated the preparation of a draft record in which nothing was decided. We consider that we are precluded by the cases cited from holding that an appeal lies in this case, and we must refer the matter to a Full Bench. The question which we refer is, whether, having regard to the cases cited, the decision of the Revenue Officer in this case is a decision in a proceeding under section 106 of the Bengal Tenancy Act which has the force of a decree, and does a second appeal from the decision of the Special Judge lie to this Court under section 108 (3). There are four other analogous cases in which precisely the same question arises, but we think it sufficient to refer only this one."

Babu *Dwarka Nath Chuckerbutty* for the Appellant.

Babu *Srinath Das* and Babu *Promotho Nath Sen* for the Respondent.

Babu *Srinath Das.*—No second appeal lies to the High Court as the decision appealed from was not under section 106 of the Bengal Tenancy Act. Section 108 of the Act deals with appeals from decisions of Revenue Officers. An appeal lies to the Special Judge from every decision of a Revenue Officer. But from decisions of a Special Judge an appeal to the High Court lies only in cases tried under section 106; see section 108 (3). Section 106 provides only for disputes after record. The dispute must be after the draft and before the final record. The dispute must be as to an actual entry in the record, but here there was [467] no record completed under section 105 (1). I rely on the cases of *Gopi Nath Masant* v. *Adoita Naik* (I. L. R., 21 Cal., 776) and *Anand Lal Paria* v. *Shib Chunder Mukerjee* (I.L.R., 22 Cal., 477).

Babu *Dwarkanath Chuckerbutty.*—It is not necessary that the objection should be made after the completion of the draft record. If the contention raised by the respondent is correct then the whole proceedings should be set aside as without jurisdiction. There is nothing in section 108 of the Act which limits the jurisdiction of a Special Judge to deal only with matters of objection taken after publication of the record of rights—see *Durga Churn Laskar* v. *Hari Churn Das* (I. L. R, 21 Cal., 521). In that case the proceedings were before the completion of the record and yet the appeal was entertained. In the case of *Secretary of State for India* v. *Kajimuddy* [I L.R., 23 Cal., 257 (261)] it is pointed out that the words "objection" and "dispute," are not synonymous terms, and that they are not used in the same sense in sections 105 and 106 of the Act. Again, if the proceedings purport to be under section 106, there must be a right of appeal. See also the cases of *Norendra Nath Roy Chowdhry* v. *Srinath Sandel* (I. L. R., 19 Cal. 641); and *Bidu Mukhi Dabi* v. *Bhugwan Chunder Roy Chowdhry* (I. L. R., 19 Cal., 643).

Babu *Srinath Das* in reply cited the case of *Irshad Ali Chowdhry* v. *Kanta Pershad Hazaree* (I. L. R., 21 Cal., 935).

The following **opinions** were delivered by the Full Bench (MACLEAN, C.J., and O'KINEALY, MACPHERSON, TREVELYAN, and BANERJEE, JJ.):—

Maclean, C.J. —In this case I think that a second appeal lies to this Court under section 108 of the Bengal Tenancy Act. I arrive at that conclusion upon the grounds stated by Mr. Justice MACPHERSON and Mr. Justice HILL in the reference. I do not propose to go over those grounds, but confine myself to saying that for the reasons they have given I arrive at the conclusion that this appeal lies.

O'Kinealy, J. – I concur in the judgment which has just been delivered. I think looking at the Act and the Rules made by the Bengal Government under the Act that an appeal does lie.

[468] Macpherson, J.—I also concur.

Trevelyan, J.– I concur. I should like to add a few words to the judgments which have been pronounced, as one of the decisions which have given rise to this reference is a decision to which I was a party. In one case at least, if not in more, I decided that no appeal would lie. Having had the advantage of a further consideration, notably having had the advantage of seeing the order of reference in this case, I think that I was wrong in the decision at which I before arrived. In my opinion there is nothing in the Bengal Tenancy Act which ought to control the wide words of section 106 of the Act. That section begins with the words "If at any time before the final publication of the record," &c. According to the decisions which have been referred to there

could be no appeal except in the case of an order made after the draft record had been published in accordance with the terms of section 105 of the Act. It is perfectly true that the position of section 106 might lead to the argument that the words of that section are controlled by the earlier section. The words being so wide, and giving, as they do, an important right, I think it would be wrong, in the absence of anything more express, to attempt to control the right thereby given. I therefore agree with the view taken by the other Judges of this Bench and hold that there is an appeal.

Banerjee, J.—I also am of the same opinion. I think the terms of section 106 of the Bengal Tenancy Act are wide enough to include the case in which a dispute arises as to the correctness of any entry which the Revenue Officer proposes to make in the record that he is preparing. And, if that is so, the decision of the Special Judge on appeal from the decision of the Revenue Officer in this case was a decision that came within the scope of sub-section 3 of section 108 of the Act.

An appeal, therefore, in my opinion lies to this Court.

[The appeal was eventually dismissed by the Full Bench.]

F. K. D.

NOTES.

[See also (1897) 25 Cal., 34 ; (1899) 26 Cal., 556 ; (1901) 28 Cal., 17 ; (1909) 13 C. W. N., 1149 F.B.]

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[469] APPELLATE CIVIL.

The 9th February, 1897.

PRESENT :

MR. JUSTICE BEVERLEY AND MR. JUSTICE AMEER ALI.

Saturjit Pertap Bahadoor Sahi............Defendant

versus

Dulhin Gulab Koer............Plaintiff.*

Arbitration—Award—Decree in accordance with award with slight modification—Appeal—Illegal award—Reference applied for by agent without authority—Knowledge and tacit ratification by principal—Civil Procedure Code (1882), section 522.

In a suit which was defended by an agent (*am-mukhtar*) on behalf of the defendant, the agent applied for a reference to arbitration although he had no power to do so under the *am-mukhtarnamah*. After the submission of the award, objection was made on behalf of the defendant that the agent had no authority to apply for or consent to the reference. The objection was overruled by the Court, and a decree made in accordance with the award with one slight modification in the defendant's favour.

* Appeal from Original Decree No. 191 of 1894 against the decree of Jadoo Nath Doss, Subordinate Judge of Tirhoot, dated the 30th of March 1894.

Held, (1) in answer to an objection that no appeal lay under section 522* of the Civil Procedure Code, except in so far as the decree was in excess of or not in accordance with the award, that an appeal would lie if the award was shown to be illegal and void *ab initio*, *Nandram Daluram* v. *Nemchand Jadavchand* (I. L. R., 17 Bom., 357) followed.

(2) That although the agent was not authorized to apply for or consent to a reference, the defendant, having been aware of the proceedings and tacitly ratified the action of his agent, could not be allowed to question the legality of the award, and the award was not void *ab initio*. *Unniraman* v. *Chathan* (I. L. R., 9 Mad., 451) referred to.

THE facts of this case, so far as they are material to this report, sufficiently appear from the judgment of the High Court. The principal question discussed in appeal was whether the decree in this case, which was passed in accordance with the award of arbitrators with a slight modification, was subject to an appeal to the High Court.

The defendant appealed to the High Court.

Babu *Saligram Singh*, Babu *Raghunandan Prasad*, and Mr. *H. E. Mendies* for the Appellant.

[470] Babu *Umakali Mukerjee* and Babu *Nalini Nath Sen* for the Respondent.

Babu *Umakali Mukerjee* for the respondent took a preliminary objection under section 522 of the Civil Procedure Code, and urged that there was no appeal against this decree except so far as it was in excess of, or not in accordance with, the award.

Babu *Saligram Singh* for the appellant contended that the objections taken to the award if established would make the award illegal, and an appeal is allowed in a case like this There was no valid reference in this case, as the defendant did not authorize it, and the whole proceeding was unauthorized and illegal. *Protap Chunder Roodro* v. *Huro Monee Dossia* (24 W. R., 188), *Lala Iswari Prosad* v. *Bu Bhanjan Tewari* (8 B. L. R., 315: 15 W. R., F. B., 9), *Junglee Ram* v. *Ram Heet Sahoy* (19 W. R., 47), *Nussurwanjee Pestonjee* v. *Mynoodeen Khan* [6 Moo. I.A., 131 (155)], and *Nandram Daluram* v. *Nemchand Jadavchand* (I. L. R., 17 Bom., 357). The other question is one of limitation. That is also an error of law, and the award should be remitted under section 520 of the Civil Procedure Code.

Babu *Umakali Mukerjee* for the respondent.—The objection as to the authority of the agent should not be allowed to be raised in this case. *Unniraman* v. *Chathan* (I. L. R., 9 Mad., 451). The objection was not taken in the petition before the Court below. There was ratification of the agent's acts. The decree being in accordance with the award, there is no appeal. As to limitation there is no error patent on the face of the award, and no objection was taken in the written statement on the ground of limitation.

Babu *Saligram Singh* referred to *Makund Ram Sukal* v. *Saliq Ram Sukal* (I. L. R., 21 Cal., 590: L. R., 21 I. A., 47).

* [Sec. 522:—If the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if no application has been made to set aside the award, or if the Court has refused such application,

Judgment to be according to award.

the Court shall, after the time for making such application has expired, proceed to give judgment according to the award,

or, if the award has been submitted to it in the form of a special case, according to its own opinion on such case.

Upon the judgment so given a decree shall follow, and shall be enforced in manner provided in this code for the execution of decrees. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.]

Decree to follow.

The **judgment** of the High Court (**Beverley** and **Ameer Ali, JJ.**) was as follows: —

This appeal is by the defendant in a suit which was brought against him in the Court of the Subordinate Judge of Mozufferpur. The defendant who resides in the district of Gorakhpur, defended the suit by his *am mukhtar*, one Hurdeo Narain, who **[471]** appears to have verified and filed the written statement. After pending for over a year in the Subordinate Judge's Court, the case was, at the request of both parties, referred to arbitration, and on the 12th March 1894 the arbitrators submitted their award, holding that the plaintiff was entitled to recover the sum of Rs. 3,217 odd with proportionate costs from the defendant. On the 19th March the defendant, through the same *am-mukhtar*, filed an objection, in which he prayed that the award might be set aside on the ground (amongst others) that the arbitrators had allowed certain items which were barred by limitation, and when the matter came on to be argued a further objection was raised orally to the effect that Hurdeo Narain's *am-mukhtarnamah* did not authorize him to consent to the arbitration. The Subordinate Judge disallowed these objections, and made a decree in accordance with the award with one slight modification in the defendant's favour. A preliminary objection has been taken that under the provisions of section 522 of the Code no appeal lies against this decree, "except so far as it is in excess of or not in accordance with the award," but upon the authorities, the latest cited to us being the case of *Nandram Dalaram* v. *Nemchand Jadavchand* (I. L. R., 17 Bom., 357), it is clear that an appeal will lie if the award is shown to be illegal and void *ab initio*. Now, the defendant himself, that is to say, in his own person, appeals to this Court, and the main ground of his appeal that is pressed upon us is that his *am-mukhtar*, so far from being authorized to consent to a reference to arbitration, was expressly prohibited by the terms of his *mukhtarnamah* from so doing. The *mukhtarnamah* in truth does in our opinion contain such a prohibition. The attorney is authorized to do all acts in Court for his principal and to file petitions of all sorts "save and except petitions for relinquishment or admission of claims and *panchnamahs*," by which last term we understand petitions for reference to arbitration.

Now, there is no question that the application for the reference to arbitration was presented to the Court on behalf of the defendant by a pleader, whose *vakalutnamah* was signed by Hurdeo Narain. Hurdeo Narain, having no authority to make such an application himself, had of course no authority to authorise any **[472]** one else to do so. The application therefore was not in accordance with the requirements of section 506 of the Code. But a further question which we have to consider in this case is, whether the defendant was aware of the reference to arbitration and acquiesced in the proceedings before the arbitrators, and, if so, whether he can now be allowed to raise this objection when the award has been given against him. The proceedings in the case appear to us to show conclusively that the defendant was personally aware of what was being done on his behalf. It was a suit between members of the same family. The plaintiff agreed to be bound by the defendant's sworn testimony in the case, and summons was served upon him to appear personally and give his evidence. An application to allow him to give his evidence on Commission was refused. Thereupon several successive medical certificates were filed on his behalf to the effect that he was too ill to attend in person to give evidence. At this stage of the case the matter was referred to arbitration. The first order of reference was made on 29th November 1893. That reference proved infructuous, and a second order was made on 23rd December 1893. The award was not submitted till 12th March 1894. Before the arbitrators, again, the plaintiff applied to have the defendant examined personally.

The defendant, apparently from fear of having to give his evidence, left his home for Lucknow, and the arbitrators were unable to secure his attendance. Upon these facts it is impossible to come to any other conclusion than that he was aware of the reference to arbitration and tacitly ratified the action of his *am-mukhtar* in applying for such reference. It was only when the award was given against him that it occurred to him to raise the present objection. The case of *Unniraman* v. *Chathan* (I. L. R., 9 Mad., 451) is an authority for holding that in a case like this a person who has stood by and assented to the proceedings before the arbitrators cannot afterwards be allowed to turn round and question the legality of the order of reference. We think, therefore, that this ground fails, and that the defendant, having acquiesced in the proceedings, the award was not void *ab initio* in consequence of the defect in the order of reference.

[473] The second point urged is that the award is illegal, inasmuch as the arbitrators have allowed certain claims which, it is said, are barred by limitation. This objection refers to three sums of money which were borrowed by the defendant more than three years before suit, but which he agreed in writing to repay at a date which was within three years of suit. The arbitrators were of opinion that these writings were not properly stamped, and were therefore inadmissible in evidence. But they found that "apart from the so-called receipts, there is ample evidence on the record on behalf of the plaintiff, documentary and oral, to prove that the defendant did actually borrow money from the plaintiff *in the way stated*." And they go on to say: "In our opinion no portion of the claim is barred by limitation." It is clear, therefore, that no illegality in this respect is apparent upon the face of the award, such as might have been a ground for remitting the award under the provisions of section 520 of the Code. And it appears to us to be still more clear that the award was not in this respect so illegal or void *ab initio*, that an appeal against the decree made upon it will lie.

For these reasons we are of opinion that the appeal fails, and must be dismissed with costs.

S. C. C. *Appeal dismissed.*

NOTES.

[As regards the question of appeal, this was followed in (1899) 1 Bom., L. R., 261. As regards ratification, see also (1900) 28 Cal., 303; (1902) 7 C. W. N., 343.]

[24 Cal. 473]

APPEAL FROM ORIGINAL CIVIL.

The 23rd and 24th November and 10th December, 1896.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, MR. JUSTICE MACPHERSON, AND MR. JUSTICE TREVELYAN.

Jogemaya Dassi............Plaintiff

versus

Thackomoni Dassi..... ......Defendant.

Limitation—Mortgage decree—Transfer to High Court for execution—Application for execution by sale--Civil Procedure Code (Act XIV of 1882), sections 227, 230, 244 -Transfer of Property Act (IV of 1882), sections 67, 99 —Limitation Act (XV of 1877), Schedule II, Articles 122, 179.

On the 29th September 1882 a decree was obtained against the defendant's husband in a suit on a mortgage by the latter, dated the 6th April 1880. On the 27th July 1883 an order was made for transfer of the decree to the High Court for execution. On the 8th April 1886 the mortgagee applied to the High Court for execution by attachment of the mortgaged properties, and in the same year an order for attachment was made. The mortgagee died in April 1892; and on the 20th August 1894 the plaintiff (his widow [474] and administratrix) applied to the High Court for an order absolute for sale of the mortgaged properties under section 89† of the Transfer of Property Act. On the 5th January 1895 the application was refused, on the ground that the mortgaged properties were outside the territorial jurisdiction of the High Court. The plaintiff then instituted the present suit in which she sought (*inter alia*) administration of the estate of the mortgagor (who had died before mortgage suit was filed), and asked for the sale of such properties as might be found subject to such mortgage.

Held (affirming the decision of SALE, J.), that whether the plaintiff sued on the original debt or on the decree of the 29th September 1882, the suit was barred by limitation.

Held, also, that, even apart from any question of limitation, the suit was not maintainable by reason of the provisions of sections 230, 244 of the Civil Procedure Code, the questions arising in the suit being such as could and should have been determined in execution of the decree, and not by a separate suit.

THE facts of this case are fully stated in the judgment appealed from, which was as follows:—

SALE, J.—The plaintiff, who sues as widow and representative of her late husband, Radhajeebun Mustaba, claims administration and other relief in respect of the estate of one Brojo Nauth Dev, deceased.

* Appeal from Original Decree No. 13 of 1896, against the decision of Mr. Justice SALE, dated the 16th September 1895, in suit No. 115 of 1895.

† [Sec. 89:—If in any case under section eighty-eight the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section eighty-eight; and thereupon the defendant's right to redeem and the security shall both be extinguished.]

Procedure when defendant pays amount due.

Order absolute for sale.

The defendant Thackomoni Dassi is the widow and representative of Brojo Nauth.

The facts upon which the plaintiff bases her claim for administration are set out in her plaint, and as to those allegations there is in substance now no dispute. By consent the case was heard on settlement of issues, and the question really resolves itself into this: Whether the plaintiff, on the facts she alleges in her plaint, is entitled to a decree for administration of Brojo Nauth's estate.

The material facts relating to that issue are, I think, as follows:—

Brojo Nauth Dey, on the 6th April 1880, executed a mortgage in the Bengalee language and character in favour of Radhajeebun Mustafi, whereby he mortgaged his undivided 2 annas 2 gundahs and 10 cowries shares in three zemindary properties which may be described as lot 1 Bankra Budarpore, lot 2 Sheakhala and lot 3 *mouzah* Begumpore, to secure payment to Radhajeebun of Rs. 10,000 and interest.

On the 22nd April 1882 Radhajeebun Mustafi instituted a suit in the Court of the Subordinate Judge of Hooghly against **[475]** Brojo Nauth Dey for recovery of Rs. 10,000 and interest due under and by virtue of the said mortgage. It appears that at the time the suit was instituted Brojo Nauth Dey was dead, though the fact apparently was unknown to the plaintiff. However, the suit was revived in the name of his widow Thackomoni, and on the 29th September 1882 the plaintiff, Radhajeebun, obtained a decree for Rs. 14,928-10-6 with interest and costs against the defendant, the decree directing that the sum found due should be realised *from the property mortgaged and other properties of the defendant.*

On the 12th July 1883 an application was made by the plaintiff, Radhajeebun, in the Hooghly Court, for execution. On the 27th July 1883 an order was made directing that the decree, with certificate of non-satisfaction, be transferred to this Court, on the ground that the properties mortgaged were in the possession of the Receiver of the High Court. The records of the suit and the certificate were subsequently transferred to this Court some time in the year 1884.

On the 8th September 1886 the plaintiff, Radhajeebun Mustafi, applied to this Court for execution by attachment of the mortgaged property, *i.e.*, the share of Brojo Nauth, in the three properties which I have mentioned, and after notice, and in the same year, an order was made for attachment of those properties by issue of a notice under section 272 of the Code of Civil Procedure, to the Receiver of this Court, in whose possession the properties then were.

Radhajeebun Mustafi died on the 17th April 1892, leaving the plaintiff his sole widow and heiress. The plaintiff obtained letters of administration to the estate and effects of her husband on the 4th July 1892. Thereafter and on the 20th August 1894 she applied to this Court for an order absolute for sale of the mortgaged premises under section 89 of the Transfer of Property Act. Notice was directed to issue to the defendant, and accordingly on the 29th August a summons was obtained, returnable on the 5th September 1894, and was served on the defendant on the 31st August 1894. The application was made on 10th and 13th December 1894, and on the 5th January 1895 the application was refused, on the ground that the Court had no juris-**[476]**diction to deal with the mortgaged property, inasmuch as it was situate wholly outside the territorial jurisdiction of this Court.

No step, save the application for execution which resulted in the issue of a notice under section 272 of the Code to the Receiver, and the subsequent application for an order absolute for sale under section 89 of the Transfer of

Property Act, has been taken with the object of giving effect to the decree obtained on the 29th September 1882 in the Court of the Subordinate Judge of Hooghly. While these steps were being taken in the mortgage suit, and previous thereto, proceedings were instituted and carried on with the object of obtaining partition of the joint family properties, of which the three zemindaries I have mentioned formed a part. The suit for partition of the joint family properties was instituted in this Court on the 18th February 1880, and is numbered suit No. 119 of 1880. In that suit Monmohinee Dassee is the plaintiff, and Brojo Nauth Dey was one of the defendants. On the 2nd April 1881 a decree was obtained by which Brojo Nath Dey was declared entitled to 901900 of the joint family property, and a partition was directed to be made in the usual terms.

The Receiver of this Court was appointed Receiver of the joint family properties on the 26th May 1881. Subsequently a supplemental suit was filed by some of the members of the joint family against the present defendant as the representative of Brojo Nauth Dey, and by the decree made in that suit it was declared that the share of Brojo Nauth Dey, in the joint family estate, was indebted to the members of the family other than Brojo Nauth Dey in the sum of Rs. 59, 975-11-5. Several separate returns were made by the Commissioners of partition in pursuance of the decree for the partition of the joint family property; and, finally, on the 22nd June 1894 the sole surviving Commissioner made a separate return, whereby he partitioned the zemindary properties, including the properties the subject-matter of the mortgage in favour of Radhajeebun Mustafi.

By that return the entirety of one of the mortgaged properties, lot Bankra Budarpore, was allotted to the present defendant, but the other zemindary properties, which, to the extent of the share of Brojo Nauth Dey, had been mortgaged to Radhajeebun Mustafi, were allotted to other members of the family.

[477] Another suit, based on a mortgage executed by Brojo Nauth Dey in favour of one Lall Behary Dutt, was instituted in the year 1882 in this Court (being suit No. 155 of 1882), and in that suit a mortgage decree, in the usual terms, was made on the 23rd of July 1883. One of the properties covered by the decree made in suit No. 155 of 1882 is the share or interest of Brojo Nauth Dey in the zemindary lot Sheakhala, which is one of the properties included in the mortgage in favour of Radhajeebun Mustafi, and it appears that on the 6th December 1891 an order was obtained in the suit last mentioned, viz., suit No. 155 of 1882, for sale of so much of the immoveable properties allotted to the defendant by the three separate returns, dated 5th May 1888, 16th June 1888, and 22nd June 1894, as would be sufficient for the payment (*inter alia*) of the amount due to Lall Behary Dutt under his mortgage decree. Having regard to these various circumstances, the plaintiff alleges that she has been unable to obtain payment of the amount due to her under the decree of the 29th September 1882, and she therefore claims to be entitled to administration of the estate of Brojo Nauth Dey, with the object, in the course of that administration, of obtaining payment of the sum so due to her. As part of the relief she seeks in this suit she asks for a declaration of what properties are now subject to Radhajeebun's mortgage, and for an account of what is due to her under the said mortgage and decree, and what is due to the other incumbrancers and creditors of the estate, for the sale of such properties, as may be found subject to such mortgage, declaration of priorities, and so forth.

After the institution of the suit in the Court of the Subordinate Judge of Hooghly, and prior to the decree obtained in that suit, the Transfer of Property Act came into force. Therefore one of the questions which arises is as to whether the decree made on the mortgage executed in favour of Radhajeebun

Mustafi is in its terms a decree such as is contemplated by the provisions of section 67 of the Transfer of Property Act, or whether, on the other hand, the decree is governed by section 99 of that Act?

Mr. *Pugh*, who appeared on behalf of the plaintiff, contended that the main question in this suit is whether the plaintiff is, on the facts stated in the plaint, entitled to a decree for the administration of the estate of Brojo Nauth Dey. The other relief sought **[478]** in this suit involves admittedly serious questions, but it is contended that they would arise only at a subsequent stage of the suit, and do not affect the plaintiff's right to a decree for administration.

On the part of the defendant several objections were relied upon as constituting a bar to the suit. In the first place it is said that the matters in issue or sought to be raised in issue in this suit are the same as those which were in issue in the former suit, and that the plea of *res judicata* applies under section 13 of the Civil Procedure Code. In the next place it is contended that the suit is not maintainable, having regard to section 244, clause (c) of the Civil Procedure Code.

The latter section provides that certain questions shall be determined by order of the Court executing a decree and not by separate suit. Amongst these questions are included, by clause (c), questions relative to the execution, discharge or satisfaction of the decree, and the contention is that, inasmuch as the object of obtaining administration of Brojo Nauth's estate is to obtain satisfaction of the judgment debt, the right of the judgment-creditor is limited or restricted by this section to proceedings in execution.

I am not prepared to say that either of these objections is well founded, so far as the question of the right to administration is concerned. The issue, or at least the main issue, which is sought to be raised in the present suit, was not as a fact raised in the former suit, and I have not been referred to any authority for the proposition that a creditor who has once obtained judgment upon his debt is thereby debarred from coming to a Court of Equity, and asking to have this debt paid to him in due course of administration. It is true that before a creditor is entitled to administration of his debtor's estate he must show that he has a debt which is unsatisfied, and of which he is unable to obtain payment, and it is also true that the debt which is the foundation of the present action is in reality the debt which was the matter in issue in the former suit. But the present suit does not seek to put in issue the fact of the existence of the debt: on the contrary, the plaintiff relies on the former decree to show that no such issue can arise between the parties in the present suit. Besides, I am unable to see why on principle a creditor who has obtained a judgment on his debt, should be in a worse position, so far as a **[479]** right to administration is concerned, than a creditor whose debt is unsecured by judgment.

As regards section 244, clause (c) of the Code, I should be inclined to hold that the words "questions relating to the discharge or satisfaction of the decree" must be limited to questions of discharge or satisfaction arising in course of execution, or in connection therewith. I cannot think that a provision appearing in the chapter of the Code, relating to the execution of decrees, was intended to limit or cut down the jurisdiction of this Court in granting administration. A Court of Equity, in executing a decree, does not necessarily proceed upon the same principles as those which it adopts in administering the estate of a deceased debtor. The foundation of the jurisdiction in the latter case, that is, in administering the estate of a deceased debtor, is said to be the principle which is applied in enforcing the execution of trusts, the executor or administrator of the deceased debtor being regarded as a trustee who is bound

to apply the debtor's estate in payment of his debts—Story, Eq. Jur., 2nd Edition (English), p. 352.

But a more formidable objection to the present suit remains to be considered, *viz.*, the plea of limitation. A creditor to be entitled to ask for administration of his debtor's estate must show either that he has a debt which is enforceable by suit, or that he has obtained a judgment thereon, which is itself capable of enforcement by execution or by separate suit.

The plaintiff in the present case is a judgment-creditor, her judgment having been obtained on the 29th September 1882, *i.e.*, more than 12 years from the date of institution of the present suit. Moreover, the decree is not a decree of this Court, but it is a decree of a mofussil Court, and no step in execution, strictly speaking, of the decree has been taken since the attachment through this Court under section 272 of the mortgaged properties in the hands of the Receiver.

Having regard to this fact, can the decree be considered as still alive for the purposes of execution? I am of opinion that it cannot. Mr. *Pugh* has contended that the attachment is still in full force and effect; and that, inasmuch as this suit may be said to be in aid or in continuation of that attachment, limi-**[480]**tation cannot apply. I cannot adopt this view. The properties attached, being the mortgaged properties, could not be brought to sale under the attachment, and the only way of enforcing the lien on the mortgaged property, or the property which had been substituted for it, was, it seems to me, by a suit under section 67 of the Transfer of Property Act. It would, I think, be impossible to say that an attachment made under the circumstances abovementioned, and which attachment must, so far as I can see, remain ineffective and infructuous, is still sufficient to keep the decree alive indefinitely. The recent decision of this Court in the case of *Chundra Nath Dey* v. *Burroda Shoondury Ghose* (I.L.R., 22 Cal., 813) is an authority for saying that the decree in execution of which the attachment was made is not in the form contemplated by section 67 of the Act, and that the attachment would therefore be governed by section 99 of the Act. Moreover, if the present suit could be said to be a step in aid of that attachment in any sense, then I see no answer to the argument that section 244, clause (*c*) of the Code constitutes a bar to the plaintiff's present suit. For the reasons I have already indicated, I am not inclined to hold that a suit for administration by a judgment-creditor is a step in execution, or in aid of execution of his decree.

But even if it were, I do not see how this argument would assist the plaintiff, because the effect of the order for execution to issue made by this Court, after notice, was not to revive the original decree, inasmuch as that is not a decree of this Court, and therefore no new period of limitation runs from the date of the attachment. See the case of *Tincowrie Dawn* v. *Debendra Nath Mookerjee* (I. L. R., 17 Cal., 491). On the other hand, the effect of section 230 of the Code is, in my opinion, to render this judgment debt a barred debt in every respect, because no step in execution can now be taken, nor can the decree be revived.

The case of *Hebblethwaite* v. *Peever* [L. R., (1892), 1 Q. B., 123] seems to show that a judgment debt, which has become barred, cannot be made the foundation of a subsequent proceeding to recover the debt, nor can a creditor, who has allowed his judgment debt to become barred, obtain an adjudication in bankruptcy against his debtor; *Ex-parte Tynte* (L. R., 15 Ch. D., 125).

[481] It would seem to follow that a judgment debt once barred is barred for all purposes, and cannot therefore be made the foundation of an administration action.

It is said, however, that the plaintiff's mortgage lien is still subsisting, and may be enforced as a collateral security for the judgment debt.

Assuming that to be so, the lien would be enforceable only as against specific properties, and would be available for the exclusive benefit of the plaintiff and not of the general body of creditors. This special and exclusive right, if it exists, would form no ground for the administration of the general estate of the debtor; and further, if the lien is still enforceable by suit, it does not appear that this Court would have jurisdiction to entertain any such suit, inasmuch as the original mortgaged properties, and the property which, under the separate return made in respect of the zemindary properties, was apparently allotted to Brojo Nath's estate in substitution of the undivided shares in the zemindaries mentioned in the mortgage deed, are alike situate outside the ordinary original jurisdiction of this Court.

For these reasons it seems to me that the plaintiff's mortgage debt and the decree which was obtained in respect thereof are alike barred; and, consequently, I must hold that this suit, which is founded on that debt, must be also barred, and cannot therefore be maintained.

The suit must therefore be dismissed with costs on scale 2.

From this decision the plaintiff appealed.

Mr. *Pugh* (with him Mr. *Evans Pugh*) for the appellant.--The plaintiff's right as a mortgagee is still subsisting, and therefore she has undoubtedly a right to maintain a suit under sections 67 and 99 of the Transfer of Property Act. The right to bring such a suit could only be maintained by establishing the fact that her rights under the mortgage are still subsisting. As to her right to claim administration in respect of the mortgage, she would be proceeding, not simply against the property actually included in the mortgage, but also against the general estate or an unascertained part of it. The suit is not for administration only; it is also for enforcement of the mortgage. If the plaintiff were [482] not entitled to administration and to judgment under the administration, then she could ask for a decree in the suit as upon a mortgage. With regard to the jurisdiction, also, the suit is not brought with reference to the mortgaged property only, but also to the rest of the estate, a large portion of which is in Calcutta.

Again, the plaintiff has a right to maintain this suit as a judgment-creditor. The judgment of the 29th September 1882 is still in force, because of the attachment order in 1886. Therefore, limitation would run from 1886, not from 1882. This case is governed, not by section 230 of the Civil Procedure Code or article 179 of schedule II to the Limitation Act, but by article 180, because, when a decree has been transferred to the High Court, it is to be treated in every sense, and for all the purposes of execution, as a decree of the High Court. Besides, under article 147, a mortgagee has sixty years within which to foreclose or sell, and to enforce that right he must bring a suit under sections 67 and 99 of the Transfer of Property Act—*Chundra Nath Dey* v. *Burroda Shoondury Ghose* (I. L. R., 22 Cal., 813).

This is not a "suit upon a judgment"; that being a term well understood of which a suit upon a foreign judgment is an illustration. A suit by a judgment-creditor for administration and for the enforcement of a collateral security has never been considered, and cannot properly be called a suit upon a judgment. All the cases decided upon the article limiting suits upon judgments show that the meaning of the term is the one I have indicated. [The cases of *Choudhry Paroosh Ram Das* v. *Kali Puddo Banerjee* (I. L. R., 17 Cal., 53) and *Futteh Narain Chowdhry* v. *Chundrabati Chowdhrain* (I. L. R., 20 Cal., 551) were also cited and relied on.]

Mr. *Dunne* for the respondent.—Whether this suit is brought on the debt or on the judgment, it is barred by limitation. The plaintiff asks for administration; but that is not a cause of action, it is merely a form of the relief she prays for.

Again, the properties, the subject-matter of the suit, are wholly outside the jurisdiction of this Court. The properties in Calcutta allotted to the defendant in Calcutta cannot be treated as security for the mortgage debt; because the most that the plaintiff could **[483]** claim on his mortgage would be the share of the zemindary properties allotted to the mortgagor; and those are all outside the jurisdiction.

The appellant's decree was a mere money decree. It was not a decree directing any sale; it was certainly not a mortgage decree under the Transfer of Property Act. It cannot be treated as such now; and she has not attempted to treat it as one, because she applied to the Hooghly Court for execution of the decree. If it was a mortgage decree, there was nothing to prevent her from having the undivided share of the mortgagor in the zemindaries sold; she only applied for attachment of the property. There is no application pending for execution; and this distinguishes the case from the case of *Chowdhry Paroosh Ram Das* v. *Kali Puddo Banerjee* (I.L.R., 17 Cal., 53).

The argument cannot prevail that section 230 of the Civil Procedure Code does not apply, because this is in effect a decree of the High Court in its original jurisdiction, within the meaning of article 180 of the Limitation Act. The decision in *Tincowrie Dawn* v. *Debendra Nath Mookerjee* (I.L.R., 17 Cal., 491) is an answer to that contention. The former Code was entirely different from the present one on this subject. The old Code refers to the effect of a decree for the purpose of execution; the present one deals merely with the machinery by which the decree is to be executed, and does not make the decree of the lower Court a decree of the High Court.

If the right to execution is barred, no suit can in any event be brought on the judgment. *Fakirapa* v. *Pandurangapa* (I.L.R., 6 Bom., 7). But whether the suit is barred by limitation or not, no such suit as this will lie at all. *Mahomed Aga Ali* v. *Widow of Balmakund* (L. R., 3 I. A., 241), *Kisan Nandram* v. *Anandram Bachaji* (10 Bom. H. C., 433), *Ranganasary* v. *Shappani Asary* (5 Mad., H. C., 375), *Nasrudin* v. *Venkatesh Prabhu* (I.L.R., 5 Bom., 382).

Finally, the mortgage lien cannot be subsisting. If the plaintiff has a mortgage decree, the lien is merged; if not, she is **[484]** in a worse position than if she had. In the former case, the suit is barred under section 13 of the Civil Procedure Code; in the latter, by section 43.

Mr. *Pugh* in reply.

C. A. V.

The following **judgments** were delivered:—

Maclean, C.J.—In this case the appellant, who is the plaintiff in the suit as the legal personal representative of her late husband Radhajeebun Mustafi, brings a suit against Thackomoni Dassi, as the heiress and representative of her deceased husband Brojo Nauth Dey, and the object of the suit is to have an account taken of what is due to her under a certain mortgage and decree, to have the estate of Brojo Nauth Dey administered by the Court, for the appointment of a Receiver, and for consequential relief. The facts briefly are as follows:—

On the 6th April 1880 Brojo Nauth Dey mortgaged his shares in three properties, all outside the jurisdiction of this Court, and which I briefly refer

to as (1) lot Bankra, (2) lot Sheakhala, (3) lot Begumpore, to the plaintiff's late husband to secure Rs. 10,000 and interest.

On the 22nd April 1882 Mustafi, the mortgagee, instituted a suit in the Court of the Subordinate Judge of Hooghly for the recovery of the debt, and on the 29th September 1882 (the defendant Brojo Nauth Dey having died in the meantime and the present defendants being entered as defendants), the decree set forth in paragraph 4 of the plaint was pronounced. I must refer to this decree. It is at page 15 of the paper book. [After reading the decree his Lordship continued] : In my opinion this was a mortgage decree, though not in the form prescribed by the Transfer of Property Act, which came into force on the 1st July 1882, but in the form in which, as I understand, such decrees had been for many years, and were drawn up in the Mofussil Courts. The decree provides for the payment of the mortgage debt, for the realization of the mortgaged property and payment thereout of the mortgage debt. The claim, in this suit, it may be observed, asks that the claim, *i.e.*, the money claim, should be realized out of the mortgaged property, and failing that from any other property of the defendant. I think the decree of 1882 **[485]** was a mortgage decree, *i.e.*, a decree made in a suit to enforce the mortgage in which the mortgagee asked, not merely for a personal judgment against his debtor, but for the realization of the mortgaged property to satisfy his claim.

On the 12th July 1883 the mortgagee applied to the Mofussil Court for execution of the decree, and on the 27th July 1883 that Court ordered that the decree should be transferred to the High Court for execution. On the 18th January 1887 an order for attachment was made by Mr. Justice TREVELYAN, and the plaintiff alleges that that order is still in force. From the date of the order in January 1887 the plaintiff did nothing whatever until 29th August 1894, nearly 8 years after, when she took out a summons in her suit for a sale of the mortgaged property under section 89 of the Transfer of Property Act, and on the 5th January 1895 that application was dismissed with costs. On the 19th March 1895 she instituted this suit. In the meantime proceedings had been taken in this Court for the partition of the entirety of the property, the shares in which of the original defendant Brojo Nauth Dey had been mortgaged by the deed of the 6th April 1880. The facts as to these proceedings may be referred to very briefly. The suit was instituted on the 18th February 1880, and a decree made on the 2nd April 1881, which directed the partition of the estate with a declaration as to what Brojo Nauth Dey's share in the estate was.

On the 26th May 1891 a Receiver was appointed in the last-mentioned suit.

On the 30th June 1885 a decree was pronounced, the effect of which is stated in paragraph 18 of the plaint.

In pursuance of that decree the Commissioners made various returns which were duly confirmed by the Court and by a return, dated the 22nd June 1894, lot Bankra, valued at Rs. 38,393, and other property valued at 10,167, was allotted to the defendant, while lot Sheakhala and lot *mouzah* Begumpore were allotted to the other members of the family. The only other fact to which I need refer is that by a decree of this Court, dated the 23rd July 1883 in a mortgage suit by one Lal Behary Dutt against the present defendant, the decree mentioned in paragraph 30 of the plaint was made.

[486] This decree shows that if the proper steps were taken by a mortgagee of Brojo Nauth Dey, the Receiver in the partition suit would be ordered to pay the mortgage debt, assuming, of course, he had the funds properly so applicable, and that directions would be given for the realization of the mortgaged property to meet that debt. The only other order to which I

need refer is that of the 6th December 1894 set out in paragraph 33 of the plaint. These are, shortly, the facts of the case; and upon them the plaintiff asks for the order I have mentioned. The question is whether she is entitled to it or to any other order. The defence is the Statute of Limitation, and the learned Judge in the Court below upheld that defence. Section 4 of the Limitation Act is as follows:—

"Subject to the provisions contained in sections 5 to 25 (inclusive), every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence."

The cause of action arose originally when the mortgage debt was created 16 years ago in 1880. If the plaintiff be suing on that debt, her remedy *primâ facie* is clearly barred.

In 1882, under the decree in that year, the original debt became a judgment debt, and if the plaintiff be suing on that, her remedy is equally barred. The plaintiff cannot obtain a decree for administration, unless she can show she is a creditor in respect of a debt, the remedy for the recovery of which is not barred by the Statute. If the debtor had been living, could the plaintiff have sued him for the debt and its realization out of the mortgage estate? I do not think she could successfully have maintained such an action; the Statute of Limitation would have been a bar, and not improbably the plea of *res judicata* under section 13 of the Code. But it was not seriously contended that she could have successfully brought such an action.

Mr. *Pugh* for the plaintiff relies upon the attachment order of 1886, and contends that that order kept alive the decree of 1882, and that the period consequently runs from 1886 and not from 1882.

He relies, as I understood his argument, on article 180 of the **[487]** second schedule of the Limitation Act. But that article does not apply.

This suit is not an application to enforce a judgment or decree or order of any Court established by Royal Charter, *i.e.*, one of the High Courts; it is not suggested that it is an application to enforce the attachment order of 1887, nor can it be regarded as an application for the execution of a decree or order under article 179.

As I do not think article 180 applies, it becomes immaterial to consider whether the attachment order of 1886 revived the decree of 1882, or to consider the various authorities which have been cited upon that point, or the dictum of Chief Justice PEACOCK, reported at page 971, Bengal Law Reports. Full Bench Rulings.

The plaintiff appears to me to be upon the horns of this dilemma. If she be suing as a creditor for administration on the original debt, she is, apart from the effect of the order of 1886, clearly barred by the Statute; and if she rely on the attachment order of 1886 as keeping the original debt alive, she is at once confronted with section 230 of the Code, which makes it obligatory upon her, if she desire to enforce her decree, to apply to the Court which made the decree, and, in face of that provision, she is not entitled, in my opinion, to institute a separate suit.

Apart from this, I think all questions arising between the parties to the original suit, ought, under section 244 of the Code, to have been decided, and could have been decided, by the Court executing the decree. A separate suit ought not to be instituted unless all questions between the parties or their representatives cannot be decided in the original suit. The plaintiff's right is, if she be now not too late, to enforce the decree of 1882, and any questions

arising as to that ought to be determined, and can only be determined, by the Court executing that decree. I am prepared to hold that, quite apart from any question as to the Statute of Limitation, the plaintiff is not entitled to maintain this suit, having regard to sections 230 and 244 of the Code.

One other point remains. It is said that under article 147 of the schedule to the Act the mortgagee has sixty years within which to foreclose or sell, and that to enforce that claim she must, under the conjoint operation of sections 99 and 67 of the **[488]** Transfer of Property Act, institute a suit for sale under the latter section. But these sections cannot apply if the mortgagee have already obtained a decree for sale, as in my opinion she has, *viz.*, the decree of 1882.

But be this as it may, the present suit is not such as is contemplated by sections 99 and 67 of the Transfer of Property Act, nor was it intended to be; and if it were, having regard to the locality of the property, and to section 12 of the Letters Patent, this Court could not entertain it.

In this case the plaintiff has for many years slept upon her rights, and if she have lost her remedy against the defendant, it is entirely her own fault. Litigation in this matter has been going on since 1882, and for nearly 8 years the plaintiff did nothing, and has never taken any steps to enforce her attachment order of 1886; and now, some 13 years after the institution of the original suit, she comes and asks that the whole matter may commence *de novo*, and the flood gates of litigation be re-opened. I think it would be lamentable if such a claim could succeed, if so, the chances of finality in litigation would be very small.

For the reasons I have given, I think the appeal has failed, and must be dismissed with costs.

Macpherson, J.– Whether this suit is to be regarded as based on the original debt, the mortgage, or the judgment or decree of 1882, it is not, I think, maintainable. The debt has passed into a judgment debt; and under article 122* of the Limitation Act no suit could now be brought on the judgment. It is said that this is not a suit on the judgment within the meaning of that article, as it is a suit for the administration of the estate, but if no suit could be brought on the judgment, I do not see how the judgment can be made a ground for relief in this case.

Then it is said that the mortgage lien still subsists, and that under section 99 of the Transfer of Property Act the plaintiff could still bring a suit for the sale of the mortgaged property. Even if this can be regarded as a suit for that purpose, I agree with Mr Justice SALE, for the reasons stated by him, that the Court had no jurisdiction to entertain it. But it seems to me that the decree of 1882 is in substance a decree for the sale of the mortgaged properties. It sets out those properties, and directs **[489]** that the sum decreed should be realized from them, which can only mean by the sale of them; and that was the relief asked for in the suit. Assuming that sections 88 and 89 of the Transfer of Property Act, which came into force while the suit was pending, applied to the suit, the decree was not, it is true, made in

* [Art. 122.–

Description of suit.	Period of limitation.	Time from which period begins to run.
Upon a judgment obtained in British India, or a recognizance.	Twelve years...	The date of the judgment or recognizance.]

conformity with them as, instead of making a decree *nisi*, followed by a decree absolute, the Court at once made a decree absolute. But the decree has never been questioned, and is now a final decree as between the parties. The case of *Chundra Nath Dey* v. *Burroda Shoondury Ghose* (I. L. R., 22 Cal., 813) is distinguishable, as the Court there in effect held that there was no decree for sale. No second suit to enforce the lien would therefore lie.

Mr. *Pugh* further argued that the decree of 1882 being still alive and capable of being executed there is a debt, the remedy for the recovery of which is not barred, and that the plaintiff can on this ground maintain the suit. The decree of 1882 is said to be still alive, because the application which was made in September 1886 for the execution of it is still pending, and because the attachment which followed on that application is still in force, and it would not therefore be necessary for the plaintiff to make any fresh application for execution, to which the 12 years' rule laid down in section 230 of the Civil Procedure Code would apply. Whether there is a pending proceeding, and whether the plaintiff can get anything out of it, are matters to be determined by the Court in which the proceeding is said to be pending, viz., the Court executing the decree. Assuming for argument's sake that there is a pending proceeding, it is only in that proceeding, and by reason of its being a pending proceeding, that the plaintiff could get any relief in the way of execution, as any fresh application for the execution of the decree would be barred by section 230 of the Code. This is not a suit in aid of execution ; it has nothing to do with the execution of the decree ; and if there is an execution proceeding pending in which, and in which alone, the plaintiff could, putting her case at the highest, get some relief, this does not, I conceive, help her in bringing this suit.

Lastly, it is argued that article 180 of the Limitation Act **[490]** applies as the decree, when sent to this Court for execution, became in effect a decree of this Court. I think it is sufficient to refer to the case of *Tincowrie Dawn* v. *Debendra Nath Mookerjee* (I. L. R., 17 Cal., 491) and to the reasons there given for holding that this contention cannot prevail.

In my opinion the appeal fails, and must be dismissed with costs.

Trevelyan, J.—In my opinion the appeal and the suit both fail.

It is, I think, perfectly clear that the plaintiff has not a better right of suit against Brojo Nauth Dey's representative than she would have had against Brojo Nauth Dey himself, if he had been alive. His death cannot have altered her right of suit, although it may have changed the character of the relief.

It is equally clear to my mind that a suit similar to the present suit could not have succeeded against Brojo Nauth Dey, if he had been alive. It is based partly upon the mortgage and partly upon the decree. So far as it is based upon the mortgage, the right was merged in the decree of the 29th of September 1882, which was a mortgage decree drawn in the form prevalent in Mofussil Courts before the passing of the Transfer of Property Act, and directed the realization of the amount of the debt from the property mortgaged and other properties of the defendant. There could be no further rights on the mortgage, the right of the creditor having become that of a judgment-creditor. This suit, as based on the judgment debt, is barred by article 122 of the Limitation Act ; but, even apart from that provision, a suit would not lie to enforce a judgment debt, the execution of which is barred by the law of limitation.

It may be that the proceedings which have been commenced under section 272 of the Civil Procedure Code are capable of being carried on to some conclusion, but the mere fact that those proceedings are not extinct would not keep alive the decree so as to render it capable of execution otherwise

than by way of continuation of the proceeding so commenced. The terms of section 230 of the Civil Procedure Code would **[491]** expressly prevent another application for the execution of this decree.

Article 179 of the second schedule of the Limitation Act is also, in my opinion, applicable; more than three years have elapsed since there has been any step in aid of execution, and therefore an application would now be barred. It has been contended that article 180 applies. In my opinion the law of limitation is not altered by the transfer of the proceedings in execution. The decree does not become a decree of the High Court, although it may have to be enforced in the same manner as decrees of the High Court.

The argument is based upon an *obiter dictum* of Sir BARNES PEACOCK with reference to the meaning of another Act. The *dictum* was not approved of by the other four Judges who sat with the Chief Justice. The *dictum* is not now in point, as we have now to deal with Acts containing a different phraseology. I think it would be impossible to apply that *dictum* to the present case. The words of article 180 of the Limitation Act are, to my mind, too plain to be capable of the interpretation which Mr. *Pugh* seeks to put upon them, and there is nothing in the Civil Procedure Code to limit those terms.

Section 227 of the Civil Procedure Code directs this Court to execute the decree sent to it, in the same manner as if it had been made by this Court in the exercise of its Ordinary Original Civil jurisdiction. The "manner" of execution refers to the procedure under which the execution is to be had, and has no reference to the limitation. It simply applies the High Court machinery to the execution of the decree.

In my opinion the execution of the decree is, except perhaps in continuation of the proceedings already taken (a matter which we have not to deal with here), barred by limitation. That being so, the title of the plaintiff to bring this suit must fail. Moreover, I am inclined to think that the terms of section 244 (c) of the Civil Procedure [Code] would have prevented this suit being brought against the judgment-debtor, and therefore would bar the present suit; although having regard to the view I entertain as to the suit being barred by limitation, it is not actually necessary to decide this point. The only questions which are raised in this suit are **[492]** "questions arising between the parties to the suit in which the decree was passed or their representatives," and they relate to the execution of the decree. The object of this suit is apparently to obtain execution of the decree against some property other than that which was actually mortgaged. I cannot see why this question cannot, as between the parties, be determined by the Court executing the decree, and in the execution proceeding. The case of *Prosunno Coomar Sanyal* v. *Kali Das Sanyal* (I. L. R., 19 Cal., 683 : L. R., 19 I. A., 166) shows that a narrow construction ought not to be placed upon section 244, but that all questions which can possibly be determined in the execution proceedings should be so determined.

I would dismiss this appeal with costs.

Appeal dismissed.

Attorney for the Appellant: Babu *Kally Nath Mitter.*

Attorney for the Respondent: Babu *Ganendra Narain Dutt.*

H. W.

NOTES.

[I. A decree which directs the realisation of the decretal amount from the hypothecated property and, if insufficient, makes the defendant remain personally liable is a mortgage decree :—(1897) 25 Cal., 580. A decree which provided that the mortgaged properties be made liable for realisation of the decretel money was similarly treated :—(1898) 26 Cal., 166.

II. As regards the scope of sec. 244 C.P.C., 1882, (sec. 47 C.P.C., 1908 :) see also (1908) 35 Cal., 1100; (1907) 12 C.W.N., 614; (1909) 10 C.L.J., 336.

III. An application for attachment of certain property cannot be treated as an application to execute a decree which directs the sale of that property :—(1904) 28 Mad., 224.

IV. In (1907) 31 Mad., 24: 17 M.L.J., 441 it was observed that Art. 178, Limitation Act 1877, did not govern applications in respect of which the machinery of the Civil Procedure Code was not to be applied.

V. The exception relating to Art. 182, Limitation Act, 1908, makes the Court which passed the decree the test for determining the limitation for execution and not the Court to which the decree is transferred for execution :— (1911) 21 M.L.J., 777.]

[24 Cal. 492]

CRIMINAL REFERENCE.

The 3rd March, 1897.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Queen-Empress
versus
Manick Chandra Sarkar.*

Practice—Sanction to prosecute—Application for sanction—Criminal Procedure Code (Act X of 1882), sections 337, 339—Penal Code (Act XLV of 1860), section 302—Withdrawal of conditional pardon.

An application to the High Court for sanction to prosecute an approver for giving false evidence should be by motion on behalf of the Crown in open Court.

The withdrawal of the conditional pardon should be made, under section 339† of the Criminal Procedure Code, by the authority that granted it and not by the High Court.

THIS case was referred by the Sessions Judge of Nadia, asking the High Court to withdraw the conditional pardon offered by the Jointf Magistrate of Meherpur to an approver, and to sanction his **[493]** prosecution under section 339 of the Criminal Procedure Code. The reference was as follows :—

"Under section 339 of the Code of Criminal Procedure, I have the honour to request the High Court to withdraw the conditional pardon offered under section 337 of the Code of Criminal Procedure by the Joint Magistrate of Meherpur to the approver Ram Prosad Bahelia in the case *Queen-Empress* v. *Manick Chandra Sarkar* under section 302 of the Penal Code, as he has wilfully concealed in his evidence in the Court of Sessions everything connected with the murder and retracted his previous statement before the Joint Magistrate of Meherpur, a copy of which is hereto annexed. In this Court he stated that the statement was made, because of the beating he received at the hands of the Sub Inspector. The evidence of the *Punchayat* Chandra Kundu showed that the statement was not extorted from the prisoner by either subjecting him to beating or holding out threats to him. There is no chance of his successful prosecution under section 302 of the Penal Code, as he did not

* Criminal Reference No 1 of 1897 made by Kumar G. K. Deb, Sessions Judge of Nadia dated the 20th February 1897.

† [Sec. 339 :—Where a pardon has been tendered under section 337 or section 338, and any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, he may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter.

Commitment of person to whom pardon has been tendered.

The statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been withdrawn under this section.

No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.]

equally criminate himself with the prisoner Manick Chandra Sarkar; but it is clear that either his evidence given before the Joint Magistrate of Meherpur was false or that given at the Sessions Court on the 16th instant. I therefore request that this Court may be pleased to sanction his prosecution under section 193 of the Penal Code and under clause 3 of section 339 of the Criminal Procedure Code. The prisoner Manick Chandra Sarkar was unanimously acquitted by the Jury, mainly because the principal witnesses retracted their statements before the Joint Magistrate, thus causing a grave failure of justice in this case."

The **judgment** of the High Court (**Ghose** and **Gordon, JJ.**) was as follows:—

We are of opinion that an application for sanction to prosecute an approver for giving false evidence should be made by motion on behalf of the Crown in open Court, and not by a letter of reference, such as has been submitted by the Sessions Judge in the present case.

As to the other recommendation made by the Sessions Judge, we think that it is for the authority, which granted the conditional pardon, to withdraw it, and not for this Court to do so in the first instance under section 339 of the Criminal Procedure Code.

C. E. G.

NOTES.

[This was followed in (1908) 32 Mad., 47; see also (1906) 30 Bom., 611; (1908) 32 Mad., 173; (1901) 24 Mad., 321.]

[494] CRIMINAL REVISION.

The 3rd March, 1897.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

S. Cahoon..........Petitioner

versus

A. Mathews..........Opposite-Party.*

Penal Code (Act XLV of 1860), section 269--Negligent act—Refusal to allow person suffering from infectious disease to be removed to a hospital—Penal Code, sections 268, 270.

Where a mother refused to allow her daughter suffering from small-pox to be removed to a hospital in accordance with an order made by the District Magistrate, unless she accompanied her, and was convicted of an offence under section 269† of the Penal Code by the District Magistrate:—

Held, that no unlawful or negligent act had been committed within the meaning of section 269 of the Penal Code.

THE petitioner, Mrs. Cahoon, resided in a certain house in Howrah with her daughter and another person, Mr. Webber, who lived as a friend of the family without payment, and occupied a room adjoining that occupied by the daughter.

The daughter was attacked with small-pox, and accordingly the Magistrate of the District issued an order for her removal to the hospital. Mrs. Cahoon

* Criminal Revision No. 42 of 1897 made against the order passed by H. F. T. Maguire, District Magistrate of Howrah, dated the 14th of January 1897.

† [Sec. 269:—Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.]

Negligent act likely to spread infection of any disease dangerous to life.

resisted the execution of this order, and stated that, if her daughter was removed to the hospital, she must be removed also. Thereupon the petitioner Mrs. Cahoon was prosecuted summarily under section 269 of the Penal Code and sentenced by the Magistrate to four days' simple imprisonment.

On application to this Court Mrs. Cahoon obtained a rule calling on the Magistrate to show cause why the conviction and sentence under section 269 of the Penal Code should not be set aside.

Mr. *Jackson* (Dr. *Ashutosh Mukerjee*, Babu *Promothonath Sen* and Babu *Mahendranath Roy* with him) for the petitioner.—Under section 269 of the Penal Code doing an act is not the same as omitting to do an act. Wherever the Penal Code deals with the question of omission, it expressly says so. The petitioner did not try to get small-pox. What offence has she committed? Does any law **[495]** contemplate that a mother should under circumstances like these be separated from her daughter? The case of *Queen-Empress* v. *Krishnappa* (I. L. R., 7 Mad., 276) where a person entered a train suffering from cholera was different. Here it is suggested that the petitioner had a lodger. If she had, there is nothing to prevent him from leaving. But there is no evidence that there was a lodger. He was only a friend, who lives in one of the rooms without payment. Section 269 cannot apply to this case, because the petitioner has done nothing. Section 270 has less bearing still. Also section 268. How is a nuisance public which takes place in a private house? How can the petitioner be guilty of any offence for refusing to allow her daughter to be taken away, unless she (the petitioner) went with her?

No one appeared to show cause.

The **judgment** of the High Court (**Ghose** and **Gordon, JJ.**) was as follows:—

The facts of this case are very short and simple. The petitioner, Mrs. Cahoon, has been residing in a certain house in Howrah with her daughter; and a certain person (Mr. Webber), who is a friend of the family, lived with them without payment of any hire or anything else, occupying the room next to that occupied by the girl. The latter was attacked with a mild form of small-pox, and the Magistrate of the District issued an order that she should be removed to the Campbell Hospital. When this order was attempted to be carried out, Mrs. Cahoon objected, and said that, if her daughter be removed, "she must also be removed." Thereupon, a prosecution was instituted against her under section 269 of the Penal Code, the result being that she was convicted and sentenced to four days' simple imprisonment.

The case was tried summarily; and the Magistrate, after giving a brief analysis of the evidence, stated as follows:—

"It appears that the accused keeps lodgers in her house and that the witness lives in the next room to the girl who has small-pox, and there is every probability of the small-pox being still further disseminated over the town on account of her action. It seems therefore necessary that she, especially as she has been a nurse, and ought to know better, should be dealt with somewhat **[496]** severely." And in this view of the matter he convicted the petitioner as already mentioned.

Section 269 of the Penal Code occurs in chapter XLV, which is headed "of offences affecting the public health, safety, convenience, decency, and morals."

The first section, section 268, in that chapter lays down how a person may be guilty of a public nuisance; and the next section 269 provides:

"Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be likely to spread the infection of any

disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine or with both."

The Magistrate seems to have been of opinion (as we understand him) that because the accused kept lodgers in her house, there was every likelihood of such lodgers catching the disease (small-pox), and that, through them, the contagion might be spread over the town of Howrah. The Magistrate in his explanation, since submitted to this Court, repeats the same view, and states that the act of Mrs. Cahoon was illegal, the word "unlawful" as occurring in section 269 having at least the same import as the word "illegal" as defined in the Penal Code; and that therefore the conduct of Mrs. Cahoon comes under the head of "public nuisance."

Now, it appears to us that the initial mistake which the Magistrate fell into was that he considered that Mrs. Cahoon kept "boarders" or "lodgers" in her house. Of this, there is no evidence; the only person residing with the family at the time being a friend who lived not as a boarder or lodger and who was welcome to go away at any moment he pleased. Mrs. Cahoon was not responsible, if he chose to stay there, and by his own intervention incurred the risk of catching the contagion.

The word "illegal" is defined in the Penal Code, but the word "unlawful" is not: and there are various sections in the Code, where the two words are rather indiscriminately used. An act however may be lawful, though it may be illegal; and an act may be unlawful, though not illegal. But accepting the view of the Magistrate as correct, the question arises whe-**[497]**ther the act of Mrs. Cahoon amounted to a "public nuisance," and caused danger to "public health." She was living with her daughter in a house of which she was the owner or occupier. it was not a public house, she kept no lodgers or boarders, she kept her daughter in a room, and never took her out of the house, or to any public place. And we fail to see how by keeping the girl in the house, or opposing her removal to a hospital, she caused any "common injury or annoyance to the public or to the people in general, who dwell or occupy property in the vicinity" within the meaning of section 268, which defines what a public nuisance is.

What is really a public nuisance may be gathered from Chapter X of the Code of Criminal Procedure headed "Public Nuisance," and the procedure laid down therein for the abatement of such nuisance.

Turning then to section 269 itself, can it be said that the act of Mrs. Cahoon in keeping her child, though attacked with small-pox, was an unlawful or negligent act, and can it be said that, when she did so, or when she opposed the removal of the girl to a hospital, she knew or had reason to believe that it was likely to spread the infection of small-pox? We are unable to answer these questions in the affirmative. It was no doubt her duty, if she had the means, to isolate her child in such a way as not to spread infection to others; and apparently she did what she was bound to do; and we do not think that she committed any unlawful act by objecting to the removal of the girl to a hospital; and indeed it may well be said, that the carrying of the patient through a public street would be more risky to the public than keeping her in a private house.

We might in this connection refer to some of the observations of Lord BLACKBURN in the case of the *Metropolitan Asylum District* v. *Hill* [L. R., 6 App. Cas., 193 (205)] where the question to be decided was whether a small-pox hospital was a public nuisance, and where the duty not to spread infectious disease was considered. Lord BLACKBURN in the course of his judgment observed as follows: "Where those who have the custody of the person sick of an infectious

disorder have not the means of isolating him from the other inmates which is [498] very commonly the case with the poor, and consequently those other inmates and the neighbours are exposed to the risk of infection, I think that the inability to isolate him would form a sufficient excuse to be a defence to any indictment; and I think also, though I am not aware of any authority on the subject, that the neighbours could not maintain any action for the damage which they would in such a case sustain from the proximity of the infected person, it being a necessary incident to the use of property for habitations in a town that contagious sickness may befall their neighbours. If those who have the charge of the infected person have the means of isolating him on the spot, they certainly do well to use them, and, if it cannot be done on the spot, and they can, either by their own means, or by the aid of charitable persons who have erected an hospital, find a place where he can be isolated so as to avoid the risk of infection, they will do well to use these means. I do not mean to express any opinion as to whether, at common law, they would or would not be responsible for not doing so; but there is no authority, and I think no principle, for saying that they are justified in removing him to a place where the neighbours would be exposed to contagion, though it may be that those neighbours would be fewer in number than the neighbours of the spot where the infection broke out, nor for saying that, if that was done, and the contagion was such as to amount to a real nuisance, those neighbours might not maintain an action and obtain an injunction to protect themselves against the importation of foreign infection. For though, as I have already said, I think it an incident to the use of a habitation in a town that the occupier must bear the necessary risks of the inmates of a neighbouring habitation falling ill of a contagious disease, I do not think it an incident that he is to submit to his neighbours, wilfully though for very laudable motives, and not maliciously, bringing in contagion, where it did not previously exist, if the effect is not merely to alarm him, but to injure him. This, I think, is borne out by the decisions on the subject of inoculation." These observations are instructive in the present case

We are not aware under what authority the Magistrate issued an order for the compulsory removal of the girl from the private residence of her mother. In the city of Bombay, we understand, the authorities have power to remove persons suffering from infec-[499]tious diseases to hospitals, but no such power seems to have been conferred in this Presidency.

Upon the whole, we think, that the conviction in this case cannot be supported, and we accordingly direct that the rule be made absolute.

C. E. G. *Rule absolute.*

[24 Cal. 499]

APPELLATE CRIMINAL.

The 23rd February, 1897.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Queen-Empress

versus

Fattah Chand............Petitioner.*

Magistrate, Jurisdiction of—Disqualification of Magistrate to try case—Witness—Omission to record statement of accused under Code of Criminal Procedure (Act X of 1882), section 364—Order as to disposal of property as to which no offence has been committed—Criminal Procedure Code, section 517—Property found by Police in possession of accused.

Where a Magistrate before whom an accused person is brought omits to record (as provided by section 364 of the Criminal Procedure Code) statements made by the accused, he does not thereby make himself a witness, and so become disqualified from trying the case.

The accused was convicted of criminal breach of trust in respect of certain money belonging to the complainant, and on his conviction the Magistrate made an order under section 517 of the Code of Criminal Procedure, directing that an amount equal to the monies embezzled should be repaid to the complainant out of certain sums of money found by the police on the person of the accused.

Held, that the Magistrate had no power to make the order under section 517 of the Criminal Procedure Code, there being nothing to show that any offence had been committed with regard to the property, or that it had been used for the commission of any offence.

THE accused, who was a cashier in the employ of the complainant, a dealer in kerosine oil, was convicted by the Presidency Magistrate of Calcutta, Syud Ameer Hossein, under section 408 of the Indian Penal Code of criminal breach of trust in respect of certain monies belonging to the complainant. Upon the complaint being lodged the Magistrate issued a warrant for the arrest of the accused, who was brought up before the Magistrate under [500] that warrant. The accused thereupon made certain statements, which were not reduced to writing, but which were made before any evidence for the prosecution had been recorded. Subsequently the trial of the accused took place, and he was convicted and sentenced to two years' rigorous imprisonment. The Magistrate in the concluding portion of his judgment made the following order:—

"I direct that out of the money and ornaments recovered by the police a sum equal to the amount embezzled by the defendant in this case should be made over to the complainant, and the balance should remain with the police until further orders, pending the disposal of the other case; *vide* section 517 of the Code of Criminal Procedure."

When the accused was arrested by the police Rs. 6,000 worth of gold ornaments and Rs. 3,500 in notes and silver and *hundis* were found in his possession.

Mr. *P. L. Roy* (Babu *Atul Krishna Ghose* with him) for the Appellant.—The Magistrate ought not to have tried this case, having made himself a witness in the case, by allowing the accused to make this unrecorded statement to him.

* Criminal Appeal No. 918 of 1896, against the order passed by Nawab Amir Hossein, Presidency Magistrate of Calcutta, dated the 26th of October 1896.

Queen-Empress v. *Manikam* (I.L.R., 19 Mad., 263), *Empress* v. *Donnelly* (I.L.R., 2 Cal., 405). The statement of the accused should have been recorded under section 364 of the Code of Criminal Procedure. As regards the order of the Magistrate making over to the complainant a sum equal to the amount embezzled out of the gold ornaments found in the possession of the accused, I submit it should be set aside by this Court. [GHOSE, J.—We can set aside the order, but we have no jurisdiction over the complainant.] In *Empress* v. *Joggessur Mochi* (I. L. R., 3 Cal., 379) it was held that this Court could do so. The Magistrate by doing what he ought not cannot place himself beyond the jurisdiction of this Court. Weir, p. 1120. The case of *Basudeb Surma Gossain* v. *Naziruddin* (I. L. R., 14 Cal., 834) is no doubt against me, but I do not know that that is correctly based on the section. If the complainant does not obey the order, he will be punished for contempt of Court. [GHOSE, J. -Then he must be prosecuted as an offender.]

The *Advocate-General* (Sir *C. Paul*) (Mr. *C. Gregory* with him) for the opposite party.—The confession as made to the **[501]** Magistrate is no doubt bad. It ought to have been recorded. As regards the second objection I rely on the case of *Basudeb Surma Gossain* v. *Naziruddin* (I. L. R., 14 Cal., 834). This Court has no power to order restitution, if the property has been handed over. *In re Annapurnabai* (I. L. R., 1 Bom., 630). The Magistrate went beyond the provisions of section 517 in making the order.

The **judgment** of the High Court (**Ghose** and **Gordon, JJ.**) was as follows:—

The appellant before us, Fattah Chand, has been convicted by the Officiating Chief Magistrate of Calcutta of the offence under section 408 of the Penal Code, namely, of criminal breach of trust as a clerk or servant of the complainant, in respect of certain monies belonging to him. It appears that upon the complaint being lodged, the Magistrate issued a warrant for the arrest of the accused, and the latter was brought up before the Magistrate under that warrant. He then made certain statements which, however, were not reduced to writing. At the trial which subsequently took place, the Magistrate took evidence upon the charge preferred against the accused; and finding that the offence attributed to him had been proved, convicted him under section 408, and sentenced him to two years' rigorous imprisonment.

The Magistrate in his judgment refers to the statement that the accused made before him when he was brought up before him under the warrant; and says that, as no evidence for the prosecution had, at the time when the statements were made before him, been recorded in the presence of the accused, he did not like to record his confession. Mr. *Roy*, on behalf of the appellant, has contended that the Magistrate, by reason of his having heard the statements thus made by the accused, made himself a witness in the case, and thereby disqualified himself from trying the case; and, therefore, the whole of the proceedings should be quashed, and a new trial ordered before another Magistrate. We are unable to accept this contention as correct. No doubt, the Magistrate did not carry out the provisions of the Criminal Procedure Code in this respect; he was bound to follow the directions of section 364 of the Code of Criminal Procedure, and to have **[502]** recorded the statement of the accused in the manner therein indicated. And it may well be said, as, indeed, it has been said before us, that the Magistrate ought not to have allowed his mind to be in any way influenced in the consideration of the question before him by the statement made to him by the accused, which was not recorded as the law required. Notwithstanding this, we are not prepared to hold that the Magistrate, by reason of his having heard the statements made before him in open Court, made himself a witness in the

cause, and thereby disqualified himself from trying the case. In fact, there is hardly any matter upon which the Magistrate could possibly give his evidence in this case. If there were any, we should have been prepared to set aside the conviction, and send the case back for re-trial. Mr. *Roy* has quoted before us certain cases, which have held that, when a Magistrate becomes cognizant of facts otherwise than in the course of a judicial investigation of the case, or directs the arrest of the accused, or is otherwise interested in the result of the case, he is disqualified from holding the trial; but that is not the case here.

If, however, we were satisfied that by reason of what took place the accused was in any manner prejudiced, we should have been prepared to order a re-trial. There is plenty of evidence on the record, upon which it is clear that the offence under section 408 was committed by the accused; and we have no doubt that the conviction is right. We accordingly refuse to set aside the conviction and sentence.

The Magistrate, however, in the concluding portion of his judgment, said as follows: —

"I direct that out of the money and ornaments recovered by the police, a sum equal to the amount embezzled by the defendant in this case should be made over to the complainant, and the balance should remain with the police until further orders, pending the disposal of the other case, *vide* section 517 of the Civil Procedure Code."

It appears that when the prisoner was arrested by the police, Rs. 6,000 worth of gold ornaments, and Rs. 3,500 in notes and silver and *hundis*, were found in his possession.

The accused made over the same to the police; and the Magistrate upon the conclusion of the trial made the order which we have **[503]** just noticed, in accordance with, as he says, the provisions of section 517 of the Code of Criminal Procedure. Now, that section provides that "when an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal of any document or other property produced before it regarding which any offence appears to have been committed, or which has been used for the commission of any offence." The question which naturally presents itself to one's mind, when he is called upon to make an order under section 517 is, whether in regard to the property produced before the Court, any offence was committed, or whether the said property was used for the commission of any offence. Now, there is nothing to show upon the record that any offence was committed in regard to the property which the police found in the possession of the accused, or that it was used for the commission of any offence: and, therefore, the Magistrate had no authority whatsoever to make the order he did make. It is not necessary for us to refer to any authority upon this matter. The language of the law is clear enough, and if the Magistrate had only considered the provisions of section 517, he would not perhaps have made the order in question. We accordingly set aside that order.

We have been informed that the Magistrate has already given effect to his order under section 517, by delivering over the property to the complainant. That matter, however, is not at present before us, and we do not think it necessary to express any opinion upon the question as to how restitution could be made to the accused, now that we have set aside the said order of the Magistrate. We do not understand how, on the face of the third paragraph of section 517, the Magistrate could have passed an order for the delivery of the

property to the complainant before the time for preferring an appeal to this Court had expired, or before this Court had disposed of the appeal

C E G.

NOTES

[In (1898) 25 Cal, 630 it was held that there was no appeal from an order restoring possession of immoveable property under sec 522, Cr P C 1882, nor could such an order be regarded as an integral part of the judgment appealed from so as to stand or fall according as the judgment is upheld or reversed]

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[504] PRIVY COUNCIL

The 6th February, 1897

PRESENT

LORDS WATSON, HOBHOUSE AND MORRIS, AND SIR R COUCH

Amriteswari Debi ... Representative of the Original Plaintiff, Fanindra Deb Raikat

versus

The Secretary of State for India in Council ... Defendant

[On appeal from the High Court at Calcutta]

Forest Act (VIII of 1878), Chapter IX, sections 45 to 56 "of drift and stranded timber"—Right of Government, under section 45, to collect and store, with obligation to notify—Meaning of "julkur"—Test of Res judicata—*Civil Procedure Code (Act XIV of 1882), section 13*

The object of Chapter IX of the Indian Forest Act 1878, is to regulate the rights of owners and not to deprive them of their property in drift and stranded timber and wood. Section 45 of that Act does not divest the owner of or transfer to the Government any right therein. Nor does anything in the Act affect the right of the Government to take possession and dispose of timber and wood whereof they are the undisputed owners. But upon certain conditions only, the Government have a right to the possession of any drift and stranded timber and wood collected by their officers, which however may be claimed by the true owner, who may be a person holding a *julkur* or water right comprehending those things. The conditions are that the officers of Government shall store the timber in the manner and issue the notification required by the Act. In case of such procedure not being followed and the wood being treated as the property of the Government the latter are, in the event of the wood being found not to belong to them, in no better position than any other trespasser.

The title to collect given to the Government by the Act is coupled with, and dependent upon, the duty of giving notice to the public in order that the true owner, whether he be a person from whom the wood has drifted away, or the owner of a *julkur* or whoever he may be entitled, may claim the drifted timber in the manner and within the time prescribed by the Act.

There is no presumptive ownership of the Government save where their officers collect and hold, for the true owner in the first instance, subject to the statutory duty of giving notice.

The Government having taken possession of drift timber in the river Teesta as having an absolute right thereto, the zemindar owning land on the bank asserted by this suit his right to it, on the ground of his owning the *julkur* where the river passed by, and through, his lands. This *julkur* as he showed had been decreed in 1882 to his predecessor in estate, in a suit against the Government.

[505] *Held*, that this term, signifying water-right, was aptly used to include the right to drift and stranded timber as well as to fishings, or other interest of a similar kind in the produce of the river; a right decreed in the above suit.

The rule is that where a final decree is couched in general terms, the extent to which it ought to be regarded as *res judicata* can only be determined by ascertaining what were the real matters of controversy in the cause. That the question of the right to drift and stranded timber was included in the *julkur*, decreed in 1882, was, in their Lordships' opinion, established by intrinsic evidence in the record of that suit.

They concurred with the High Court that correspondence and orders by officers, of dates subsequent to the former decree, could not be received as aids to its construction. But the record showed that the right was in controversy before the judge and that he meant to include it in the *julkur*, which he decreed. The zemindar's claim was, therefore, adjudged to be established.

APPEAL from a decree (3rd September 1892) of the High Court, affirming a decree (23rd December 1890) of the Subordinate Judge of Jalpaiguri.

The appellant, the Rani Amriteswari Debi, was the executrix appointed by the will of her deceased husband, Raja Fanindra Deb Raikat of Baikantpur, to manage the estate which he left. This was a very old possession of the former Raikats on the frontier line of the Bhutan and Cooch Behar territories. After the submission of the Deb Raja, and the Raikat about 1772, the latter was placed in the position of an ordinary zemindar, a settlement and assessment to the revenue following. There was some change of *taluks* after the annexation of the Bhutan Doars. The zemindari was in the Jalpaiguri District, extending along the bank, and in some places on both banks of the river Teesta. The Raja who had instituted this suit died on the 22nd Magh, or 4th February 1896, pending this appeal, and left an only son, Prosunno Deb Raikat, a minor, having, by his will, appointed his widow to be guardian of the minor and manager of the estate.

The object of the present suit was to obtain a declaration against the defendant, that the plaintiff was entitled to all the wood found adrift, sunk, or stranded in that part of the Teesta lying between the Garumara Hills on the north and Mekhligunge on the south, and also to recover the value of the wood [506] appropriated by the Government within those limits during the three years before suit.

The question raised on this appeal was whether the appellant, as representing the proprietor of a zemindari on the bank, had a right to such wood in that part of the river. With this was connected the question whether the title to such wood had been determined in a suit brought by the late Raja's predecessor in estate, in 1882, against the present defendant. In that suit the *julkur* had been decreed. And now, whether this term comprehended all water-rights, so as to include the right to the wood, or had a more limited meaning, was involved as a question for decision. The suit was commenced on the 7th January 1890, in the Court of the Subordinate Judge of Rungpore at Jalpaiguri, claiming the above right on the ground that it had been exercised from time immemorial by the proprietor of Baikantpur. The plaint referred to the suit of 18th December 1882, in which the Rani Jagadeswari Debi, widow and executrix of a former Raja, Jogendra Nath Raikat, had obtained a decree for the *julkur*, within the above limits, against the Government; and stated the fact that this decree had been carried into effect, having been recognized by the local officers. Since July 1885, however, the zemindar had been prevented from collecting the drift wood by them. The right claimed was estimated at Rs. 9,000, and the mesne profits at Rs. 1,500 for the three years.

For the defence, the written statement denied that the plaintiff had any proprietary rights exerciseable by him in the river, or on any part of it, of the

character claimed. The right of the Government to the drift and stranded timber and wood was based on section 45 of the Indian Forest Act, VII of 1878. Under the provisions of that section and the rules made under section 51, published on the 3rd November 1887, the right to take all kinds of wood found sunk and adrift in the river Teesta or stranded on banks or churs, had been determined to belong to the defendant alone. If the defendant had taken the timber or wood in question he had legally exercised his own right. It was also alleged for the defence that in the suit of 1882 the only right claimed was a right of *julkur* which did not include the right now claimed.

[507] The issues framed in the suit raised the questions: (1) whether the plaintiff had a title to the timber and wood found adrift, sunk, beached or stranded, in the river between the places above mentioned? (2) Was the title of the plaintiff's predecessor thereto determined in the suit between the latter and the present defendant in the suit of 1882? (3) Has the defendant acquired a title to collect such timber under the Indian Forest Act, 1878, and under the rules, made thereunder, of 3rd November 1879?

On the 3rd November 1879, the Government published a notification under section 51 of the Indian Forest Act, declaring that this and other portions of the Teesta river was an area within which all unmarked timber shall be the property of the Government unless and until some person established his right and title thereto, under the provisions of that Act.

On the 18th March 1882, the plaintiff's predecessor brought the suit, No. 18 of that year, against the Secretary of State for possession of the *julkur* of the river Teesta over the same part of the river as that over which the right was claimed in this suit, and also for mesne profits.

Part of the judgment, given in 1882, and the decree, were as follows:— The Subordinate Judge found that the *julkur* in dispute was part of the zemindari rights of which permanent settlement was made with the ancestors of the then plaintiff who were in possession of the same for sixty years before the date of the dispossession alleged. Upon these facts he held that the "onus of proving *khas* possession is shifted on to the defendant;" *vide* I. L. R., 7 Cal., p. 591.

After reference to revenue papers, for several years anterior, the Court was of opinion that, as the Government had to show that they had a right to the *julkur*, and had failed to show it, there might, on the above, be a decree for the plaintiff; but it was added that evidence had been adduced by the plaintiff to show that in fact the *julkur* in dispute was settled with his ancestor as a part of the Baikantpur zemindari.

The judgment concluded thus:—

"The first two issues being found in his favour the plaintiff is undoubtedly entitled to mesne profits for the three years preceding suit, and from the date of suit to the date of recovery of possession. It appears from the [508] written statement of the defendant and from No. 72, cash book of the Forest Department, and No. 73, abstract account of revenue received on account of drift timber from the Teesta river, that the mesne profits for the three years preceding suit have been Rs. 7,181-13-6, and that the suit has not been laid at a larger value than it should have been laid at.

"A decree is therefore given to the plaintiff against the Secretary of State in Council for India for possession of the disputed *julkur*, and for Rs. 7,181-13-6 as mesne profits for the three years preceding suit, and for further mesne profits from the date of suit to the date of restoration of possession or until the expiration of three years from the date of this decree (whichever event first occurs), and for costs and interest at the rate of Rs. 6 per cent. per annum. Interest on the mesne profits before suit running from date of suit, and on costs

running from this date, and on mesne profits after date of suit from the end of the year for which they become due."

In consequence of this, possession of the *julkur* mehal in the Teesta, where bordered by the Baikantpur estate, was delivered to the then Raikat on the 9th August 1883, and the timber then in possession of the Forest officer was made over to him. His possession was undisturbed until the month of October 1884, when orders were received from the Government under which, in 1885, the Forest officers again took possession of all the drift timber and wood in that part of the river.

"*Julkur*" is stated in Wilson's Glossary to mean (p. 227) "water tax, profits, or rents derived from water, lakes, ponds, or the like, upon a tract of country or an estate, with the right of fishing, and of cultivating the beds if dry." At p. 580 it is said to be "largely used for a fishery, or right of fishing."

The record of the suit of 1882 was filed in the present suit in which the Subordinate Judge gave judgment of dismissal, concluding as follows:—

"The judgment and the decree of the former suit are no doubt conclusive evidence of the plaintiff's proprietary interest in the river in dispute, and it has been proved by the oral evidence adduced by the two parties in this case that the plaintiff's predecessors collected all drift wood and timber for about thirty years before the year 1870. But for the provisions of Act VII of 1878 and Government notification of the 3rd November 1879, the plaintiff would, in my opinion, be entitled to all drift wood and timber. Under the provisions of section 45 of that Act and the said notification, however, such wood and timber are to be deemed to be the property of Government unless and until any person establishes his right and title thereto as provided in Chapter IX of that Act; and to declare the plaintiff's title to all such wood [509] and timber in this suit would be to act directly against the provisions of the said Act and notification. This suit must consequently fail, and it is hereby dismissed with costs."

The High Court (NORRIS and MACPHERSON, JJ.) dismissed an appeal by the plaintiff.

After stating the object of the suit, the issues raised, and the decision of the Court below, the judgment continued thus:—

It is now contended for the appellant that the Subordinate Judge was wrong in his construction of the decree of 1882, that the matter is really *res judicata*, and that Act VII of 1878 is not in the way of the declaration sought. The respondent, while supporting the judgment so far as it is in his favour, contends that the evidence does not establish the existence of the right claimed.

The Notification of the 3rd November 1879, made under section 45 of the Forest Act, declared that this and other portions of the Teesta was an area within which all unmarked timber shall be the property of the Government, unless and until any person establishes his right and title thereto under the provisions of the Act.

The suit of 1882 was brought by the plaintiff's predecessor against the Government for possession of the *julkur* of the Teesta within the limits stated in the present plaint, and for mesne profits during the period of dispossession. The plaint, the written statement, issues, judgment and decree refer to the *julkur* only; but the mesne profits decreed included the value of drift timber appropriated by the Government, and the mesne profits afterwards obtained from date of suit to date of delivery of possession also included a sum of Rs. 2,718 on that account. There is also no doubt that the decree was treated, by at least the local officers of Government, as conferring on the plaintiff the right to drift timber within his estate, as on the 9th August 1883 the Deputy Commissioner publicly notified that the *julkur* mehal, including the right to take drift timber, had been made over to the decree-holder, and the latter continued to appropriate such timber till March 1885, when the Government, repudiating the construction which had been put on the decree, directed its officers to take possession of it. Unless, however, a *julkur* right includes the right to drift timber, it cannot, we think, be said that the question raised in this suit was raised and decided in the suit of

1882, notwithstanding the circumstances above referred to. The decree for mesne profits is good so far as it goes; but it does not determine prospectively the rights of the parties to every source of income included in them, and the misconstruction of a decree cannot give it a wider scope than it really has.

We know of no authority for the proposition that a *julkur* right includes the right now claimed, and we know of no instance in which such an extended meaning has been given to the term. The right to drift timber which is [510] carried on to an estate by the action of a river is not, as against the Crown, a right which is appurtenant to the ownership of the estate. A decree for the possession of an estate would not carry with it any such right as that now claimed, and a decree for a *julkur* right can have no higher effect. We think, therefore, that as the right was not expressly claimed in the previous suit or referred to in the pleadings, issues or judgment, the Subordinate Judge was right in holding that it was not conferred by the decree, which also does not allude to it. The plaintiff has put in copies of the depositions of a number of his witnesses to show that the exercise of the right was prominently brought forward; but this does not carry the case any further. We must hold, also, that the Subordinate Judge was right in deciding that the plaintiff cannot get the relief asked for. It is clear that he cannot recover anything in the shape of compensation for timber taken or appropriated in the face of the stringent provisions of sections 45 to 48 of the Forest Act. There is certainly no evidence that the timber was taken to a notified depot, and there is no evidence that the public notice prescribed by section 46 was given: two of the witnesses, indeed, say that there were no notices. But it is not the plaintiff's case that the provisions of the Act were not complied with by the Government officials, that he was unable consequently to prefer a claim and had no other remedy than that which he has resorted to in the present case; nor is it his case that he has suffered loss or damage from the neglect of the Government officials to comply with the provisions of the Act, which were set up as a bar to the suit. The existence of the Act is wholly ignored by him, and no question as to whether its terms had or had not been complied with was raised or considered in the Court below. It was, we think, for the plaintiff to raise that question if he wished to do so, and it is too late now to say that the case is outside the Act even if he could show it to be so.

As regards the declaration, it is argued that the Act does not interfere with vested rights. It does not do so in express terms; but we think the retention of a right, such as that claimed, is quite inconsistent with its provisions.

Section 45 enacts that, without any exception, all timber found adrift, beached, stranded or sunk, and in certain notified areas (including the area over which the right is claimed in this case) all unmarked wood and timber shall be deemed to be the property of the Government unless and until any person establishes his right and title thereto, as provided in Chapter IX; and Forest and other officers are empowered to collect such timber and to store it at notified depots. The following sections relate to the preferring of claims, the disposal of the same by Forest officers and the institution of a suit by persons whose claims have been rejected for possession of the timber claimed. Section 48 then provides that, subject to the claim or suit (if any), the ownership of the timber shall vest in the Government or in the person to whom it has been delivered under section 47.

The declaration which we are asked to make is, that timber found beached, [511]stranded or sunk in the plaintiff's estate shall be deemed to be the property of the plaintiff and not of the Government. Assuming for the moment that such a declaration could be made, the plaintiff, armed with it, might possibly so far defeat the presumptive title of Government. But the question of title as true owner would in many cases, and certainly in this case, still arise. The Government has an extensive forest on the east bank of the river, and the plaintiff has an extensive forest on the west bank. Under such circumstances, the ownership of the drift timber found in the river which divides the two forests must always be doubtful. If the effect of a declaration in the plaintiff's favour was to put the Government in the position of a claimant, that is to say, to throw upon it the burden of proof, the declaration would be clearly contrary to the spirt and letter of the law, and no

such declaration could be made. If it had not that effect, it would be valueless. The Government is empowered to collect and hold the timber as presumptive owner until some person makes good his right to it. *Prima facie* its title as true owner is as good as that of the plaintiff; the latter would still have to prove his ownership, and the declaration would not help him.

That it was the intention of the Legislature to give to the Government a presumptive title in all cases whether there was a vested interest or not appears further from the provisions as to unmarked timber, all of which it is empowered to collect within the limits over which the plaintiff claims to exercise this right, and to hold as owner until a title to it is established in accordance with the procedure prescribed. The presumptive title so conferred would not, we conceive, be defeated as between the plaintiff and the Government by showing that the timber was found adrift or stranded in the plaintiff's estate. It comes, in short, to this, that a declaration which had not the effect of defeating the obvious object and direction of the law would be valueless, and a declaration intended to produce that effect cannot of course be given. Looking at the provisions of Chapter IX of the Forest Act as a whole, we must hold that no declaration such as that asked for can consistently with the Act be given. There would, moreover, be great difficulty in framing it, as it must be subject to the right of Government, as well as of other persons, as true owner. "It was contended that the Government forests on the east bank of the river were at some distance from the bank. The evidence on the point is not quite consistent; but we must accept in this respect that of the plaintiff's first witness, the Assistant Conservator of Forests, who says that they are just on the bank. It is unnecessary in the view we take to determine the other questions, but we may say that if we had to decide them we should not differ from the lower Court. The appeal is dismissed; but we do not think it is a case in which we ought to allow the successful party his costs."

On an appeal from that judgment,—

Mr. *H. H. Asquith*, Q. C., and Mr. *C. W. Arathoon*, for the Appellant, argued that the judgment of the High Court was erroneous, both as to the effect of the proceedings, judgment, and **[512]** decree of 1882, and as to the powers conferred upon the Government by the Indian Forest Act, VII of 1878. As to the first of these points, it had been decided in the suits of 1882, between the representative of the late Raja's predecessor in estate and the Government, that the *julkur* rights, identical with those now in dispute, over the water of the Teesta, where it flowed past the Baikantpur estate, were vested in the zemindar. Reference to the proceedings and evidence recorded in that case, when read with the judgment and decree, showed that the decision of the Court in 1882 was meant to include the right to the wood floating, sunk, and stranded in the river over against the land owned by the zemindar of Baikantpur, within the limits specified. The defendant's present objections were barred, as matters already decided, under section 13, Civil Procedure Code. Those objections had been substantially and finally determined in the prior suit, in which the question,—To whom did the *julkur* belong—was decided, that term being the apt and proper word to express the water profits, which comprehended the right to take such wood. The plaintiff's predecessor had obtained the declaration in 1882, and the object now was to have the title cleared, proof having been given again as to the ownership of the drift and stranded timber. On this redundant evidence there could be no doubt that the plaintiff was entitled to the declaration now sought. The claim to the mesne profits should be decreed upon the general right being established, the latter being the principal object. On the second point, the Forest Act of 1878 had not transferred to the Government any right belonging to the zemindar. Its effect and meaning were to impose a duty on the Government to store the drift and stranded timber which their servants were to collect, and to issue a notice of their

having done so, in order that the true owner might come forward to claim it. The section 45, on which the defence rely, did not bear out the judgment of the High Court.

Mr. *A. Cohen*, Q.C., and Mr. *J. H. A. Branson*, for the respondent, argued that the suit of 1882 had not dealt with, nor decided the question now raised in this suit. If the right to drift timber was determined in that suit, it was only the title to such drift timber as was comprised in the mesne profits awarded in that suit, and the term *julkur* had not the wide application contended for on behalf of the appellant. It was apparent that the floating timber [513] in the river might be the property of any one of a variety of persons, and it was with reference to the rights of those persons that the Forest Act, 1878, was framed. To that Act the present claimant should adhere; for the Government, under that Act, were perfectly right in collecting, and remaining in possession of, that timber until a title to it should be shown. The question now raised was of importance, for it could not be conceded that a riparian proprietor should be considered the owner of all, or any, drift timber that floated past lands from distant places, however far. No *julkur* would be of this wide significance. The object of the Act was to protect existing rights in the owners of timber; but the claim of the appellant had been made independently of, and consequently in disregard of, the proceedings prescribed by the Forest Act.

It was not disputed that *julkur* in the former decree included any water-rights that the zemindar could claim under settlement proceedings, concluded between him and the Revenue Department. But he could not make title to drift timber (as to which the work on "Forest Law," by Mr. B. H. Baden-Powell, C.I.E., was referred to) as against the Government in possession, except under the provisions of the Forest Act, 1878.

Counsel for the appellant was not called upon to reply.

Afterwards on February 6th, 1897, their Lordships' **judgment** was delivered by

Lord Watson.—Their Lordships think that the various points of controversy which are raised by this appeal will be rendered more intelligible if, before noticing the facts of the case, they refer at once to the provisions of Chapter IX of the Indian Forest Act, No. VII of 1878. The difficulties which have arisen in the disposal of the case appear to them to have been mainly occasioned by a misconception of the true import of these provisions.

Chapter IX of the Act runs upon the same lines as the British Act 9 and 10 Vict. cap. 99, the main object of which was to protect the true owners of ships and goods stranded or cast on shore against depredations by persons having no title, and also against any interference with their rights by landowners having grants from the Crown of wreck of the sea, and of goods *jetsam*, [514] *flotsam lagan* or derelict. That object is effected by the appointment of officials whose duty it is to take charge of such wreck or goods, and, after due notice to all who may have an interest, to deliver the same to the true owners, and failing them to the Lord of the Manor who can show a valid title by grant from the Crown.

Chapter IX of the Indian Act, which is entitled "of the Collection of Drift and Stranded Timber" comprises sections 45 to 51, both inclusive. Section 45 provides that (1) all timber found adrift, beached, stranded or sunk, (2) all wood or timber bearing marks which have not been registered under section 41 of the Act, or on which the marks have been obliterated, altered or defaced, and (3) in such areas as the Local Government directs all unmarked wood and timber "shall be deemed to be the property of Government unless and until any person establishes his right and title thereto, as provided in this chapter." The same

clause enacts that such timber may be collected by any Forest officer, or other person duly authorised under section 51, and taken by him to such depots as the Forest officer may from time to time notify as depots for the reception of drift timber.

Section 46 makes it the duty of the Forest officer from time to time to give public notice of timber collected under the preceding section, containing a description of the timber, and requiring any person claiming the same to present a written statement of his claim, within not less than two months from the date of notice. Section 47 enacts that when such statement is presented to him the Forest officer may, after making such inquiry as he thinks fit, either reject the claim (in which case he is bound to record his reasons for so doing), or deliver the timber to the claimant. When there are more than one claimant, the Forest officer may either deliver to those of the claimants whom he deems entitled, or may refer them to the Civil Courts, retaining the timber pending the receipt of an order from the Court for its disposal. Any person whose claim has been rejected may, within two months from the date of such rejection, institute a suit to recover possession of the timber claimed by him, but it is expressly provided that no person shall recover any compensation or costs against the Government, or against any Forest officer, "on account of [515] such rejection, or the detention or removal of any timber, or the delivery thereof to any other person under this section." Lastly it is provided by section 46 that no such timber shall be subject to process of any Civil Criminal or Revenue Court, until it has been delivered or a suit brought as therein provided.

Section 18 enacts that if any claimant fails, within due time, to avail himself of the remedies prescribed by section 17, the ownership of the timber shall vest in the Government, or when such timber has been delivered to another person under section 17, in such person, free from all encumbrance. Section 49 enacts that the Government shall not be responsible for any loss or damage which may occur in respect of any timber collected under section 45; and that no Forest officer shall be responsible unless he causes such loss or damage "negligently, maliciously or fraudulently."

In their Lordships' opinion, the Act of 1878 has not the effect of taking away from private owners, and vesting in Government, any rights to drift and stranded timber which they possessed before and at the date of its passing, except in so far as these rights may be affected by their failure to prefer their claims, in the manner and within the time prescribed by the Act. The object of the Act is not confiscation, but regulation; and these rights remain as they were, but subject to the important qualification that they can no longer be exercised by proprietors, at their own hand, and at their own discretion. When the timber is collected by the Government officers, it does not at once become the property of Government, but is held by them for behoof of the person who can show the best title, whether as the true owner who has never abandoned his interest, or as the grantee of a water right to timber which is waste or derelict. Neither of these parties can enforce his claim except against the Government, after it has taken possession through its officers; and if the Government dispute his right, or deliver the timber to an opposing claimant, he can have no redress either against the Government, or against the person to whom delivery have been made, unless he follows the procedure prescribed by the Act. Possession taken by the Government in terms of the Act, and for the purposes of the Act, being lawful and not tortious, can give rise [516] to no claim for mesne profits, even if such a claim were not excluded by section 49.

In March 1882, the legal guardians of Jagadindra Deb Riakat, then owner of pergunnah Baikantpur, and mouzah Kharia, in the collectorate of Julpaiguri, to which the appellant has now succeeded, brought an action against the Secretary of State for India, upon the allegation that the *julkur* or water-right of the river Teesta within the boundaries of his zemindari belonged to him, and had been possessed by his predecessors from before the time of the Decennial Settlement. The plaint further alleged that his father and predecessor, Jogendra Deb Raikat, had been illegally dispossessed of the said *julkur* by the Government, and prayed (1) for a decree of his right to the *julkur* claimed, and (2) for a decree for three years' mesne profits of the same. A written statement was lodged for the defendant, which consisted in a denial of all the material averments of the plaintiff, and made no reference whatever to the Indian Forest Act of 1878. It is clear that at that time the Government, to whom the right would have belonged, in the alleged absence of any title in the plaintiff, was asserting an exclusive claim to the disputed *julkur*.

Issues were adjusted by the Subordinate Judge of Rungpore, the issues upon the merits of the action being: "Is the *julkur* in dispute a part of the zemindari of which permanent settlement was made with the ancestors of the plaintiff? And were the ancestors of the plaintiff in adverse possession of the same for sixty years before the date of dispossession? Is the plaintiff entitled to any mesne profits, and to how much?" The learned Judge, after hearing and recording evidence, found for the plaintiff upon all of these issues, and, on the 18th December 1882, gave him a decree for possession of the *julkur* of the river Teesta within certain specified limits, and also for a sum of mesne profits.

In the foregoing suit, neither the prayer of the plaint nor the final decree of the Subordinate Judge contain any enumeration of the different items which were meant to be comprised in the term *julkur*. But their Lordships are satisfied that the term is a general one, signifying "water-rights," -a proposition which was not disputed by Counsel for the respondent in this appeal, —and [517] might therefore aptly include the right to drift and stranded timber, as well as the right to fishing, or any other interest of a similar kind in the produce of the river.

In February 1890, the present suit was brought by Fanindra Deb, the proprietor of pergunnah Baikantpur, and mouzah Kharia against the Secretary of State for India in Council, and is now insisted in by his widow and executrix, who is the guardian of his minor son. The plaint narrates the proceedings in the suit of 1882 · and, on the allegation that the local officers of the Government "will not allow the plaintiff to take the drift wood of the said river Teesta, and the wood sunk in the water, and found in the bed of the river, and stranded on the chur," it prays (1) a decree declaring the plaintiff's right to such wood, and (2) a decree for mesne profits. The limits of the *julkur* right thus claimed are the same with those assigned by the decree of the Subordinate Judge in the previous suit. In his written statement, the defendant averred that, in the said suit, "a decree was passed in favour of the plaintiff's predecessor, only for the *julkur* right (fishery right), *i.e.*, right to fish, with mesne profits. No issue was raised with regard to drift wood, or wood sunk and stranded in the said river, and there was no adjudication of any title to such wood." The defendant also alleged and pleaded that, under section 45, Act VII of 1878, the right to take all kinds of wood found sunk and adrift in the river, or stranded on the bank side, bed or chur, belonged to the defendant alone, and that the defendant had consequently acted in the legal exercise of his own right. Mr. Justice W. MACPHERSON,

one of the learned Judges of the High Court, has observed in this case, that "there is certainly no evidence that the timber was taken to a notified depot, and there is no evidence that the public notice prescribed by section 46 was given; two of the witnesses, indeed, say that there were no notices." Their Lordships see no reason to doubt that the observation is well founded. It appears to them the defendant and his officials or advisers laboured under the misapprehension that section 45 transferred to the Government and divested private owners of the right of property in drift and stranded timber, which they previously possessed. The provisions of the Act do not affect the right of the Government to take possession of [518] and dispose of drift or stranded timber of which it is the undisputed owner; but it is clear, beyond a doubt, that under these provisions the Government has no title given it to collect timber which may possibly be claimed either by the true owner, or by a riparian proprietor having a *julkur* right, except upon the condition of its storing such timber, and of giving the notices required by the Act. In cases where it neglects to follow that procedure, and treats the timber as its own property, the Government, in the event of its being found that the property does not belong to it, is in no better position than any other trespasser.

The pleadings of the parties make it abundantly clear that the only substantial controversy betwixt them, in the present case, related to the legal import of the decree which had been obtained by the appellant's ancestors in the suit of 1882. So far as it goes, that decree, being *inter eosdem*, is *res judicata*, and binding upon both parties to this litigation.

The officiating additional Subordinate Judge dismissed the suit with costs. He held that the decree in the previous suit established beyond question the proprietary right of the plaintiff's predecessor in that part of the river Teesta which is referred to in the plaint; but that no question arose in that suit, or was therein decided, as to the title to collect the wood and timber found adrift within its limits. He was of opinion that, but for the provisions of Act VII of 1878, the plaintiff would be entitled to all drift wood and timber; but he held that under the provisions of section 45 such wood and timber are to be deemed the property of Government until any person establishes his right thereto, as provided in Chapter IX: and that to declare the plaintiff's title as prayed would be directly to contravene the provisions of the Act. The learned Judge had obviously failed to apprehend that the Government had not collected the timber under the Act, and had given no notice of its having done so with the view of delivery being made to the true owner; but had taken possession, in the assertion of its own exclusive right, and was impeaching the plaintiff's *julkur* title, which the learned Judge held, apart from the provisions of the Act, to be unquestionable.

The case was carried to the High Court at Fort William, who [519] dismissed the appeal. The Court, consisting of NORRIS and MACPHERSON, JJ., were of opinion that, inasmuch as the right to drift timber was not expressly claimed in the suit of 1882, or referred to in the pleadings, issues or judgment, the right was not conferred by the decree which does not make express mention of it. Mr. Justice MACPHERSON, who delivered the opinion of the Court, said: "The Government is empowered to collect and hold the timber as presumptive owner until some person makes good his right to it. *Primâ facie* its title as true owner is as good as that of the plaintiff; the latter would still have to prove his ownership." In one sense these statements may be correct, but they are imperfect. They omit all notice of the fact that the Government's statutory title to collect is coupled with the duty of giving notice of what it has collected to the public, in order that the true owner of the timber, whether he be the person from whom it has escaped, or a riparian proprietor, may have the

opportunity of reclaiming his property in the manner prescribed by the Act, and that such title is made dependent upon the performance of that duty. The true owner can have no such opportunity in cases where the Government takes possession of timber, as in its own absolute right, and neither conveys it to a depôt, nor gives notice to the public. Their Lordships are of opinion that, when such a case does occur, there is no provision in the Act of 1878 which can hinder the true owner from having his remedy, by a direct action, against the Government. The so-called presumptive ownership of the Government does not, in their opinion, exist, save in those cases where the Government collects and holds for the true owner in the first instance, and subject to the statutory duty of giving him due notice.

Their Lordships would, if it were necessary, be disposed to hold that the decree pronounced in the suit of 1882 must, *primâ facie*, and in the absence of anything calculated to limit its effect, be held to include every right and interest, which is in the nature of a water-right. That it was meant to embrace and did embrace the right to drift and stranded timber is, in their opinion, clearly shown by an examination of the record; and they cannot avoid the observation, that, in the Court below, sufficient attention has not been paid to the rule that, in cases where a final decree is couched in general terms, the extent to which it ought to be [520] regarded as *res judicata* can only be determined by ascertaining what were the real matters of controversy in the cause. All the witnesses for the plaintiff in the suit of 1882 speak to the possession of drift wood by him and his predecessors; and, with two exceptions, all of them were cross-examined on that point by the defendant. Again, in his judgment, the Subordinate Judge, after finding for the plaintiff upon the issue with respect to mesne profits, goes on to say: "It appears from the written statement of the defendant, and from No. 72, cash book of the Forest Department, and No. 73, abstract account of revenue received on account of drift timber from the Teesta river, that the mesne profits for the three years preceding suit have been Rs. 7,181-13-6." Accordingly, for that sum the learned Judge gave a decree against the defendant; and, in the opinion of their Lordships, there could hardly be more satisfactory and intrinsic evidence, that the question of right to drift and stranded timber was a matter in controversy before him, and that he meant to include that right in the *julkur* which he decreed. Their Lordships agree with the learned Judges of the High Court in thinking that such extrinsic evidence as correspondence and orders by officers of the Government, of dates subsequent to the decree, cannot be received as aids to its construction.

Their Lordships, for these reasons, are of opinion that the appellant is entitled to a decree affirming that the right of the minor to drift and stranded timber is included in the decree obtained by his predecessor, that being the only relief for which her Counsel insisted. An order in these terms will have the effect of ousting the claim of the Government to take possession of such timer, within the limits specified in the decree, upon the footing that it has an absolute right of property therein; and will not hinder the Government from collecting and storing the timber, if it thinks fit, in terms of the Act, for behoof of the appellant, or of any other person who can show a better title.

Their Lordships will humbly advise Her Majesty to reverse the judgments appealed from; to find and declare that the right to drift and stranded timber is included in the *julkur* which was decreed to the predecessor of the minor by the Subordinate Judge of Rungpore, on the 18th December 1882, and to find the

appellant [521] entitled to her costs in both Courts below. The respondent must pay to the appellant her costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondent: *The Solicitor, India Office.*

C. B.

NOTES.

[I. In (1914) 22 I.C. 844, (Cal.), the term *jalkar* was held not to include a right to snare water-fowl.

II. The Crown was held in (1913) 15 M.L.T. 121 not to have a right of ownership in drift-wood on Indian rivers.

III. The pleadings and even the evidence may be gone into to ascertain whether the decree makes certain matters *res judicata*.—(1910) 10 I.C. 748 : 13 Bom., L.R. 162.]

[24 Cal. 521]

APPELLATE CIVIL.

The 6th July, 1896.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE HILL.

Miajan............Plaintiff

versus

Minnat Ali and others............Defendants.*

Bengal Tenancy Act (VIII of 1885), s. 22, clause (1)—Effect of Purchase, by Talukdar, of raiyats' holding.

If a *talukdar*, at a sale in execution of a decree obtained by him against a raiyat, purchase the *raiyat's* interest, such purchase does not extinguish the holding, but merely divests it of the right of occupancy (if any) attached to it.

Jawadal Huq v. *Ram Das Saha* (*ante*, p 143) followed.

THE owners of a certain *putni taluk* obtained a decree for rent against a *raiyat*. In execution of that decree they brought to sale his *raiyati* holding and purchased it themselves. They then sold it to the plaintiffs, the rent payable being the same as the previous holder had paid. Prior to the sale of the holding the defendant had purchased from the defaulting tenant a portion of his holding; and after the purchase by the plaintiff, he opposed the plaintiff in getting possession of the land.

The plaintiff thereupon instituted a suit for possession. The Munsif held that the *kobala* under which the plaintiff claimed could be treated at any rate as a lease, and passed a decree for possession in favour of the plaintiff. On appeal to the Subordinate Judge this decree was set aside, on the ground that the plaintiff acquired nothing by his purchase from the *talukdars*, there being nothing to transfer. The plaintiff appealed.

[522] Babu *Gobindo Chunder Das*, for the appellant, after stating the facts, was stopped by the Court calling upon the respondent's pleader.

* Appeal from Appellate Decree No 556 of 1894, against the decision of Babu Gopal Chandra Bose, Subordinate Judge of Tipperah, dated the 3rd March 1894, reversing a decision of Babu Romesh Chunder Sen, Sudder Munsif of Comillah, dated the 24th February 1893.

Babu *Akhoy Coomar Bannerjee* for the respondents.—After the purchase by the landlords the right of occupancy ceased to exist. [MACPHERSON, J.—There is nothing to prevent the landlords from buying up the right of occupancy; and, if they do, the holding remains in abeyance. They can sell that if they choose.] It is the vendee who is now suing for ejectment. He must prove such a title as will enable him to eject the defendant. The right intended to be sold was the right of occupancy, which did not exist. It is not as if they had created a new tenancy with the right of occupancy; there was no such intention.

The **judgment** of the Court (**Macpherson** and **Hill, JJ.**) was as follows:—

The Lower Appellate Court is, in our opinion, wrong in the view which it has taken of the plaintiff's position. The facts are shortly these: There was a certain *putni taluk* subject to which there was a *raiyati* holding held by one Sameer. The *talukdars* obtained a decree against him for arrears of rent, brought the holding to sale, and purchased it themselves. After their purchase they sold it to the plaintiffs for a sum of Rs. 230, the rent payable being the rent which had been paid by the previous holder.

The defendants had, prior to the sale in execution of the rent decree, purchased a portion of the holding from the defaulting tenant, and they oppose the plaintiff in getting possession of the land.

The plaintiff asks that possession may be given to him on the strength of his purchase of the *raiyati* holding.

The Lower Appellate Court holds that what was sold at the execution sale was the occupancy right; that that right and the holding were extinguished when the landlords purchased; that, in point of fact, they purchased nothing, and that consequently the plaintiff took nothing by his purchase from them.

That, we think, is an erroneous view of the position of the parties. Assuming that Sameer had a right of occupancy in the land, there is nothing in the law which prevented the landlords **[523]** from purchasing an occupancy holding. What the law does say is that if the landlords do, as landlords, purchase such a holding, the right of occupancy shall cease to exist. In the case of *Jawadul Huq* v. *Ram Das Saha* (*ante*, p. 143) decided a few days ago by a Division Bench of this Court under section 15 of the Letters Patent, it was held, with reference to the second clause of section 22, that if one of several co-sharers purchase an occupancy holding, the purchase did not put an end to the holding, but that the holding remained divested of the right of occupancy. In the same way, under clause 1 of section 22, we think that the effect of a purchase of an entire occupancy holding by the landlords is not necessarily to put an end to the holding but to divest it in their hands of the right of occupancy, if any, which is attached to it. The defendants in the present case stand in no higher position than the defaulting tenant: they were bound by the sale, and have no existing right, and it is conceded that they could not resist the landlords in taking possession of the land. It seems to us unnecessary to consider the exact nature of the right which the plaintiff acquired by his purchase. That is a matter to be decided between him and his vendors. If his vendors acquired a right as against the defendants to this holding and to *khas* possession of it, there is nothing to prevent their giving the holding to the plaintiff and conferring on him the right to hold it as their tenants. We know of no law which prevents landlords from purchasing a holding and disposing of it. It does not seem to make very much difference whether they being the landlords dispose of the old holding under its old name, or whether they dispose of it as a holding newly created. We

think the Munsif was right in holding that the effect of the *kobala* was to create the relationship of landlord and tenant as between the *talukdars* and the plaintiffs. It gives the plaintiff a right to the possession of the holding as their tenant and fixes the amount of rent payable for it. That being so, the appellant is entitled to eject the defendants, who have no right at all.

In this view of the case, the judgment of the Lower Appellate Court must be set aside and the decree of the first Court restored. The appellant will get his costs in both the Courts.

H. W. *Appeal allowed.*

NOTES

[See *ante* (1896) 24 Cal., 143, also (1905) 32 Cal., 386 9 C.W N., 249. 1 C.L.J., 1. 12 I.C., 249]

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[524] *The 1st March, 1897.*

PRESENT.

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Mohamed Abdul Hafiz and others........... Defendants

versus

Latif Hosein............Plaintiff.*

Jurisdiction of Civil Court Right of suit - Suit for declaration of right to carry religious emblems in a procession and for damages.

A suit for declaration of right to carry religious emblems in a procession through the streets of a village, and for damages for preventing the plaintiff from doing so, lies in the Civil Court

In a case in which a Mahomedan of the *Shia* sect, claiming to be a part-owner of a village, was prevented by a number of the rival sect of *Sunnis* from introducing the emblems of a standard and flags and a *massak* pierced by an arrow, in the procession of *tazias* during the *Mohurrum*, it was held that a suit of this description would lie, either on the footing that the roads were roads of which the public had the use, or on the footing that the plaintiff had a right as one of the sharers in the village.

THE facts of this case sufficiently appear from the judgment of the High Court. The plaintiff obtained a decree in the lower Court, declaring his right to carry or cause to be carried the *Alam*, a standard to which is attached a *pharhara*, a *massak* (a leather bag for carrying water) pierced with an arrow, through the lanes and pathways of *mouzah* Pali, awarding damages, and ordering the defendants not to interfere with the plaintiff.

The defendants appealed to the High Court.

Moulvie *Mahomed Yusuf*, Moulvie *Syed Shumsul Huda*, Moulvie *Mahomed Ishfak*, Moulvie *Syed Mahomed Tahir*, Moulvie *Mahomed Mustafa Khan* and Moulvie *Mahomed Habibullah* for the Appellants.

*Appeal from Original Decree No. 362 of 1894, against the decree of Babu Brijmohun Pershad, Subordinate Judge of Gya, dated the 27th of August 1894.

The *Advocate-General* (Sir *Charles Paul*), Babu *Saligram Singh* and Babu *Mohabir Sahay* for the Respondents.

The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ.**) was as follows:—

Although this appeal at first sight appeared somewhat formidable, and we were led to expect that very serious questions, having an important effect upon the religious rights of the Mahomedan community, had to be considered in it, yet soon after the **[525]** opening of the appeal by the learned Moulvie who appeared for the appellants had commenced, it became abundantly apparent that there was no substance at all in the appeal.

This suit owes its origin to an unfortunate dispute between the *Shea* and *Sunni* inhabitants of a village called Pali in the district of Gya, and it is much to be regretted that the good sense of the members of the Mahomedan community in that village did not prevent, not only the expenditure of the money which has been thrown away in this litigation, but also the expression of the high and intemperate feeling which was shewn in this matter. It seems that the plaintiffs and the defendants are sharers in the village. The plaintiff is a *Shea*, and desired at the *Mohurrum* to take through the streets or lanes of this village a procession, which, besides including *tazias* which are admittedly innocuous, was to include a standard and flags and a *massak* pierced by an arrow. For the first time apparently he contemplated adding these emblems of his own branch of the Mahomedan religion to the procession. This was resented by some of the *Sunni* inhabitants of the village, and threats were offered of violence in case the plaintiff carried out this contemplated procession. Certain communications were made by the defendants to the officers of the police, and the procession was stopped in that particular year. The plaintiff then, in order to assert his rights, brought this suit in the Civil Court. The defence was shortly that a suit of this kind will not lie, and then by evidence it was sought to make out that emblems of the description that the plaintiff sought to have carried in his procession would cause very great and bitter offence to the *Sunni* members of the community in that village.

It is quite clear to us that the Subordinate Judge is right in holding that a suit of this description will lie either on the footing that the roads were roads of which the public had the use, or on the footing that the plaintiff had a right as one of the sharers in this village. Every person who uses a highway for a legitimate purpose, that is to say, for the purpose of walking along it alone, or even as a member of a procession which is allowed by law, and which is inoffensive to the community, is entitled to go along that highway without any impediment; and the man who obstructs him in the use which the law gives him **[526]** of that highway may be liable to have a civil suit brought against him. The cases in which it is laid down that a private right of action does not lie in respect of an offence against the public relating to a highway, unless special damage is proved, can have no application to the present case, for two reasons: in the first place, because here the plaintiff's private right was infringed; and, secondly, because there was actual damage resulting to him from his being prevented from using this highway in the manner permitted him by law. He is not suing here simply as a member of the public which has been aggrieved, but as a private individual who has himself suffered a private and individual wrong. A number of cases have been mentioned by the Subordinate Judge, and he has, we think, come to a right conclusion that the suit will lie.

There is practically little else in the case. The story why these emblems are carried has been related; and, although to some extent, they commemorate events, the memory of which may be calculated to create antagonism between these two sects of the Mahomedan religion, yet, having regard to the

evidence in the case, it is quite clear that no reasonable member of the *Sunni* sect could be offended by emblems of this kind.

The learned Moulvie, who argued the case before us for the appellant, with his usual fairness pointed out evidence which had been given on the *Shea* side of the controversy, that is, on the plaintiff's side, by an independent *Sunni*, namely, Mahomed Ehya, whose position is such that the learned Vakil for the appellant, not only did not venture to attack him, but used words expressive of the high position he occupied in the Mahomedan community. This gentleman is a *Sunni*. He is apparently a gentleman of some position. He is a pleader and an Honorary Magistrate of Patna. He is also a Superintendent of the Jama Masjid in the Madarsa Mahalla of Patna. Therefore, having regard to his position as a lawyer, he is a person on whose evidence we might fairly rely, and having regard to his position as a Superintendent of the Jama Masjid, he is a person who might be expected to be acquainted with the rules and customs, not only of his own co-religionists but also of those belonging to the *Shea* sect. After referring to the way in which these emblems are carried about he **[527]** says: "The taking out of the *Alam* is no contempt of the *Sunni* religion." There is, we are told, no independent evidence of any *Sunni* of any position which shows that the *Sunni* community would be in any way offended by a procession of this kind. That being so it is perfectly clear that a procession of the description contemplated by the plaintiff is inoffensive to the *Sunni* community, and is one which the plaintiff is entitled to inaugurate in accordance with law. It is very commendable, we may here notice, that, instead of doing as many others might have done under similar circumstances, that is taking the law into his own hands, the plaintiff resorted to a Court of Justice which would be able to determine a matter of this kind free from the heat of any religious feeling. It is not necessary for us to say more on this subject.

It is complained that the plaintiff ought not to have had given to him such a large sum as costs. The plaintiff was compelled to go into Court. The matter of costs is a matter within the discretion of the Court, and we see no reason to interfere with what the lower Court has awarded to the plaintiff.

There are cross-objections by the respondent as regards damages. The Court below has awarded Rs. 50 as nominal damages. The plaintiff complains that he ought to have got more. But having regard to all the circumstances, and to the fact that this was the first occasion that the right was claimed, and that the object of the suit was to enforce that right and clear away any objection which might be raised with regard to a procession of this kind, we think that the learned Subordinate Judge was right in giving nominal damages only.

The result is that the appeal must be dismissed with costs, and the cross-objections disallowed.

S. C. C. *Appeal dismissed.*

NOTES.

[As regards the right of processions, see the Privy Council decision in **(1907) 30 Mad., 185.**]

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[528] CRIMINAL REVISION.

The 17th March, 1897.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Grish Chunder Roy............Petitioner

versus

Dwarkadass Agarwallah............Opposite Party.*

Complaint, dismissal of—Revival of proceedings—Right of appeal—Criminal Procedure Code (Act X of 1882), sections 423, 439.

Where a complaint was dismissed by an Honorary Magistrate and an application was made to a Presidency Magistrate on the same facts and materials for a fresh summons:

Held, that as a Presidency Magistrate has co-ordinate jurisdiction with an Honorary Magistrate, there was no right of appeal to the Presidency Magistrate from the order of the Honorary Magistrate.

The proper course would be to apply to the High Court under sections 423† and 439 of the Criminal Procedure Code to set aside the order and direct a retrial.

Nilratan Sen v. *Jogesh Chundra Bhuttacharjee* (I.L.R., 23 Cal., 983), approved *Virankutti* v. *Chiyamu* (I. L. R., 7 Mad., 557), and *Opoorba Kumar Sett* v. *Probod Kumary Dassi* (1 Cal., W. N., 49), discussed.

A COMPLAINT was instituted on 27th August 1896 before the Presidency Magistrate of the Northern Division of the Town of Calcutta against the petitioner for cheating under section 417 of the Penal Code.

The case was transferred for trial to an Honorary Magistrate, Mr. Farr. On 19th December 1896 the case was taken up after several postponements. On the complainant, who was present in Court, stating that his attorney was not present and applying for a postponement, the Magistrate adjourned the case for half an hour to enable the complainant to bring his attorney or instruct somebody else. On the case being again called on, an attorney appeared for the

* Criminal Revision No. 96 of 1897 made against the order passed by Nawab Syud Ameer Hossein, Presidency Magistrate of Calcutta, Northern Division, dated the 5th day of January 1897.

† [Sec. 423:—The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under section 417, the accused, if he appears, the Court may, if it considers there is no sufficient ground for interfering, dismiss the appeal, or may—

Powers of Appellate Court in disposing of appeal.

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court, or committed for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or (3) with or without such reduction, and with or without altering the finding, alter the nature of the sentence, but not so as to enhance the same;

(c) in an appeal from any other order, alter or reverse such order:

(d) Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a mis-direction by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him.]

complainant, and applied for the transfer of the case to the Magistrate of the Northern Division on the ground that the complainant had been informed that the accused was a client of, and personally known to, the Honorary Magistrate.

[529] On the Magistrate declining to accede to this request, the attorney applied for a postponement upon the ground that the attorney who had been instructed in the case could not attend, and that the complainant's witnesses had left the Court. This application was opposed by the Counsel for the accused, and the Magistrate ordered the case to be proceeded with. The attorney appearing for the complainant stated that he was not acquainted with the facts of the case, and no evidence being offered for the prosecution, the summons was dismissed and the accused discharged. Subsequently, on 5th January 1897, the complainant, through another attorney, verbally applied to the Magistrate of the Northern Division on the same facts and materials that were before Mr. Farr, the Honorary Magistrate, for the issue of a fresh summons in the same case, putting in a charge under section 420 of the Penal Code in place of section 417. This application was granted. The accused appeared and contended that the Magistrate had no authority in law to issue fresh process in the case, he having been once discharged by another competent Magistrate. The Magistrate, being of a contrary opinion, on 19th January allowed the matter to stand over to enable the accused to move the High Court against this order. A rule was thereupon issued by the High Court upon the complainant to show cause why the order of the Magistrate granting process against him should not be set aside, on the ground that he had no jurisdiction to make the order.

Mr. *P. L. Roy* for the complainant, Dwarka Dass Agurwallah.—The complaint in this case is that the petitioner under a misrepresentation that he was of age induced us to lend him money. He knew he was not, because only a few months before he had had a guardian appointed for him. On 29th August the attorney for the complainant laid a complaint before the Presidency Magistrate of the Northern Division, stating the facts of the case. After several adjournments the case was transferred to the Honorary Magistrate Mr. Farr, who discharged the summons. The complainant then asked the Presidency Magistrate to issue a fresh summons, which, it is submitted, he had power to do. The subsequent proceedings in this case came before the same Magistrate, and on a petition for a transfer the Presidency Magistrate **[530]** recorded an order that, if Mr. Farr did not object, the case should be retransferred to him. We thus have the order of the Honorary Magistrate dismissing the summons and the order of the Presidency Magistrate granting a fresh summons. It is submitted that the Presidency Magistrate had power to revive the case. *Opoorba Kumar Sett* v. *Probod Kumary Dassi* (1 Cal., W. N., 49).

Mr *Hyde* (Mr. *Watkins* with him) for the petitioner.—The Magistrate had no power to revive the summons. The case has been disposed of by a competent Magistrate, and there is, therefore no power left for another magistrate to issue a fresh summons. The case of *Opoorba Kumar Sett* v. *Probod Kumary Dassi* is no authority. Under section 435 of the Criminal Precedure Code this Court has power to call for the proceedings of any Court. *Queen-Empress* v. *Donnelly* (I. L. R., 2 Cal., 405). That case was under the Code of 1892, but the revision powers are the same. *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (I. L. R., 23 Cal., 983). There is no allegation of any fresh materials. What the Magistrate did was merely to issue a fresh summons on the same materials, but under a different section. He had no jurisdiction to do so.

The **judgment** of the High Court **(Ghose and Gordon, JJ.)** was as follows :—

The facts, out of which the questions before us have arisen, are shortly these : –

A complaint was instituted before the Presidency Magistrate of the Northern Division of the Town of Calcutta against the petitioner for cheating under section 417 of the Penal Code. The case was transferred for trial to an Honorary Presidency Magistrate, Mr. Farr. After several postponements, the case was taken up on the 19th December last. The complainant, who was then present in Court, stated that his attorney was not there, and that he was not in a position to proceed with the case, and applied for a postponement. The Magistrate adjourned the case for half an hour to enable the complainant to bring his attorney or instruct somebody else. When the case was afterwards called on, an attorney appeared for the complainant, and applied for the transfer of the case to the Northern **[531]** Division Magistrate on the ground that the complainant had been informed that the accused was a client of, and personally known to, the Magistrate (Mr. Farr). The Magistrate, for reasons given by him, declined to accede to this request. Thereupon, the attorney again applied for postponement of the case upon the ground that the attorney, who had been duly instructed in the case, could not attend, and that the complainant's witnesses had left Court upon an assurance given by a person, who was managing the case of the accused, that he would agree to the case standing over. This application was opposed by the Counsel for the accused, who represented (and the representation was found to be true) that there were at least two witnesses for the prosecution present in Court. The Magistrate then ordered the case to be proceeded with. The attorney of the complainant stated that he was not acquainted with the facts of the case, and, no evidence being offered for the prosecution, the Magistrate dismissed the summons and discharged the accused.

Subsequently, on the 5th January last, the complainant, through another attorney verbally applied to the Magistrate of the Northern Division, apparently upon the same facts and materials that were before Mr. Farr, for the issue of a fresh summons in the same case, putting in simply what is described as a " charge " under section 420 in place of section 417 of the Penal Code. The Magistrate granted this application. Upon a summons being then served on the accused, he appeared and contended that the Magistrate had no authority in law to issue fresh process in the case, he having been once discharged by another competent Magistrate. The Magistrate, however, on the 19th January last, was of a contrary opinion, but he allowed the matter to stand over for a time to enable the accused to move this Court against his order. The accused accordingly applied to us and obtained a rule upon the complainant to shew cause why the said order of the Magistrate granting process against him should not be set aside, upon the ground that he had no jurisdiction to do so.

The order of discharge made by Mr. Farr does not, certainly, operate as an acquittal, the case being a warrant case. And it may well be gathered from the terms of section 403 of the Code of Criminal Procedure that it is no bar to the retrial of any person **[532]** so discharged. But then the question is whether the stipendiary Magistrate of the Northern Division had the authority to sit, as it were, on appeal from the order of the Honorary Magistrate, and direct the issue of a process, notwithstanding that upon consideration of the same materials Mr. Farr, a Magistrate of co-ordinate jurisdiction, held that the summons should be dismissed and the accused discharged.

We cannot discover anything in the Code giving a stipendiary Presidency Magistrate or any other magistrate of co-ordinate jurisdiction such an authority. Under section 439 (read with section 423), and possibly also under the charter of this Court, it is open to this Court to set aside the order of Mr. Farr and direct a retrial or further inquiry. And *that* apparently is the only mode indicated in the Code by which in a case like this an order of discharge may be interfered with.

A somewhat similar question arose in a case of dismissal of a complaint under section 203 before another Divisional Bench of this Court in the case of *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (I. L. R., 23 Cal., 983); and it was held, among other matters, that the practice of the Courts has always been to debar such fresh proceedings, and BANERJEE, J., observed "that it would be anomalous if, notwithstanding the dismissal of a complaint, and the discharge of an accused person, after an elaborate inquiry, by one magistrate. another magistrate may, merely upon a fresh complaint being filed, take proceedings against the accused again for the same offence, and on the same evidence, though he has no authority as a Court of Appeal or Revision to examine the correctness of the previous order made in the case." These remarks well fit in here, though the present case is a warrant case, in which the accused was discharged under section 253.

The view that we have just expressed may at first sight seem somewhat opposed to that adopted by the Madras High Court in the case of *Virankutti* v. *Chiyamu* (I. L. R., 7 Mad., 557); but upon examination of the facts of that case, and the true ground upon which the judgment proceeded, it will be found that our view does not at all clash with the decision in that case.

[533] As to the case of *Opoorba Kumar Sett* v. *Probod Koomary Dass* (1 Cal. W. N., 49), to which our attention has been drawn, it will be observed that the application to revive the proceedings was presented to, and the order for issue of fresh process made by, the same Magistrate who had discharged the accused

We are not called upon here to determine whether the order of discharge made by Mr. Farr was a proper one. All that we are at present concerned with is, whether the Magistrate of the Northern Division was competent to order the revival of proceedings and issue a fresh process against the accused after the order of discharge by another magistrate of co-ordinate jurisdiction in precisely the same case, as we understand this to be. We are of opinion that he was not so competent.

Upon this ground we set aside the order complained against and direct that the rule be made absolute.

C. E. G. *Rule made absolute.*

NOTES.

[See the Notes to 24 Cal., 286 *supra*.]

[24 Cal. 533]

ORIGINAL CIVIL.

The 18th February, 1897.

PRESENT :

MR. JUSTICE SALE.

Baboo Lall and others

versus

Joy Lall and others.*

Hundi—Money advanced on fraudulent misrepresentation Suit before due date of hundi.

The defendants obtained advances of money on *hundis* by making untrue representations, knowing them to be untrue, and knowing that without them they could not have got the money. *Held* that the plaintiffs were entitled to rescind the contract and claim immediate repayment before the due date of the *hundis*.

There is no reason why the principle that fraud vitiates all agreements should not be applied to debts evidenced by *hundis*, promissory notes, or other negotiable instruments, if the facts show that the loans were contracted on the faith of fraudulent misrepresentations made by a debtor to a creditor

THE facts of the case appear sufficiently from the judgment.

Mr. *Garth* and Mr. *Chaudhuri* appeared for the Plaintiffs.

Mr. *Avetoom* appeared for the Defendants.

Sale, J.—This is a suit by the plaintiffs who carry on business under the name of Sanker Lall Augurwallah to recover Rs. 5,000 **[534]** with interest alleged to have been advanced as a loan to the defendants in their firm of Asaram Joy Lall. In respect of this loan two *hundis* were drawn and accepted by the defendant Joy Lall in the name of his firm Asaram Joy Lall and delivered to the plaintiffs; the *hundis*, the dates of which are, respectively, 6th and 10th November 1896, were payable after 61 days from their respective dates. The defendants' business was closed on the 17th November and the plaintiffs, alleging that the loans had been obtained by fraudulent misrepresentations, instituted this suit before the due date of the *hundis*, the plaint being filed on the 27th November 1896.

In the plaint the circumstances are set out under which the advance of the money was made to the defendants; and after stating that in respect of these advances the *hundis* were drawn and accepted by Joy Lall in favour of the plaintiffs, the plaintiffs in the 5th paragraph allege as follows:—

"That under the circumstances the plaintiffs charge the defendants with having fraudulently obtained the said sums from the plaintiffs, intending at the time they received the said sums not to repay the same, and the plaintiffs are advised and submit that the said sum so advanced is at once realisable."

It cannot, I think, be doubted that if the evidence is sufficient to show that the monies in respect of which the *hundis* were given were obtained by the defendants on representations made by them which were false in fact, but on the faith of which the plaintiffs were induced to advance the monies, it would follow that the plaintiffs would be entitled to rescind the contracts

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* Original Civil Suit No. 829 of 1896.

embodied in the two *hundis* and to claim immediate repayment of the amount of the advances.

The question is whether the evidence is sufficient to establish such a case of fraudulent misrepresentation as would entitle the plaintiffs to rescind the arrangement under which the *hundis* were executed and to sue to recover the amount of the advances before the due dates of the *hundis*.

It has been said that fraud vitiates all agreements, and I see no reason why the same principle should not be applied to debts evidenced by *hundis*, promissory notes, or other negotiable instru-**[535]**ments, if the facts show that the loans were contracted on the faith of fraudulent misrepresentations made by the debtor to a creditor.

The evidence of Preolall, who is the managing gomasta of the plaintiffs in Calcutta, shows this: There had been previous dealings between the plaintiffs' firm and Asaram Joy Lall in respect of which Preolall came to be acquainted with Joy Lall and Kaliprosad. In November 1896, that is Kartick, Sudi 1953, the defendants' firm of Asaram Joy Lall were indebted to the plaintiffs, and being so indebted, Preolall was requested by both Joy Lall and Kaliprosad to make further advances to them in their firm of Asaram Joy Lall. This, according to the evidence of Preolall, he was indisposed to do, and said to them that they were already indebted and had not observed promptitude in repayment of previous loans.

The defendants, however, pressed Preolall, and represented to him that the business carried on in Calcutta, as also the business carried on in Agra under the name of Asaram Kaliprosad, were both progressing favourably, and assured him that the money would in due course be faithfully paid. Preolall says that relying on this statement as to the satisfactory state of the defendants' businesses, he was induced to make the further advances which are the subject-matter of this suit.

Comment has been made on the circumstance that the representation, so far as the condition of the defendants' business was concerned, was not put forward by the witness, Preolall, until his attention was called to it by a question framed specially for that purpose, and of course that is a circumstance which would have to be taken into account, and would, as a matter of fact, have considerable weight if there was any reliable evidence to contradict it. It is necessary to see who it is that has been called to contradict Preolall. The only witness called for this purpose is the defendant Kaliprosad, and what is his evidence? He says in the first case that he never accompanied his father when these loans were obtained; that he had nothing to do with the firm of Asaram Joy Lall, that his father never spoke to him about the business at all, and that he knew nothing of its prospects or condition, and that the only partners in the firm were his father and uncle, Hidaram.

[536] Neither Joy Lall nor Hidaram have been called, and they are the only persons, according to Kaliprosad's account, who could have told us of the financial state of the firm at that time. So far as the issue as to partnership is concerned it was agreed between the parties that the evidence given in the case of *Nirbaina* v. *Joy Lall* should be taken as evidence in this case, and there is no doubt that the alleged partnership is a relevant fact in this case, because if it is the fact that Kaliprosad was a partner with his father Joy Lall then it affords strong corroboration of Preolall's evidence, and Kaliprosad's evidence, on the other hand, must be false in many respects. I have already come to the conclusion that Kaliprosad and Joy Lall were partners in this firm, and I have no hesitation in accepting the evidence of Preolall, in preference to that of Kaliprosad, and in finding that it is true that the defendant Kaliprosad did as

a matter of fact on the occasions of the advances made by Preolall accompany his father, and that he did, as Preolall says, join with his father in representing that the firm of Asaram Joy Lall was in a satisfactory condition. Preolall says that but for those representations he would never have made these advances, and I see no reason to doubt that.

The only conclusion I can draw from Joy Lall's absence from the witness-box is that he must have known that at the time he and Kaliprosad made those representations to Preolall their business was in an unsatisfactory condition, and that his object in keeping out of the box was to conceal that fact.

If then the defendants did, as I hold they did, obtain these advances on untrue representations knowing them to be untrue, and knowing that without them they could not have got the money, I think the plaintiffs were entitled, on stoppage of the defendants' business, at once to rescind the contracts evidenced by the *hundis* and to sue for the amounts advanced to the defendants.

In the result there must be a decree against both the defendants for the full amount claimed with costs on scale 2.

Attorney for the Plaintiffs: Babu *R. C. Bose.*

Attorney for the Defendants: Babu *S. K. Deb.*

S. C. B.

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[537] APPELLATE CIVIL.

The 8th March, 1897.

PRESENT:

MR. JUSTICE HILL AND MR. JUSTICE RAMPINI.

Pasupati Mohapatra............Principal Defendant No. 1

versus

Narayani Dassi (Plaintiff) and others............*Pro forma* Defendants

Bengal Tenancy Act (VIII of 1885), sections 161, 171- Payment by person interested to prevent sale--Mortgage—Incumbrance.

A mortgage created by the operation of section 171 of the Bengal Tenancy Act (VIII of 1885) is not an incumbrance within the meaning of section 161 of that Act, and is not liable to be annulled as such at the instance of a purchaser of a holding at a sale in execution of a decree for arrears of rent.

THE facts of the case sufficiently appear from the judgment of the High Court.

Babu *Bepin Behari Ghose* for the Appellant.

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* Appeal from Appellate Decree No 885 of 1895, against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of Midnapur, dated the 16th of February 1895, reversing the decree of Babu Kanti Chandra Bhaduri, Munsif of Garbetta, dated the 11th of September 1894.

Babu *Tara Kishore Chowdhry* and Babu *Bidhu Bhusan Ganguli* for the Respondents.

The **judgment** of the High Court (**Hill** and **Rampini, JJ.**) was as follows:—

The question raised by this appeal is whether a mortgage created by the operation of section 171 of the Bengal Tenancy Act is an incumbrance within the meaning of chapter XIV of that Act, and as such liable to be avoided by the purchaser of a holding at a sale in execution of a decree for arrears of rent.

The facts found by the Lower Appellate Court are as follows: Subordinate to a certain *putni* tenure there were two holdings, one of which was in the occupation of a person named Sumitra, and the other in that of Sundari and Nityamoyi.

On the 11th Pous 1296 the husband of Matungini, the second defendant in the present suit, purchased both these holdings from the tenants.

Afterwads in the year 1891 the *putnidars* instituted two suits **[538]** for arrears of rent for the years 1295 to 1298, one against Sumitra and the other against Sundari and Nityamoyi. Matungini intervened in both suits as purchaser, and ultimately a compromise was arrived at between her, the *putnidars*, and the sons of Sundari and Nityamoyi, under which Matungini confessed judgment for the rent claimed in the suits, and it was agreed that the sons of Sundari and Nityamoyi should hold both the holdings as *raiyats* under her.

On the 2nd Assin 1299 Matungini granted a *dur-mokurari* lease of Sumitra's holding to Pasupati, the first defendant in the present suit; and shortly afterwards pending proceedings in execution taken by the *putnidars* in the suits already mentioned, she sold her *mokurari mourasi* interest to the third defendant in the present suit, Srimanta Lal Bera, he undertaking to satisfy the decrees out of the purchase money. This, however, was not done, and Pasupati then, in order to save the holdings from sale, paid the amount of both the decrees into Court. In the year 1892 the rent of the holdings being again in arrear the *putnidars* brought a suit against Srimanta Lal Bera for its recovery. They obtained a decree, in execution of which the holdings were brought to sale and purchased by Kasinath, the fourth defendant in the present suit. In 1893 Pasupati sued Matungini for recovery of the money paid by him into Court as mentioned above. He obtained a decree against her for the amount claimed, together with a declaration that, by virtue of section 171 of the Bengal Tenancy Act, he was entitled as mortgagee to bring the holdings to sale. This he proceeded to do; whereupon Kasinath put in a claim to the property, but, having failed in that, he procured the issue of notices under section 167 of the Tenancy Act, and then sold his interest in the holdings to the plaintiff. Under these circumstances the present suit has been brought for avoidance of Pasupati's mortgage and the *dur-mokurari* lease. The Court of First Instance dismissed the suit, but its decree was reversed in appeal by the Subordinate Judge who held both the mortgage and *dur-mokurari* to be voidable at the instance of the plaintiff as the successor in interest of Kasinath the purchaser of Srimanta's *mokurari*.

In appeal before us it was argued that, in so far at least as the mortgage is concerned, the decision of the Subordinate Judge **[539]** is wrong, inasmuch as a mortgage created by the operation of section 171 of the Tenancy Act cannot be regarded as an incumbrance in the sense in which the term is used in chapter XIV of the Act. We think that this contention is correct. The term "incumbrance" is defined for the purposes of chapter XIV by section 161 of the Act, and means, according to that section, "any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein and

not being a protected interest." In order to satisfy this definition, it is clear that, whatever the nature of the particular incumbrance may be, it must be the creation of the tenant, but in the case now before us the mortgage interest claimed by Pasupati was not created by the tenant, but arose independently of him by the operation of section 171 of the Act. We think, therefore, that it is not an incumbrance within the meaning of Chapter XIV, and consequently that it is not an incumbrance which may be annulled at the instance of a purchaser under the provisions of that chapter.

We think, however—and in this we agree with the Subordinate Judge—that the effect of the payment made by Pasupati must be limited to the holding of Sumitra to which his *dur-mokurari* interest was subordinate. The sale of the holding of Sundari and Nityamoyi would not have affected his position.

The appeal will accordingly be decreed in part, and the decree of the Lower Appellate Court be modified to this extent, that the suit, in so far as it seeks the avoidance of the mortgage held by Pasupati over the holding of Sumitra, will be dismissed. In other respects the decree will stand. We make no order as to costs.

H. W. *Decree varied.*

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[540] *The 14th January, 1897.*

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Mohima Chandra Roy Chowdhry and another............Plaintiff

versus

Atul Chandra Chakravarti Chowdhry and others............Defendants.*

Misjoinder of Causes of Action—Joinder of several plaintiffs in respect of separate causes of Action—Contribution—Civil Procedure Code (Act XIV of 1882), section 578—Irregularity affecting merits.

The plaintiffs, who were husband and wife, brought a suit to recover a certain sum of money, part of which was alleged to have been paid by plaintiff No. 1, who was a co-sharer with the defendants in two *putnis*, to save the *putnis* from being sold for arrears of rent; and the remainder by plaintiff No. 2, who alleged that she had a subordinate *miras taluk* under the two *putnis* granted to her by plaintiff No. 1, and that the sale would have resulted in the cancellation of her *miras taluk*. In second appeal it was contended by the respondents, in support of the decree made by the Court below dismissing the claim of plaintiff No. 2, that the claim was liable to dismissal by reason of its involving the misjoinder of plaintiffs with different causes of action. This objection had been raised in the written statement, and the Court was asked to raise an issue on the point. In answer to this contention it was urged by the appellants that, as the respondents went to trial upon the merits, it was not open to

* Appeal from Original Decree No. 148 of 1894 against the decree of Babu Radha Gobind Sen, Subordinate Judge of Mymensingh, dated the 7th of March 1894.

them to urge any objection like this to the frame of the suit on second appeal. *Held*, that the suit was bad for misjoinder of plaintiffs as the suit of plaintiff No. 2 ought properly to have been brought against all the holders of the *putnis*, including plaintiff No. 1, and not merely against the defendants in the suit.

Held, further, that it was open to the respondents to raise the objection as to misjoinder in second appeal.

Tarinee Churn Ghose v. *Hunsman Jha* (20 W. R., 240) distinguished. *Smurthwaite* v. *Hannay* [L. R. (1894) A. C., 494] referred to.

The facts of this case are sufficiently stated in the judgment.

Dr. *Rash Behari Ghose*, Babu *Dwarka Nath Chakravarti*, Babu *Gobind Chunder Das* and Babu *Chunder Kant Ghose* for the Appellants.

Babu *Srinath Das*, Babu *Mohini Mohan Roy*, Babu *Baikant Nath Das*, and Babu *Grish Chandra Chowdhry*, for the respondents.

[541] The **judgment** of the Court (**Banerjee** and **Rampini, JJ.**) was as follows :—

This appeal arises out of a suit brought by the two plaintiffs (appellants) who are husband and wife, to recover a certain sum of money, part of which is said to have been paid by plaintiff No. 1, who is a co-sharer with the defendants in two *putnis*, to save the *putnis* from being sold for arrears of rent, and the remainder is alleged to have been paid by plaintiff No. 2, who says that she has a subordinate *miras taluk* under the two *putnis*, granted to her by plaintiff No. 1, and that she paid the sums to prevent the sale of the *putnis* for arrears of rent, as the sale of the *putnis* for arrears of rent would have resulted in the cancellation of her *miras taluk*.

The defence, so far as it is necessary to consider it for the purposes of this appeal, was to this effect, that the frame of the suit is bad for misjoinder of the two plaintiffs, whose causes of action were different; that the *miras taluk* claimed by plaintiff No. 2 had no real existence; that it was created by the plaintiff No. 1 only with a view to prevent the decree in a partition suit that was then pending from being operative in transferring the possession of certain *mouzahs* included in the *putni* from plaintiff No. 1; that plaintiff No. 2 had not paid any money to save the *putnis* from sale; and that the amounts claimed against certain of the defendants, viz., defendants 1 to 4, were larger than what they were liable for.

The parties went to trial on several issues of which it is important to notice the first, second, and fifth, which run as follows : —

(1) " Is the plaintiff No. 2 entitled to any of the properties in dispute, and can she maintain this suit."

(2) " Is the suit multifarious, and, as such, liable to dismissal."

(5) " Are the plaintiffs entitled to recover contribution. If so, from which of the defendants, and to what extent." * * *

The learned Subordinate Judge decided the first issue against plaintiff No. 2, holding that the *miras taluk* set up by her had no real existence, and that it had been created merely to prevent the decree in the partition suit that was then pending from being **[542]** operative against her husband : and he accordingly held that the plaintiff No. 2 had no cause of action.

Upon the second issue he observed that the finding of fact arrived at in the adjudication of the first issue rendered it unnecessary to pronounce any opinion as to the second issue, and that it would have simplified matters if plaintiff No. 1 had not brought this suit jointly with his wife, who, according to his own showing, was a subordinate tenure-holder and not a co-sharer of the *putni taluks*. On the fifth issue, he apportioned the liability of the several defendants

so far as the claim of the first plaintiff was concerned in a certain way. And he then made a decree in favour of the plaintiff No. 1 alone in respect of the greater portion of the amount which he is said to have paid.

Against this decree the present appeal has been preferred by plaintiffs 1 and 2 jointly. There are also objections under section 561 of the Code of Civil Procedure on behalf of defendants 1 to 4.

We shall consider the appeal of the plaintiffs first, and then the objections of the respondents 1 to 4.

In their appeal the plaintiffs urge that the Court below was wrong in dismissing the claim of the plaintiff No. 2 on the ground that the *miras taluk* set up by her is unreal and invalid; and that the evidence upon the question is altogether one-sided, and goes to show that, at any rate, at the date when the payments alleged in the plaint were made, plaintiff No. 2 had a subsisting right in the *miras taluk* in question.' It is further contended that upon the finding arrived at by the Court below, that the payment said to have been made by the plaintiff No. 2 had in fact been really made by plaintiff No. 1, it ought to have given plaintiffs a joint decree for the full amount they had asked for. And, lastly, it is contended that the Court below ought to have given effect to the petition of the plaintiff No. 1, dated 18th May 1893, by which he asked the Court to strike out the name of plaintiff No. 2 and to substitute his name in her place on the ground that he had obtained a transfer by gift of the amount claimed in this suit by the plaintiff No. 2. On the other hand, it is contended by the respondents in support of the decree made by the Court below dismissing the claim of the plaintiff No. 2 that that claim was liable to dismissal by reason of its involving the misjoinder of plaintiffs with different causes of action.

[543] In answer to this contention of the respondents it is urged on behalf of the appellants that, as the respondents went to trial upon the merits, it is no longer open to them to urge any objection like this to the frame of the suit.

We are of opinion that, apart from the merits of the case, the frame of the suit was clearly bad, there being a misjoinder of two plaintiffs with two distinct causes of action. The plaintiff No. 1 says that he paid certain sums of money to save the two *putnis* in which he had a certain share from being sold for arrears of rent, and his suit was, no doubt, rightly brought against his co-sharers in the *putnis*.

The case of plaintiff No. 2, as stated in the plaint, is that she owns a subordinate tenure under the two *putnis*: that she paid certain sums on certain dates to save the *putnis* from sale, as the subordinate tenure which she held stood in danger of being cancelled if the *putnis* were sold for arrears of rent. Her suit, therefore, ought properly to have been brought against all the holders of the *putnis* including plaintiff No. 1, and not merely against the defendants in the suit. The two claims were as incapable of being joined together as any two claims by two different persons well can be.

It was argued that plaintiff No. 1 was not a necessary party to any suit that plaintiff No. 2 might bring if she were to bring a separate suit, as nothing was due from plaintiff No. 1. Whether that was so or not we do not know. The fact is not admitted by the defendants, and no finding has been arrived at on the point by the Court below. It was further argued that it might have been in anticipation of the objection of *benami* that was urged by the defendants that the two plaintiffs joined in one suit, but there is not the faintest trace of there being any such reason to be discovered in the plaint.

The case, therefore, does not come within the scope of section 26 of the Code of Civil Procedure, which is the only section authorizing different plaintiffs to join in one suit. And the only other express provision that we find relating to different plaintiffs is that in the second paragraph of section 31 which distinctly provides that nothing in that section shall be deemed to enable plaintiffs to join in respect of distinct causes of action.

[544] Nor can section 578 of the Code be invoked in aid of the appellants. Here no decree has been made in their favour such as might be held to be protected from interference by the Appellate Court by section 578, even if it were granted that an objection, like the one that the defendants raised, involves only a question of irregularity- -a point which is by no means free from doubt, having regard to the observations of the Lord Chancellor and the Lord Chief Justice in the case of *Smurthwaite* v. *Hannay* [L. R. (1894) A. C., 494]. It was urged, as we have noticed above, that the fact found by the Court below that the sums alleged to have been paid by plaintiff No. 2 had in fact been paid by plaintiff No. 1, is sufficient to entitle the plaintiff No. 1 to a decree for the amount in dispute in this appeal.

There are two answers to this contention. In the first place the finding is not very clear and definite that all the sums that have been claimed as having been paid by plaintiff No. 2 had been paid by plaintiff No. 1. All that the lower Court says upon this point is this: "As to the money said to have been paid by Gnanoda Soondry, plaintiff's witness No. 18, Koonja Kishore Biswas says that he got Rs. 265 from Chandra Kishore Chowdhry, *naib* of Mohim Chandra Roy, that it was debited in the *jama-kharach* account of Mohim Baboo, and that it was only deposited in the name of Gnanoda. In fact Mohim Chandra Roy is all in all, and the name of his wife is only used as a cloak to disguise his pretension to the villages of which he wants to retain possession in some shape or other."

This is very different from a definite finding that all the sums in question were paid by plaintiff No. 1. But even if there were such a finding, it would be a finding contrary to the allegations of the parties. It is not alleged by the defendants that all the sums said to have been paid by plaintiff No. 2 had been paid by plaintiff No. 1, and it is the very reverse of the allegations of the plaintiffs, not only in their plaint, but also in the arguments before us. That being so, we cannot give any effect to this contention. Nor can we give any effect to the petition of the 18th May 1893, referred to in the course of the argument. The plaintiff No. 1, after the institution of the suit, and after the suit had made some progress, put in that petition stating that he had acquired by gift from plaintiff No. 2 her rights to these sums.

[545] This cannot remove the defect of form in the suit as originally brought, which we have already noticed. The substitution of one plaintiff for another can ordinarily be allowed only in a suit brought in proper form. Certain cases were relied upon as showing that where a party, notwithstanding that there may be objections to the form of the suit, allows the suit to proceed to trial on its merits, it is no longer open to him to ask a Court of appeal to dismiss the suit, or any part of it, on the ground of any defect of form. Of these cases the most important one is *Tarinee Churn Ghose* v. *Hunsman Jha* (20 W. R., 240). The facts of that case, however, are quite distinguishable from those of the present. There, not only was the objection in point of form not pressed, but the Court was never asked to frame any issue on the point. Here, on the contrary, we find that the objection as to misjoinder was raised in the written statement. The Court was asked to frame an issue on the point; and, then at a still later stage, when the plaintiff No. 1 asked the Court to substitute

his name in the place of plaintiff No. 2, the defendants opposed that application on the ground that they had raised an objection at the first hearing to the frame of the suit, and that that objection should be disposed of in their favour.

We are of opinion, therefore, that the plaintiffs are not entitled to ask us to give them a decree in respect of that portion of the claim which has been dismissed. Here the question arises as to the form of the order that should have been made in the Court below, and as to the form which the order we make in respect of the claim of plaintiff No. 2 ought to take. No doubt, if the claim of plaintiff No. 2 is disallowed as having been improperly joined in this suit, so much of the judgment of the Court below as determines the question whether the plaintiff No. 2 has any real *miras* right, must be struck out, and the dismissal of the claim of the plaintiff No. 2 must be made to rest purely on the ground that it has been improperly joined in the present suit. We do not think that our making an order to that effect now can prejudicially affect either plaintiff No. 1 or plaintiff No. 2, or any of the defendants in this case. As plaintiff No. 1 has obtained a decree in regard to that part of the claim which relates to monies paid by **[546]** him, and as the defendants did not take exception to that decree on the ground of the frame of the suit being bad, we may take it that, if the plaintiffs had in the Court below been asked to elect, the election would have been made in a way such as would have enabled the Court to make the decree that it has made. At any rate nothing to the contrary has been urged before us. And then as regards plaintiff No. 2, it is true that if she had been put to her election she might have been in a position to bring a fresh suit earlier; but late as she now is, we may observe that her claim is not likely to be barred by any law of limitation Therefore there is no prejudice to any of the parties resulting from the order that we now make; and that order is that the claim of plaintiff No 2 be disallowed on the ground of its having been improperly joined with that of plaintiff No. 1.

[Their Lordships also held that the cross-appeal ought to be dismissed but on grounds not material to this report.]

The result is that the appeal and the cross-appeal both fail, and the decree of the Court below will be affirmed, subject to the modification indicated above in regard to the dismissal of the claim of the plaintiff No. 2.

F. K. D. *Appeal dismissed.*

NOTES.

[I. As regards the rules regulating the joinder of parties or causes of action, see the C.P.C., 1908, O. 1, rules 1 to 3, which modify the previous state of the law.

II. In the C.P.C., 1908 sec. 99, '*misjoinder of parties or of causes of action*' are expressly mentioned as irregularities which should not *ipso facto* cause a decree to be reversed etc.

See also (1903) 27 Mad., 80; (1904) 2 C.L.J., 602.]

[24 Cal. 546]

The 2nd April, 1897.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE AMEER ALI.

Pran Nath Roy ....Plaintiff

versus

Mohesh Chandra Moitra and others............Defendants.*

Right of suit—Fraud—Suit to set side ex parte *decree and sale in execution thereof, on the ground of fraud- Jurisdiction* —Res judicata— *Effect of not appealing against an appealable order-- Remand— Civil Procedure Code (Act XIV of 1882), sections 13, 108, 244, 311.*

The plaintiff having applied unsuccessfully under sections 108 † and 311 ‡ of the Civil Procedure Code to set aside an *ex-parte* decree against him and the sale of his property in the execution thereof on the ground of fraud, and without preferring an appeal against the order rejecting his said application under section 108 of the Code, instituted this suit praying for the same relief. The Subordinate Judge dismissed the suit as not maintainable.

[547] *Held*, that such a suit was maintainable, and that sections 13 and 244 of the Civil Procedure Code were no bar thereto. The facts that his application under section 108 was unsuccessful, and that he did not appeal against the order rejecting that application, did not disentitle him from prosecuting his remedy by suit on the ground of fraud.

Held, also, that when there is an appeal against a decision the effect of not appealing is that the decision holds good for what it is worth ; so far as concerns any other modes of relief available, the person not appealing is in no worse position than if he had appealed and failed.

Abdul Mazumdar v. *Mohamed Gazi Chowdhry* (I. L. R., 21 Cal., 605) approved. *Raj Kishen Mookerjee* v. *Modhoo Soodum Mundle* (17 W. R., 413) distinguished.

THE facts of the case and the arguments adduced appear sufficiently from the judgment of the High Court.

Mr. *Woodroffe* and Babu *Dwarka Nath Chuckerbutty* for the Appellant.

Dr. *Rash Behary Ghose*, Babu *Saroda Charan Mitter*, Babu *Mokund Lal Koondu*, and Babu *Haran Chunder Banerjee* for the Respondents.

The **judgment** of the High Court (**Macpherson** and **Ameer Ali, JJ.**) was as follows :—

This suit has been dismissed without trial on the preliminary issue as to whether it was maintainable having regard to the provisions of sections 13 and

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* Appeal from Original Decree No. 354 of 1895, against the decree of Babu Krishna Chandra Das, Subordinate Judge of Pubna and Bogra, dated the 4th of September 1895.

Setting aside decree *ex-parte* against defendant.

† [Sec. 108 : - in any case in which a decree is *ex-parte* against a defendant, he may apply to the Court by which the decree was made for an order to set it aside ;

and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree upon such terms as to costs, payment into Court or otherwise, as it thinks fit, and shall appoint a day for proceeding with the suit.]

Application to set aside sale of land on ground of irregularity.

‡ [Sec. 311 :- The decree-holder, or any person whose immoveable property has been sold under this chapter, may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it ;

but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.]

244 of the Civil Procedure Code, and the fact that the plaintiff's applications for setting aside the decree and the sale under sections 108 and 311 of the Code were rejected.

The object of the suit is to set aside an *ex-parte* decree for rent obtained by the first and second defendants against Ram Krishna Sarkar, seventh defendant, and the plaintiff, and to recover from the third, fourth and fifth defendants possession of a property of the plaintiff's which was sold in execution of that decree and purchased by them in the name of the sixth defendant. The plaint sets out that the plaintiff had nothing to do with the *jote* in respect of which the rent was decreed, or with Ram Krishna Sarkar; that the suit was fraudulently brought at the instigation of the third, fourth and fifth defendants in order to get hold of the plaintiff's property at a low price, and that with a view to carry out the fraud no summons was served, and a false return of [548] service was caused to be given: that the defendants did not proceed against the tenure for which the arrears were due or against the property of Ram Krishna, but fraudulently caused a very valuable property of the plaintiff's to be sold without service of any of the process required by law and by getting false returns of service submitted, and themselves purchased it for a price much below its value. In short, the plaintiff's case is that the suit culminating in the sale was from first to last a fraud, in which the defendants, who purchased and got possession of his property, were concerned.

In order to see whether the suit is maintainable, we must assume the facts to be as stated; two more facts, which are not mentioned in the plaint, but about which there is no dispute, must be added: those are that the plaintiff applied under section 108 of the Code to get the *ex-parte* decree set aside, and also applied under section 311 to get the sale set aside, and that both applications failed.

As we understand the judgment of the Subordinate Judge he would have decided the preliminary issue referred to above in favour of the plaintiff, but for the one circumstance that the plaintiff had applied unsuccessfully to get the *ex-parte* decree set aside under section 108 of the Code. He says that in applying under that section the plaintiff adopted the proper, but not the only, course open to him; that there was an appeal against the order rejecting his application, of which he did not avail himself; that the effect of the rejection order was to change the *ex parte* decree into a contested decree which the Court had no jurisdiction to set aside, except by way of appeal; and that without setting aside the decree the plaintiff could not get back the property sold in execution of it.

It is not and could not be now contended that a suit will not lie to set aside a decree obtained by fraud, nor is it contended that a fraudulent decree, which is obtained *ex-parte* can only be set aside under the provisions of section 108 of the Procedure Code. The case of *Abdul Mazumdar* v. *Mohamed Gazi Chowdhry* (I. L. R., 21 Cal., 605) is an authority that a suit will lie to set aside an *ex-parte* fraudulent decree, although no endeavour has been made to get the decree set aside and suit revived under section 108

[549] The contention is that when a person, against whom an *ex-parte* decree is passed, does apply under section 108 to have the decree set aside and fails, he cannot afterwards, on the same ground as was put forward in the proceeding under section 108, bring a suit to get the decree set aside, even if fraud is alleged. It is said, as regards the decree, the only fraud here alleged is in the non-service of the summons, and that it was found in the proceedings under section 108 that the summons was served, or, at all events, that the plaintiffs had failed to prove that it was not served. We do not understand

the learned pleader for the respondent to argue that the question of the service of the summons is in this case *res judicata*. His argument, broadly stated, is that when two courses are available, and one is resorted to and fails, recourse cannot be had to the other.

It may be conceded that the plaintiff could not bring a suit to set aside the decree on the bare ground that the summons was not served, or that he was prevented for some good reason from defending the suit, and that would be so whether he had or had not availed himself of the remedy provided by section 108. Nor could he maintain a suit to set aside the decree on the bare ground that he was not liable for the rent decreed, for it was decided in the suit that he was liable. His case is not of that description. It is that the suit in which the decree was obtained was a fraud in its inception and throughout, and he seeks to recover property of which he has been deprived by means of the fraudulent decree, and which has passed into the possession of persons who are said to have been parties to the fraud, but not parties to the suit in which the fraudulent decree was passed. It is not correct to say that the only fraud alleged is in the non-service of the summons. This was a part of the scheme and the means or one of the means by which the fraud was committed. It may be necessary for the plaintiff, in order to get relief, to attack the decree, and he does attack it as fraudulent. If the decree was obtained by fraud, and the plaintiff was in consequence deprived of his property, the Court has full power to set aside the decree and restore his property, unless its jurisdiction in the case of *ex-parte* decrees is taken away; but there is nothing in sections 108, 214, 311, or in any other provisions of law to which we have been referred which does take it away. Section 13 of the Code clearly offers no bar. The issues which arise are not the same, **[550]** the parties are not all the same and the Court which decided the *ex-parte* suit has no jurisdiction to decide this suit. The mere fact that the plaintiff failed to obtain relief on the narrow ground on which he might have obtained it under section 108 cannot prevent him from getting relief on the much wider grounds now put forward.

It is said and correctly that the plaintiff might have appealed against the rejection order under section 108. All that can be said is that if he had appealed and succeeded there might have been no necessity for the present suit. If this is a valid objection it would apply equally to a case in which a plaintiff had made no application under section 108, but had at once brought a suit to set aside the decree. The avoidance of unnecessary litigation may furnish some ground for arguing that before a person brings a suit he ought to exhaust the remedy provided by section 108, but not that if he fails in his application under section 108 he is debarred from bringing a suit. The only case cited as a direct authority for the respondent's contention is that of *Raj Kishen Mookerjee* v. *Modhoo Soodun Mundle* (17 W. R., 113). There the plaintiff brought a suit to set aside a rent decree obtained under Act X of 1859 on the ground that a confession of judgment, on which the decree proceeded, was not put in by him, but was fraudulently placed on the record by other parties. The plaintiff had applied to the Deputy Collector who passed the decree to revive the suit under section 58 of the Act on this particular ground, but the Deputy Collector rejected the application, holding that the confession of judgment was not fraudulently obtained. The plaintiff did not appeal as he might have done against the rejection order, and a Division Bench of this Court held that the plaintiff, having a remedy by way of appeal which he did not resort to, was precluded from bringing a suit in the Civil Court to set aside the decree. The ground, on which the decision is arrived at, is not clear, and there is no allusion in the judgment to fraud as the foundation of the suit. The case might be an authority for holding that no civil suit would lie until the remedy provided by

section 58 of Act X of 1859, which is, generally speaking, analogous to the provisions of section 108 as regards civil suits, was exhausted, in which [551] event it would apparently conflict with the case of *Abdul Mazumdar* v. *Mohamed Gazi Chowdhry* (I. L. R., 21 Cal., 605), but it is no authority for the proposition that a person failing to obtain relief under section 108 is debarred from bringing a suit to get the decree set aside on the ground of fraud. When there is an appeal against a decision the effect of not appealing is that the decision holds good for what it is worth; so far as concerns any other modes of relief available the person not appealing is in no worse position than if he had appealed and failed.

We must hold that the suit is maintainable, and that the decision of the Subordinate Judge is wrong. The decree is set aside and the case remanded under section 582 of the Civil Procedure Code for trial. The costs of this appeal will abide the result.

The appellant will be entitled to a refund of the value of the Court fee stamp.

B. D. B. *Appeal allowed and case remanded.*

NOTES.

[See **(1901) 28 Cal., 475** which contains the Privy Council decision approving the judgment of the High Court reported here.

As regards preliminary orders, the C.P.C., 1908, sec. 97 precludes the questions being raised subsequently if unappealed from, then and there.

See also (1898) 21 All., 289; (1899) 27 Cal., 197; (1901) 5 C.W.N., 559; (1907) 29 All., 418; (1909) 9 C.L.J., 367; (1909) 13 C.W.N., 1197; 10 C.L.J., 420; (1909) 10 C.L.J., 336; (1910) 7 I.C., 11.]

[24 Cal. 551]

CRIMINAL REVISION.

The 24th March, 1897.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Hem Coomaree Dassee............Petitioner

versus

Queen-Empress............Opposite Party.*

Commission in Criminal Case—Commission to examine witness—Purdanashin lady—Code of Criminal Procedure (Act X of 1882), sections 6, 7, 503, 504, 505, 506, 507—Presidency Magistrate, Power of.

It is doubtful, if a Presidency Magistrate in the Town of Calcutta has power to issue a commission under sections 503 to 507 of the Code of Criminal Procedure to examine a

* Criminal Revision No. 162 of 1897, made against the order passed by T. A. Pearson, Esq., Chief Presidency Magistrate of Calcutta, dated the 17th of February 1897.

witness residing within his own jurisdiction; but there is nothing in the Code to prevent a Presidency Magistrate examining a witness within his jurisdiction at some place other than the Court house.

Where a Presidency Magistrate refused, on the ground of want of jurisdiction, to grant a commission for the examination of a purdanashin lady, but offered to take her evidence in his Court when cleared for the purpose, or in his private room in the Court house, and she applied to the High Court for [552] a commission being granted, or for such other order as they might deem proper, the High Court on revision directed that if the lady would take a house or suite of rooms not far from the Magistrate's Court, and pay all the costs which the Magistrate deemed reasonable and proper, he should not enforce her attendance in Court, but examine her in the place so appointed, in the presence of the parties concerned, and in the manner in which *purdanashin* ladies are ordinarily examined.

ON 17th February 1897 an application was made to the Chief Presidency Magistrate, in the course of a prosecution, by a *purdanashin* lady residing within the local jurisdiction of his Court, who had been subpœnaed as a witness, to be allowed to be examined on commission. The Chief Presidency Magistrate refused the application for a commission to issue on the ground that section 503 of the Criminal Procedure Code gave him no power to issue a commission to any one for the examination of a person residing within the jurisdiction of his own Court. He stated, however, that he would be prepared to examine her in the presence of the accused, either in Court at a time when it was cleared for the purpose, or, if the witness thought it more convenient, in his private room in the Court house. The witness, being dissatisfied with this order, thereupon obtained from the High Court a rule calling upon the Presidency Magistrate to shew cause, why his order of 17th February should not be set aside, and on 15th March 1897 this rule came on for hearing.

Mr. *Dunne* shewed cause. - It is entirely a matter of discretion with the Court. The Presidency Magistrate is willing to have the Court room cleared or to hold the examination of the witness in his own room. It may be a real difficulty for her to be examined in this way, but at the same time the Court cannot allow a witness in a criminal case to be examined at any place she may choose to provide. In the case of *Queen-Empress* v. *Barton* (I. L. R., 16 Cal., 238) a commission was issued. The section includes commissions in Presidency towns and includes the High Court; although the language of the section is very curious. If the section were intended to apply only to the issuing of commissions to Magistrates outside the jurisdiction, then *Queen-Empress* v. *Barton* is wrong. If you cannot issue a commission under this section, then you cannot issue it at all; *Empress* v. *Bal Gangadhar Tilak* (I. L. R., 6 Bom., 285). [553] But assuming that a commission could issue, would this Court issue a commission? I submit not. It is a highly unsatisfactory method of taking evidence in a criminal case. [GHOSE, J. -If the lady can make arrangements for giving her evidence somewhere near, we do not see why the Presidency Magistrate should not go there.] That would form a precedent, as in the case of *In re Din Tarini Debi* (I. L R., 15 Cal., 775). If the difficulty of her not appearing in public is met, what is her objection to coming to the Magistrate's room. The case of *In re Farid-un-nissa* (I. L. R., 5 All., 92) dissents. *In re Hurro Soondery Chowdhrain* (I.L.R., 4 Cal., 20). It is not desirable that there should be formed a precedent of this sort in criminal cases.

Mr. *Hill* (Mr. *Farr* with him) in support of the rule.—It is necessary to place a reasonable construction on the sections of the Code, if they will admit of it. It has always been held that section 503 is wide enough to enable District Magistrates to issue a commission to a witness resident in his own district. The section does not say that a witness must be outside the jurisdiction. The cases have not hitherto held that the section only relates to witnesses residing

outside the jurisdiction of a Magistrate issuing the commission. Section 6 of the Code divides the Courts into five classes. Section 7 says that every Presidency Town shall be deemed a District. The Presidency Magistrate may be treated as a District Magistrate. *In re Din Tarini Debi* (I. L. R., 15 Cal., 775). In that case the witness was willing to take a house within the jurisdiction. The case of *Queen-Empress* v. *Barton* (I. L. R., 16 Cal., 239) was of a different character. There it was argued that no commission could issue because in England in a criminal trial no commission can issue. The reading of the sections relating to this subject has been that a commission may issue to a witness residing within the Town. It is necessary to consider the habits and customs of the people of the country. The two cases in the Allahabad Court were before Mr. Justice STRAIGHT, who knew the rules of the English Courts and was imbued with those ideas more than gentlemen with experience of this country would be. It would in this case be a hardship if the Court disregarded the horror a *purdanashin* lady has of appearing in Court. In this case the witness is **[554]** willing to take a house or a suite of rooms not far from the Magistrate's Court for the purpose of being examined.

The **judgment** of the Court (**Ghose** and **Gordon, JJ**) was as follows :—

The petitioner before us, Hem Coomaree Dassee, a *purdanashin* Hindu lady of rank, residing in the town of Calcutta, was subpœnaed by the Chief Presidency Magistrate of Calcutta to appear in his Court for the purposes of giving evidence in a certain criminal case. Thereupon, she presented a petition to the Magistrate, stating that she had never appeared in any Court or other public place, and asking that a commission might be issued for her examination. The Magistrate, on the 17th February last, rejected her application, upon the ground that, under section 503 of the Code of Criminal Procedure he had no power to issue such a commission, she being a resident within his jurisdiction. He recorded, however, at the same time that he "shall be prepared to examine the lady in the presence of the accused, either in Court at a time when it shall be cleared for the purpose, or, if thought more convenient, in his private room in the Court house."

Dissatisfied with this order of the Presidency Magistrate, the petitioner applied to this Court for a commission being granted, or for such other order as to this Court might seem meet and proper. And a rule was issued calling upon the Magistrate to shew cause why his order of the 17th February last should not be set aside.

Section 503 of the Code is as follows : -

"Whenever, in the course of an enquiry, a trial, or any other proceeding under this Code, it appears to a Presidency Magistrate, or District Magistrate, a Court of Session, or the High Court, that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense, or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate or Court may dispense with such attendance, and may issue a commission to any District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides to take the evidence of such witness," and so on.

If the lady had been a resident outside the limits of the town, **[555]** of Calcutta, there could be no doubt that the Presidency Magistrate would have authority under the section to issue a commission for her examination; but it seems to be doubtful, having regard to the collocation of the words in the last portion of the first paragraph of the section, whether he has such authority when the

witness is a resident within his jurisdiction. It will be observed that a commission can be issued only to a District Magistrate "or Magistrate of the first class" within the local limits of whose jurisdiction such witness resides. Section 6 of the Code differentiates "Presidency Magistrates" from "Magistrate of the first class," and section 10 defines who the "District Magistrate" is.

Our attention has been called to several cases, but; in none of these cases, except in that of *Empress* v. *Bal Gangadhar Tilak* (I. L. R, 6 Bom., 285), does the precise question now raised before us seem to have been raised. In some of these cases, the Court to which the application for a commission was made was a Court in the Mofussil, and not in any Presidency town [as, for instance, in the cases of *In re Hurro Soondery Chowdhrain* (I. L. R., 4 Cal., 20), *In re Faridunnissa* (I. L. R., 5 All., 92), *In re Basant Bibi* (I. L. R., 12 All., 69)]. No doubt the case of *Din Tarini Debi* (I. L. R., 15 Cal., 775) is one which came from the town of Calcutta, but it will be observed from a consideration of the case that the rule that was issued by this Court was simply to show cause, why it should not be ordered that the lady concerned should not be required to appear in Court to give her evidence (as the Presidency Magistrate had ordered), and it does not seem to have been discussed whether the Presidency Magistrate had the power to issue a commission within his jurisdiction, though no doubt in one portion of their judgment the learned Judges said "the question is whether a commission ever issued in regard to *purdanashin* ladies in his Court (Presidency Magistrate's Court). Of that he makes no mention. He also says that this lady travels from Govindanga to Calcutta, but he does not say that she does so publicly. So far therefore as cause has been shown by the learned Presidency Magistrate, it does not seem that the facts stated by him affects the reasons upon which such commissions have been granted." They then **[556]** gave certain directions as to how the evidence might be taken without compelling the lady to appear in the Court premises, and, as we understand the order of this Court, the learned Judges contemplated that the Magistrate should himself take the evidence, though no doubt in the last paragraph the word "commission" was used.

In the case of *Queen-Empress* v. *Barton* (I. L. R., 16 Cal., 238), an order for the examination of witnesses by commission in the town of Calcutta was issued by this Court to a Presidency Magistrate, and the evidence so taken was admitted in evidence, but there also the question now before us was not raised or discussed.

In the case of *Empress* v. *Bal Gangadhar Tilak* (I. L. R., 6 Bom., 285) the question no doubt was raised, but it will be observed that the Court had then to consider the language of section 76 of the High Court Criminal Procedure Act of 1875; and it was held that there was nothing in the language of that section to support the contention that the Court was not authorized to grant a commission to examine a witness, who was within its own jurisdiction. The language of that section is somewhat different from that of section 503 of the Code, with which we are now concerned; and the question is whether the section authorizes the Presidency Magistrate to issue such a commission within his own jurisdiction.

We have considered the provisions of sections 503 to 507, and the cases that have been cited in the course of argument; and it seems to us doubtful, as already observed, whether a Presidency Magistrate has the power that is now claimed for him by the petitioner.

But however that may be, there is nothing to prevent a Presidency Magistrate from examining a witness within his jurisdiction at some other place than the Court house, and it is quite within our province, having regard

to the revisional powers conferred by the Charter of this Court, to direct the Magistrate as to the mode in which the evidence of the petitioner may and should be taken.

The Presidency Magistrate has no doubt shown some consideration to the petitioner by offering to examine her in the manner [557] indicated in his order; but having regard to her rank and position in Hindu society, and to the fact that she (as stated) never appeared in any Court or other public place, we think that the offer made by the Magistrate is not, in the circumstances of the case, quite adequate. We think that we might give the same directions which were given by this Court in the case of *Din Tarini Debi* (I. L R., 15 Cal., 775). If the lady would take a house or a suite of rooms not far from the Magistrate's Court, and if she will pay all the costs which the Magistrate shall deem reasonable and proper, he will not enforce her attendance in Court, but examine her in the place so appointed in the presence of the parties concerned, and in the manner in which *purdanashin* ladies are ordinarily examined. This will not entail any inconvenience or loss of time upon the Court, but will at the same time remove the hardship which the lady may be subjected to, if the order of the Magistrate as it stands is enforced. If, however, she does not comply with the conditions imposed, the order of the Magistrate will stand.

In these terms the rule will be made absolute.

C. E. G. *Rule made absolute.*

NOTES.

[This was followed in (1911) 12 I.C., 221 (Mad.)]

[24 Cal 557]

APPELLATE CIVIL

The 10th February, 1897.

PRESENT.

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE AND MR. JUSTICE BANERJEE.

Kali Krishna Tagore............Plaintiff

versus

Izzatannissa Khatun and another............Defendants.*

Second Appeal—Code of Civil Procedure (Act XIV of 1882), section 586—Suit for compensation for use and occupation of land valued at less than Rs. 500—Provincial Small Cause Courts Act (IX of 1887), sections 15 and 23, Schedule II, Article 8.

A suit for compensation for money realized by the defendants from the actual occupants of land, who were stated to be the plaintiff's tenants, is a suit of a nature cognizable by the Small Cause Court; therefore, no second appeal lies to the High Court in such a suit valued at less than Rs 500, notwithstanding that the plaint was returned by the Small

* Appeal from Appellate Decree No 83 of 1895, against the decree of A E. Staley, Esq., District Judge of Backergunge, dated the 26th of September 1894, reversing the decree of Babu Siti Kantha Mullick, Munsif of Barisal, dated the 26th of April 1894.

[558] Cause Court to be filed in the Civil Court under section 23 of the Provincial Small Cause Courts Act, on the ground that the suit involved a question of title.

Mohesh Mahto v. *Piru* (I. L. R., 2 Cal., 470), and *Muttukaruppan* v. *Sellan* (I. L. R., 15 Mad., 98), referred to.

THIS appeal arose out of an action for compensation for use and occupation of land The plaintiff, who was the proprietor of sixteen annas of pergunnah Edilpore, brought twelve suits for rent for the years 1292 to 1295, B. S., against Kamal Khan and others, in whose names different quantities of land were recorded in the measurement paper prepared at the time of the *deara* settlement. His allegation was that, within the said pergunnah, there was a *howla* in the *chur* contiguous to *mouzah* Apupur standing in the names of Azgar Khan and others, which was held by the defendants by virtue of auction purchase; that there was a *deara* settlement with him by the Government in respect of the said *chur*, but at the time of the said settlement the defendants did not cause their *howladari* rights to be recorded; that out of these aforesaid twelve rent suits, four were decreed *ex parte*, but the remaining eight were dismissed, the tenants denying the title of the plaintiff, and alleging that the land in question was held by the defendants in *howla* right; that since the dismissal of these suits the defendants had realized and received the profits of the said land to a considerable amount, and as at the time of the settlement the defendants did not cause their *howladari* right to be recorded, they were not legally entitled to enjoy the profits thereof. Hence the present action for compensation was brought. The plaintiff also claimed road cess and public works cess. The suit was first instituted in the Small Cause Court, but as in the written statement the defendants raised various questions of title the plaint was returned to be filed in the Civil Court. The Munsif decreed the suit, but on appeal the learned District Judge reversed the decision of the Munsif, holding that the defendants were in possession of the disputed land as *howladars*, and that the plaintiff was not entitled to any damages.

From this decision the plaintiff appealed to the High Court.

Babu *Saroda Churn Mitter* and Babu *Amar Nath Bose* for the Appellant

Babu *Bussunt Kumar Bose* for the Respondents.

[559] Babu *Bussunt Kumar Bose* for the respondents took a preliminary objection to the hearing of the appeal on the ground that as the suit was one of a nature cognizable by the Small Cause Court, and as it was valued at less than Rs. 500, no second appeal would lie to the High Court under section 586 of the Code of Civil Procedure. See *Kunjo Behary Singh* v. *Madhub Chundra Ghose* (I. L. R., 23 Cal., 884).

Babu *Saroda Churn Mitter* for the appellant contended that section 586 of the Code of Civil Procedure did not apply, as the plaint was returned by the Small Cause Court for presentation to the Civil Court under section 23 of the Provincial Small Cause Courts Act. The object and effect of the provision in section 23 is to give jurisdiction to ordinary Civil Court. See *Mahamaya Dasya* v. *Nitya Hari Das Bairagi* (I. L. R., 23 Cal., 425). Under section 13, explanation 2, of the Code of Civil Procedure, the decision on the question of title is final. It is really a suit under article 11, schedule II of the Provincial Small Cause Courts Act, a suit "for the determination or enforcement of any other right to, or interest in, immoveable property." The effect of section 23 of the Provincial Small Cause Courts Act was to convert this suit, after the plaint was returned, to one for determination or enforcement of any other right to, or interest in, immoveable property. It can also be said that the suit is one for rent, as is contemplated in article 8, schedule II of Act IX of 1887. The plaintiff does not say that the defendant is a trespasser, but

she asks for what he realized from the plaintiff's tenants. In this case the plaintiff has asked for cesses also; that being so the case is one not cognizable by the Small Cause Court.

Babu *Bussunt Kumar Bose* in reply.—The mere fact that in a suit cognizable by the Small Cause Court, a question of title to immoveable property has been raised, does not take the case out of the provisions of section 586 of the Code of Civil Procedure. See *Mohesh Mahto* v. *Piru* (I. L. R., 2 Cal., 470.). It has been held in the case of *Muttukaruppan* v. *Sellan* (I. L. R., 15 Mad., 98) that a suit of a nature cognizable by a Small Cause Court does not cease to be so within the meaning of the Civil Procedure Code, section 586, because the Court in which it was instituted as a small cause suit returned the plaint **[560]** to be filed on the regular side under the Provincial Small Cause Courts Act, section 23.

The following **judgments** were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.) :—

Maclean, C.J.—I think that this preliminary objection must prevail. In section 586 of the Code of Civil Procedure it is provided that no second appeal shall lie in any suit of the nature cognizable in a Court of Small Causes when the amount or value of the subject-matter of the original suit does not exceed Rs. 500. If we turn to the Small Cause Courts Act (IX of 1887) we find this provision in sub-section 2 of section 15 of the Act, "Subject to the exceptions specified in that schedule," that is, the second schedule of the Act, "and to the provisions of any enactment for the time being in force, all suits of a civil nature, of which the value does not exceed Rs. 500, shall be cognizable by a Court of Small Causes." If the matter stood there, there could be no reasonable doubt that this was an action cognizable by the Small Cause Court, and therefore within the meaning of section 586 of the Code of Civil Procedure, and consequently no second appeal would lie.

But it has been ingeniously argued on behalf of the appellant that section 23 of the Act of 1887 makes a difference in the case. That section provides as follows: "Notwithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immoveable property, or rather title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title." That section is an enabling section only; and enables the Court, at any stage of the proceedings, to return the plaint in order that it may be presented to any Court which could determine the title. But, as was pointed out in the course of the argument, the section does not say that such suits shall not be cognizable by the Small Cause Court. It could easily have said so; it could easily have said, if that were the intention of the Legislature, that a suit, where the issue depended upon the proof or disproof of the title, would cease **[561]** to be cognizable by the Small Cause Court. It appears to me, therefore, that that section only does not make a case such as this, less a case cognizable by the Small Cause Court, as to which, under section 586 of the Code of Civil Procedure, no second appeal lies.

But that does not quite dispose of the matter. One other point was urged before us. It was urged that this particular case came within the exception of article 8 in the second schedule of Act IX of 1887: an exception that takes the case out of the operation of section 15 of the Act. It was stated that this was a suit for the recovery of rent. I think that when one looks at the plaint, and when one applies one's knowledge of what the term "rent" ordinarily means, it is not easy to arrive at the conclusion that this is a suit for the recovery of rent.

It is an action for the recovery of damages. The conclusion at which I arrive appears to me to be consistent with the principle laid down by a Full Bench of this Court in the case of *Mohesh Mahto* v. *Piru* (I. L. R., 2 Cal., 470), and with the view held by the High Court at Madras in the case of *Muttukaruppan* v. *Sellan* (I. L. R., 15 Mad., 98).

For these reasons I think the preliminary objection must prevail, and this appeal must be dismissed with costs.

Banerjee, J.—I am of the same opinion. The preliminary objection being that a second appeal is barred by section 586 of the Code of Civil Procedure, the question for consideration is whether the suit was of the nature cognizable in the Court of Small Causes, the amount being admittedly below Rs. 500. The learned Vakil for the appellant contended that the suit was not of that nature for two reasons—first, because, though the plaint was originally filed in the Court of Small Causes, it was returned by the Judge of the Small Cause Court under section 23 of Act IX of 1887 for presentation to the Court having jurisdiction to determine the question of title that was involved in the case; and, secondly, because, having regard to the nature of the claim, the suit ought to be treated as one for rent, and therefore excepted from the jurisdiction of the Court of Small Causes under article 8 of the second schedule of Act IX of 1887.

As to the first branch of this argument, I do not think that **[562]** the effect of the transfer of a suit cognizable by a Court of Small Causes is to make it any the less cognizable by such Court. Section 23 of Act IX of 1887 simply enacts that, "notwithstanding anything in the foregoing portion of the Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes, depend upon the proof or disproof of a title to immoveable property, or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title." That does not alter the nature of the suit. The section is evidently intended to enable Courts of Small Causes to save their time by returning plaints in suits which involve indirectly enquiry into questions of title which may take time; and a comparison of sub-section 2 of section 15 of the Small Cause Court Act of 1887, with section 16, will clearly show that a suit which under any of the provisions of that enactment may be tried by an ordinary Civil Court, notwithstanding that it is cognizable by a Court of Small Causes, does not cease to be a suit of that description by the mere fact of its being tried by such Court. The effect of the trial of such a suit by the ordinary Civil Court was considered by a Full Bench of this Court in a case tried under the old law, that is, the case of *Mohesh Mahto* v. *Piru* (I. L. R., 2 Cal., 470); and it was held that a second appeal would not lie in such a case.

Then, as to the second branch of the argument, I do not think that this suit can be treated as one for rent in any sense of the term. It is clear from the plaint that what is claimed is not any sum payable by the defendant as holding lands under the plaintiff as his tenant. What is claimed is a sum of money which, the plaintiff says, ought to have come to his hands in the first instance, but which the defendant wrongfully realised from the actual occupants of the land who are stated to be the tenants of the plaintiff. It was argued that as part of the claim consisted of road cess and public works cess, and as road cess and public works cess are realisable under the Cess Act as rent, the suit should, so far as the claim for road and public works cesses was concerned, be treated as one for rent. But on looking at the 6th paragraph of the plaint, I find that cesses are introduced, not as **[563]** independent items of the claim, but as merely furnishing data for the assessment of the damages

claimed in the suit. Both branches of the argument, therefore, upon which it is sought to take the case out of the description mentioned in section 586 of the Code of Civil Procedure, fail; and the preliminary objection must be allowed, and the appeal dismissed with costs.

S. C. G. *Appeal dismissed.*

NOTES.

[This was followed in (1896) 20 All., 480; (1901) 25 Bom., 625; (1902) 6 C.W.N., 687. See also (1900) 23 Mad., 547.]

[24 Cal. 563]

The 9th April, 1897.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Rajaram Pandey............Plaintiff

versus

Raghubansman Tewary and others............Defendants.*

Claim to attached property--Civil Procedure Code (1882), section 280--Claim by a Mokuraridar--Limitation--Limitation Act (XV of 1877), Schedule II, Article 11.

Upon attachment of immoveable property in execution of decree a claim was made on the ground that the judgment-debtor had granted a *mokurari* in respect of the property in favour of the claimant. The claim was allowed, and the property was ordered to be sold with a declaration of the *mokurari*. More than a year after this order, the decree-holder who purchased at an execution sale, brought a suit for a declaration that the *mokurari* was fraudulent and *benami* and for possession and mesne profits.

Held, that the order was a judicial determination under section 280† of the Civil Procedure Code (1882), and that, therefore, the suit was barred under article 11‡ of the second Schedule of the Limitation Act (XV of 1877).

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* Appeal from Appellate Decree No. 1657 of 1895, against the decree of F. S. Hamilton, Esq., Officiating District Judge of Sarun, dated the 29th of July 1895, affirming the decree of Babu Krishna Nath Roy, Officiating Additional Subordinate Judge of that district, dated the 16th of September 1893.

† [Sec. 280:—If upon the said investigation the Court is satisfied that, for the reason stated in the claim or objection, such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall pass an order for releasing the property, wholly or to such extent as it thinks fit, from attachment.]

Release of property from attachment.

‡ [Art. 11:—

Description of suit.	Period of limitation.	Time from which period begins to run.
By a person against whom an order is passed under sections 280, 281, 282 or 335 of the Code of Civil Procedure, to establish his right to, or to the present possession of, the property comprised in the order.	One year ...	The date of the order.]

A DECREE was passed in favour of the plaintiff upon a petition of compromise and confession of judgment by Bagisdut Misser (defendant No. 2 in this case), whereby he was made liable for Rs. 3,100, and certain properties, including 18 bighas 5 biswas of *zerait* land, were declared securities for the amount. In execution of that decree claims and objections were made on behalf of different members of the family of the judgment-debtor as well as by defendant No. 1, Raghubansman Tewary. The claims of the members of the judgment-debtor's family were disallowed, and regular suits were brought by them to establish their rights, and **[564]** their litigation, which terminated in 1890, was in the event unsuccessful. The claim of defendant No. 1 on the ground that he was in possession under a *mokurari potta* executed by the judgment-debtor on the 5th September 1885 was, however, allowed, and it was ordered that the property would be sold with a declaration of the *mokurari*. The order was passed on the 12th June 1887, and the sale was held on the following day.

The plaintiff brought the present suit on the 10th November 1891, on the allegations (*inter alia*) that he had been dispossessed from the *zerait* lands aforesaid in consequence of an order of the Criminal Court under section 145 of the Criminal Procedure Code passed on the 11th November 1890, in favour of defendant No. 1 and against the plaintiff; that the defendant No. 1 was merely a disciple and *benamidar* of the judgment-debtor, defendant No. 2, and that the *mokurari*, dated 5th September 1885, was fraudulent and inoperative, and did not effect any change in the possession of the lands. The plaintiff prayed for a declaration that the *mokurari* was fraudulent and inoperative, for possession of the *zerait* lands and for mesne profits.

The written statement of Raghubansman Tewary raised the plea of limitation on the ground that more than one year had elapsed since his objection was allowed on the 12th June 1886, and also on the ground that the plaintiff's claim for setting aside the *mokurari* was barred by three years' limitation prescribed by article 91 of the Limitation Act.

The lower Courts did not notice the plea of one year's limitation, but dismissed the suit under article 91 of the second schedule to the Limitation Act. Evidence was not gone into.

The plaintiff preferred a second appeal to the High Court.

Babu *Sris Chandra Chaudhuri* for the Appellant.

Babu *Golap Chandra Sarkar* for the Respondents.

Babu *Sris Chandra Chaudhuri* contended that article 91 did not apply to the present suit, as it was not necessary to set aside the *mokurari*, which was, on the facts stated, void and never intended to be operative. The latest case on the point is *Sham Lall Mitra* v. *Amarendra Nath Bose* [I. L. R., 23 Cal., 460 (469)]. All the High Courts agree in **[565]** this respect where the deed is inoperative, as would appear from the more recent cases. [TREVELYAN, J.—But in this case there seems to have been a claim which was allowed; how do you get over the limitation under Article 11 of Schedule II of the Limitation Act read with section 283 of the Civil Procedure Code?] The order was not one under section 280. The petition is not before the Court, but it could not possibly be entertained as a "claim" to the property attached, in terms of section 278, for the property attached was not the *mokurari* interest; nor could it be an "objection to the attachment;" the attachment was of the interest of the judgment-debtor, whatever that was. An objection, moreover, like the present is clearly kept out of view in section 280. A *mokuraridar* "is a tenant or other person paying rent to the judgment-debtor" in the language of that section, and there can be no judicial order upon objection raised by

tenants under section 280. As an order under section 280 it was *ultra vires*. Then also the property attached was not released from attachment by this order. [TREVELYAN, J.—The order may be to release to *such extent* as the Court thinks fit.] The expression "to such extent" refers to what precedes: "Partly on his account and partly on account of some other person;" or it may mean the interest of co-owners where the whole property is attached. It cannot be taken to mean all subordinate interests, including the *raiyati* tenures, much less all interests in general. Section 282 would not be necessary in that case.

Babu *Golap Chandra Sarkar* for the Respondents was not called upon.

The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ**). was as follows:—

This suit was brought by the plaintiff, who is a judgment-creditor and bought property in execution of his decree against persons who claim to hold under a *mokurari* executed by the judgment-debtor after the decree and before the attachment. The suit has been held to be barred by both the lower Courts on the ground that it was brought beyond the three years' period of limitation given by Article 91 of the second schedule to the Limitation Act in cases of suits to set aside an instrument.

In our opinion it is not necessary to consider that question, **[566]** as we think the suit is barred by the one year's limitation provided under Article 11 of the second schedule of the same Act.

The alleged *mokuraridar* filed a claim. The claim has not been put in, but the order has been put in. The order made recites what was done. It is dated the 12th June 1896. It states that the claimant's witnesses were examined; that the claimant's Vakil declined to call any more witnesses; that the decree-holder's Vakil's arguments were heard; that the *mokurari pottah* was proved; and that the claim was granted; and that the property would be sold with a declaration of the *mokurari*.

That is a judicial determination under section 280 of the Code of Civil Procedure of the claim to possession of the property under this *mokurari*. The claim was allowed. The section directs that when the Court "is satisfied that for the reasons stated in the claim or objection, such property was not when attached in the possession of the judgment-debtor or some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in possession of the judgment-debtor at such time, it was so in his possession not on his own account or as his own property, but on account of or in trust for some other person or party on his own account and partly on account of some other person, the Court shall pass an order for releasing the property wholly or *to such extent* as it thinks fit from attachment."

The effect of this order was to release the property *to the extent of the mokurari* interest, and direct that it be sold subject to that *mokurari* interest. What was to be sold was in reality the right to receive *mokurari* rent. There is no other construction, so far as we can see, which can be placed upon this order. If that be so, it follows that the judgment-creditor, if he wanted to sell the property clear of the *mokurari*, was bound to bring the suit within a year. The suit was brought long after a year had elapsed; and is, therefore, barred by the Law of Limitation.

On this ground we think that this appeal must be dismissed with costs.

S. C. C. *Appeal dismissed.*

NOTES.

[See (1907) 35 Cal., 202 : 35 I. A., 22 as regards the nature of an order in these summary proceedings.]

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[567] TESTAMENTARY JURISDICTION.

The 3rd May, 1897.

PRESENT :

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE.

In the Goods of Ram Chunder Ghose (deceased).

Court Fees Act (VII of 1870), Schedule I, Art. 11—Probate fee—Doubtful debt.

The uncertainty of recovering a debt due to the estate of a deceased person is not a sufficient ground for a proportionate reduction of the fee payable in respect of probate of a will.

THIS case was referred as follows by Mr. Belchambers, the Taxing Officer, for the decision of the Chief Justice under section 5 of the Court Fees Act (VII of 1870) :—

" The testator in his will, dated 17th January 1895, mentions the following sums as being due to him :—

Rs.	11,000
"	7,700
"	8,300
'	1,400
"	3,100
"	100
"	31,600

" In the petition for probate it is stated 'that the amount of the estate and effects of the deceased, so far as your petitioners have been able to ascertain, and which are likely to come into your petitioner's hands *after payment of his debts*, will not exceed the sum of Rs. 10,830-10.'

" Annexed to the petition is a schedule which contains—

" (1) 'A list of immoveable properties.'

" (2) 'A list of moveable properties *realizable*,' in which, of the debts due to the estate, only one of Rs. 1,400 is entered.

" (3) 'A list of *unrealizable* assets,' in which the other debts due to the estate are entered.

" (4) 'A list of debts due by the deceased.'

" Upon the facts so stated the petitioners submit that in calculating the amount of probate duty the debts due by the [568] estate amounting to Rs. 5,800, and such of the debts due to the estate as are mentioned in the 'list of unrealizable assets,' amounting to Rs. 26,753, ought to be excluded.

"It has been held that the duty payable is to be calculated on the amount or value of the property, without deducting the debts due by the deceased—*In the Goods of Ram Chandra Das* (9 B. L. R., 30). It does not follow that debts admittedly due by an estate will be paid. If and when paid a refund of duty may be obtained. This is provided for by section 19 *B* of the Court Fees Act, 1870, as amended by Act XIII of 1875.

"The first of the debts mentioned in the 'list of unrealizable assets' is the subject of a claim in an administration suit. It is uncertain what may be realized in respect thereof after payment of preferential claims. It is, therefore, a matter which may be dealt with according to the rule which was applied under similar circumstances in the case of *In the Goods of Abdool Aziz* (I. L. R., 23 Cal., 577).

"The other debts mentioned in the 'list of unrealizable assets' are judgment-debts not barred by the limitation, but supposed to be unrealizable with reference to the present circumstances of the judgment-debtors. Exemption on similar grounds was disallowed in *In the Goods of Beake* (13 B. L. R., Ap., 24). It is desired by the petitioners that this question should be reconsidered with reference to the case of *Moses* v. *Crafter* (4 C. and P., 524). In that case it was held that desperate and doubtful debts need not be included in the amount on which probate duty is payable. In the present case the debts in question being judgment-debts cannot be treated as doubtful. Whether they may be treated as desperate in the sense of being unrealizable is a question of fact. In *In the Goods of Beake* (13 B. L. R., Ap., 24), to which I have referred, the uncertainty of recovering a debt was, as a question of general importance, referred to and decided by COUCH, C.J., under section 5 of the Court Fees Act, 1870. That, under the terms of that section, was a final decision on a question of general importance, and is applicable to every similar case. It was not, I think, intended that a question of general importance should, after 'final decision,' be reconsidered except on other grounds. But [569] at the request of the petitioners the case, so far as it relates to the uncertainty of recovering debts due to this estate, is referred to his Lordship the Chief Justice under section 5 of the Court Fees Act, 1870."

Maclean, C.J.—This case to my mind is governed by the decision of Sir RICHARD COUCH in the case of *In the Goods of Beake* (13 B. L. R., Ap., 24), from which I see no reason to differ.

S. C. B.

NOTES.

[The mere fact of a property being the subject of litigation did not suffice for exemption from probate-duty :—(1900) 24 Mad., 241.]

[24 Cal. 569]
APPELLATE CIVIL.

The 11th March 1897.
PRESENT:
SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE AND MR. JUSTICE BANERJEE.

Srihari Banerjee and another............Plaintiffs
versus
Khitish Chandra Rai Bahadoor............Defendant.*

Res Judicata—*Code of Civil Procedure (Act XIV of 1882), section 13—Landlord and tenant—Suit for rent—Question of title incidentally raised in a previous suit—Subsequent suit for declaration of title to land purchased.*

A suit was brought by *A* against *B* and others for rent; and the matter directly and substantially in issue was as to what the share was for which *A* was entitled to rent. The plaintiff obtained a decree for the whole rent. In a subsequent suit by *B* and others against *A* for declaration of title to land purchased by them in execution of their mortgage decree, the defence was that the former decree for rent operated as *res judicata*: *Held*, that as the issue in the rent suit was for what share the plaintiff was entitled to rent and not to what share of the property was the plaintiff entitled as owner, the question of title could be said to have been in issue in that suit only incidentally and not directly, and it could not have been entertained in the form in which it was now raised; therefore the subsequent suit was not barred as *res judicata*.

Run Bahadur Singh v. *Lucho Koer* (I. L. R., 11 Cal., 301; L. R., 12 I. A., 23) followed. *Radhamadhub Holdar* v. *Monohur Mukerji* (I. L. R., 15 Cal., 756; L. R., 15 I. A., 97) distinguished.

[570] *Nanack Chand* v. *Teluckdye Koer* (I.L.R., 5 Cal., 265), *Dirgopal Lal* v. *Bolakee* (I. L. R., 5 Cal., 269) referred to.

THE facts of this case are sufficiently stated in the judgment of the High Court.

Babu *Saroda Churn Mitter* and Babu *Hara Kumar Mitter* for the Appellants.

Dr. *Asutosh Mukerjee* for the Respondent.

Babu *Saroda Churn Mitter*.—The decision in the rent suit does not operate as *res judicata*, inasmuch as the question of title, if tried at all, was tried incidentally and not directly. See the observations of the Judicial Committee in the case of *Run Bahadur Singh* v. *Lucho Koer* (I. L. R., 11 Cal., 301; L. R., 12 I. A., 23).

Dr. *Asutosh Mookerjee*.—The decision of a question of title in a rent suit may operate as *res judicata* in a title suit, if the self-same right and title is in issue in the two suits. See the cases of *Gobind Chunder Koondoo* v. *Taruck Chunder Bose* (I. L. R., 3 Cal., 145), *Gopal Das* v. *Gopi Nath Sircar* (12 C. L. R., 38), *Radha Madhub Holdar* v. *Monohur Mukerji* (I. L. R., 15 Cal., 756; L. R., 15 I. A., 97), *Dakhyani Debea* v. *Dole Gobind Chowdhry* (I. L. R., 21 Cal., 430), *Bharasi Lal Chowdhry* v. *Sarat Cunder Dass* (I. L. R, 23 Cal., 415). A decision operates as *res judicata*, if the matter has been decided in substance or even by necessary implication. See *Soorjomonee Dayee* v. *Suddanund Mohapatter* (12 B. L. R., 304; L. R., I. A., Sup. Vol., 212), *Pahalwan Singh* v. *Muheshur Buksh Singh* (12 B. L. R., 391).

* Appeal from Appellate Decree No 288 of 1895, against the decree of Alfred F. Steinberg, Esq., Officiating District Judge of Nuddea, dated the 13th of December 1894, reversing the decree of Babu Debendra Nath Pal, Munsif of Ranaghat, dated the 8th of September 1893.

Babu *Saroda Churn Mitter* in reply.

The **judgment** of the High Court (**Maclean,, C. J.**, and **Banerjee, J.**) was as follows:—

This appeal arises out of a suit brought by the plaintiffs, appellants, for a declaration of their right by purchase to a 1 anna 15 gandas 2 karas 2 krantis share in certain land, for a further declaration that the right of the defendant No. 1 by purchase extends only to a 6 annas odd gandas share of the said land, and **[571]** that the defendant No. 1 is therefore entitled to recover from the plaintiffs as rent for the said land only Rs. 5 odd annas annually, and for refund of a certain sum of money which the defendant No. 1 is said to have unjustly recovered by suit from the plaintiffs. The allegations upon which the plaintiffs base their right to the reliefs claimed are shortly these: That the husband of plaintiff No. 1, while living jointly with plaintiffs Nos. 2 and 3, obtained *mourasi mokurari pattas*, or permanent leases at fixed rent, of the land in dispute, which is revenue-free land, from the former proprietors thereof, namely, defendants 2—25; that subsequently some of those proprietors sold their 8 gandas odd karas share in the said land to the husband of plaintiff No. 1 and to the plaintiffs Nos. 2 and 3; that on the 26th Jaistha 1288 (corresponding to same day in June 1881) one of the former proprietors, namely, defendant No. 21, mortgaged his 1 anna 6 gandas 2 karas 2 krantis share to the husband of plaintiff No. 1, and that share was purchased by the plaintiffs on the 6th August 1888 in the name of the mortgagee at a sale in execution of the decree obtained on the mortgage; that the defendant No. 1, in execution of a certificate against some of the other defendants, purchased their shares in the said land on the 12th October 1882; that thereafter defendant No. 1 sued the plaintiffs for the entire rent of the *mourasi mokurari* tenure, and notwithstanding the objection of the plaintiffs that defendant No. 1 was not entitled to the entire 16 annas of the rent, the suit for rent was decreed in full and the entire rent has been recovered from the plaintiffs; and that though the plaintiffs' purchase of the 1 anna 6 gandas 2 karas 2 krantis was subsequent to the purchase by defendant No. 1, their purchase should prevail, as being in satisfaction of their prior mortgage.

The defence of defendant No. 1 was that the matter in dispute was *res judicata* by reason of the decision in the previous rent suit, and that the plaintiffs were not entitled to the share claimed by them.

The first Court over-ruled the plea of *res judicata*, and on the merits held that, though the purchase set up by the plaintiffs of the 8 gandas odd share was not made out, they were entitled to a declaration of their right to a 1 anna 6 gandas 2 krantis 6 dantis share as purchasers under their mortgage decree, and a **[572]** further declaration that the defendant No. 1 was entitled only to Rs. 6 odd annas annually as rent, and to refund of a certain sum.

Against the decree of the first Court, defendant No. 1 preferred an appeal, and the lower Appellate Court, without going into the merits of the case, has dismissed the suit on the ground that it is barred as *res judicata* by reason of the decision in the previous rent suit.

In second appeal it is contended for the plaintiffs that the decision of the lower Appellate Court is wrong in law, as the question of title, if tried at all in the rent suit, was tried only incidentally and not directly, and the judgment in the rent suit could not therefore make the matter *res judicata*. It is conceded now, as it was conceded in the lower Appellate Court, that the decree for refund of money granted by the first Court cannot stand.

The question whether the plea of *res judicata* is good in any case must depend for its answer upon the circumstances of the case.

The former suit, upon the judgment in which the plea of *res judicata* is based in this case, was one for arrears of rent for certain years, due in respect of land now in dispute, brought by the present defendant No. 1 against the present plaintiffs. The issue raised upon the question of title was as follows:—

"For what share is plaintiff entitled to rent ?" The decision of the first Court upon that issue was this:—

"The plaintiff purchased under the certificate procedure for arrears of rent due to him. That was in 1882. In 1883 the defendant No. 1's husband sued one of the old proprietors, Dinabundhu Chuckerbutty, on a mortgage bond, but did not make plaintiff a party. He brought the property to sale and purchased himself. But Dinabandhu was a party to the certificate case, and plaintiff had purchased that right.

"The defendants do not show how and when they acquired title to Golap Sundari's share. I find plaintiff entitled to the whole rent."

And the judgment of the District Judge upon this point on appeal was as follows—

[573] "In the next place it does not appear that the twenty-one *maliks* are registered in Register B under the Land Registration Act (Bengal Act VII of 1876), and under section 78 the defendants are not bound to pay those unregistered, if they subsequently demand rent. Then defendants allege two purchases of two shares of their superior landlords. They only produce one sale certificate, and that is of date subsequent to the plaintiff's purchase, and therefore is of no avail and was rightly rejected by the lower Court. Hence the defendants do not substantiate their plea."

These being the judgments of the Original and Appellate Courts upon the issue as to shares in the former suit for rent, the question is whether they operate as *res judicata* in the present suit for declaration of the plaintiff's title to the share purchased by them in execution of their mortgage decree. We are of opinion that the question ought to be answered in the negative.

To make the judgment in the former suit conclusive in this, it must be shewn that the matter directly and substantially in issue in the present suit was directly and substantially in issue in the former. Now the matters directly and substantially in issue in this suit (leaving out of consideration points which have been given up and confining our attention to the only points to which the claim is now limited) are—whether the plaintiffs are entitled to the share of defendant No. 21, Dinabandhu, and to what share is defendant No. 1 entitled; while that in the former suit was as to what the share was for which the present defendant No. 1, the plaintiff in that suit, was entitled to rent. And though the share of the rent of a tenure to which a party is entitled depends generally upon the extent of his share in the property in which the tenure is included, or in other words, upon the extent of his title, yet, having regard to the frame of the issue and to the judgments of the Original and Appellate Courts in the former suit, the question of title can be said to have been in issue in that suit only incidentally and not directly, and it could not have been entertained in the form in which it is now raised, nor was the question in that form decided in the former suit.

The issue in the rent suit was "for what share is the plaintiff entitled to rent" and not "to what share of the property is the plaintiff entitled as owner." And the judgment of the Court **[574]** of Appeal rested upon considerations based on the provisions of the Land Registration Act, and on the fact of the purchase of the present plaintiffs being subsequent to that under which the present defendant No. 1 claimed; considerations which were necessary and sufficient for the determination of the rent suit, but which are not conclusive

in a suit like the present, which is for determination of title to land, as distinguished from title to recover rent, and in which the plaintiffs claim a preferential right, notwithstanding that their purchase was subsequent to that of the defendant No. 1, by reason of that purchase being in satisfaction of a decree on a prior mortgage. Section 78 of Bengal Act VII of 1876, and section 60 of Act VIII of 1885, bar inquiry in a rent suit into any question of title independently of the Land Registration record, while clause (*a*) of section 89 of the former Act reserves the right to obtain a declaration of title independently of such record by a regular suit. And the cases of *Nanack Chand* v. *Teluckdye Koer* (I. L. R., 5 Cal., 265), *Dirgopal Lal* v. *Bolakee* (I. L. R., 5 Cal., 269) show that the right to possession, and therefore the right to recover rent by suit, belongs to the prior purchasor, though the subsequent purchaser in satisfaction of a prior mortgage may raise the question of priority of his title in a suit properly framed for the purpose.

The view we take on the question of *res judicata* is fully supported by the decision of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (I. L. R., 11 Cal., 301; L. R., 12 I. A., 23).

It was contended for the respondents that this view is opposed to the decision of the Privy Council in *Radhamadhuv Holdar* v. *Monohur Mukerji* (I. L. R., 15 Cal., 756; L. R., 15 I. A., 97). We do not think that this contention is correct. In the case just referred to, the decision in the previous suit, which was no doubt one for rent, did not, and could not, rest upon any consideration based on the Land Registration Act or the Bengal Tenancy Act, because those Acts were passed subsequently; and the precise question of title that was raised in the subsequent suit had been heard and decided in the rent suit. See [576] the case of *Rajkishen Mookerjee* v. *Radhamadhuv Holdar* (21 W. R. 349). That case therefore is quite distinguishable from the present.

For the foregoing reasons we think the Court of Appeal below was wrong in holding that the suit was barred as *res judicata*. The judgment appealed against must therefore be set aside, and the case remanded to the lower Appellate Court to be tried on the merits. Costs will abide the result.

S. C. G. *Appeal allowed; case remanded.*

NOTES.

[See also (1905) 32 Cal., 891; (1897) 25 Cal., 136; (1906) 10 C.W.N., 820; (1912) 23 M.L.J., 543.]

[24 Cal. 575]
FULL BENCH.

The 12th March, 1897.
PRESENT:
SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN, MR. JUSTICE BEVERLEY AND MR. JUSTICE BANERJEE.

Hemadri Nath Khan, by his Mother and Guardian Jagadiswari Debi, and another............Defendants Nos. 9 and 10
versus
Ramani Kanta Roy, Plaintiff and others............Remaining Defendants.*

Partition—Right to partition—Partition between zemindar and putnidars—Partition between parties, one of whom owns interest subordinate to the other.

The plaintiff was proprietor of an entire estate paying an annual revenue to Government of Rs. 2,414. In 1854 his father gave a *putni* lease of an undivided six annas share of the estate to the defendants' predecessors in title. The plaintiffs alleged that the land being held *ijmali*, although he and the defendants collected separately from the tenants their respective shares of the rent, difficulty and inconvenience had arisen in the management of the property, and he therefore sued to have his ten annas share of the land divided by metes and bounds from the six annas share of the *putnidars*, the land of the entire estate remaining liable as before for the entire amount of the Government revenue payable in respect of it.

Held, by the Full Bench that the plaintiff was entitled to a decree for partition.

THIS case was referred to a Full Bench by MACPHERSON and JENKINS, JJ., on the 8th September 1896, with the following opinion:—

[576] "The facts of this case are short and simple. The plaintiff is the proprietor of an entire estate paying an annual revenue to Government of Rs. 2,414-2-4. In 1854 his father gave a *putni* lease of an undivided 6 annas share of the estate to the defendants' predecessors in title. The plaintiff alleges that the land being held *ijmali*, although he and the defendants collect separately from the tenants their respective shares of the rent, difficulty and inconvenience has arisen in the management of the property, and he brings this suit to have his 10 annas share of the land divided by metes and bounds from the 6 annas of the *putnidars*, the land of the entire estate remaining liable as before for the entire amount of the Government revenue payable in respect of it.

"Two only of the nine defendants who are the owners of the *putni mehal* opposed the claim for partition, and the Subordinate Judge has made a decree for the division of the land comprised in the estate into two portions of 10 annas and 6 annas, the former to be allotted to the plaintiff and the latter to the defendants as the land of their *putni mehal*. Against this decree the ninth defendant, who was one of the objecting defendants in the lower Court, alone appeals, and the sole ground taken, or at least argued, before us is that, as the interests of the parties are not the same, the plaintiff being zemindar and the defendants *putnidars*, and as such the owners of an interest subordinate to the zemindar, the suit for partition is not maintainable. It is said that the

* Full Bench reference in appeal from Original Decree No. 234 of 1894, against the decree of Babu Nil Madhub Das, Rai Bahadur, Subordinate Judge of Rungpur, dated the 17th of July 1894.

effect of the partition is to alter the condition of the tenants at the instance of the landlord by converting them from tenants of an undivided portion of the entire estate into tenants of specific land in that estate and that this cannot be allowed. This may be the effect of the partition; but the answer is that the defendants' predecessors, by taking a *putni* lease of an undivided 6 annas share, took it subject to all the incidents attaching to such an interest in property, and that the defendants as their successors are bound by the same incidents, though one of them be the liability to partition.

"The suit cannot be regarded as a suit by a landlord against his tenant to alter in any way the nature of the tenancy. The plaintiff is certainly the landlord of the defendants as regards [577] the 6 annas share held by them in *putni* right, but he is also the owner in zemindari right and as such in possession of the 10 annas share, and it is in the latter character that he brings this suit. There being no stipulation in the *putni* lease against partition, and no implied contract not to partition, the *putni* grant of the undivided 6 annas share did not alter or affect his right or position as proprietor of the remaining 10 annas share. He was left in full and uncontrolled possession of all his rights as such proprietor, and was free to deal with the share in any way he pleased. Supposing he sold it as distinct from the 6 annas share over which the *putni* right extended, the purchaser would as against him be entitled as of right to a partition of the zemindari interest, and he would have the same right against the purchaser. By the partition the *putnidari* right would be limited to the land allotted to the 6 annas sharer, and in that way a partition of it would be effected. So also if he gave a *putni* lease of the remaining 10 annas share, the *putnidars* holding *ijmali* with the *putnidars* of the 6 annas share would, we consider, be entitled to partition. There is nothing to prevent the plaintiff from doing what a person deriving title solely from him could do, and it does not seem to make any difference that he occupies the double character of lessor of the share given in *putni* and proprietor in zemindari right of the remaining share, or, that he and not the *putnidar* is the person asking for partition. The case must, we think, be dealt with on the same footing and governed by the same principles as if the grantor of the *putni* had been a co-sharer of the plaintiff and all necessary parties were joined.

"The parties are in *ijmali* or joint possession in different shares of the entire property which it is sought to partition, and that property is the whole of the estate of the defendants. The latter circumstance distinguishes the case from the case of *Parbati Churn Deb* v. *Ainuddeen* (I. L. R., 7 Cal., 577) and also in one respect from the case of *Mokunda Lal Pal Chowdhry* v. *Lehuraux* (I. L. R., 20 Cal, 379), as there is no difference between a lease of a share of a particular piece of land forming part of an entire estate, and a lease of a share of certain *mouzahs* forming part of an entire estate.

"There is unity of possession but not of interest, and the parties are in fact as regards the 6 annas share and the 10 annas share [578] tenants in common. It is said that there is no real difference in the interest, as, there being no reversion in favour of the zemindar, the *putni* grant confers an absolute estate terminable only on the sale of the parent estate for arrears of revenue due in respect of it. But, however that may be, there is no doubt that the zemindari interest and the *putnidari* interest are not the same.

"The only question then is, whether in this country to entitle a person to partition, there must be unity of interest as well as of possession in the property to be partitioned. It was so held in the case of *Mokunda Lal Pal Chowdhry* v. *Lehuraux* (I. L. R., 20 Cal., 379) referred to above, and this is the only case in point to which we have been referred. It has been held otherwise in England

as the cases there cited show. The facts in *Mokunda Lal's* case were very complicated, and there were many difficulties in the way of a partition. It was the converse case to this, as the persons claiming partition were the permanent *talukdars* of a share of a portion of the land comprised in the entire estate, the defendants being the *putnidars* and zemindars of the estate. The claim might have been and probably was rejected partly on the ground that a partition could not be enforced of a part of the estate held by the defendants as in the case of *Parbati Churn Deb* v. *Ainuddeen* (I. L R., 7 Cal., 577), but the substantial ground of the decision undoubtedly was that the interest being different there could be no partition. The learned Judges held that joint possession alone is not a sufficient basis for a claim to partition, and say 'in order that persons may be co-parceners and so have a right to partition, it seems to us that not only must they be in joint possession of the property, but that that joint possession must be founded on the same title,' by which we understand a title of the same description, if not exact unity of interest. They then go on to apply that principle to the facts of the case, and hold that for that and other reasons the suit must fail.

"Were it not for that decision we should have been disposed to dismiss this appeal and allow the decree for partition to stand. We cannot, we consider, do this without acting contrary to it.

"If the *putnidars* had been the persons asking for partition, we think, on principle, they would have been entitled to it. For **[579]** the reasons already given we think the case cannot be regarded as a case by a landlord against a tenant or a tenant against a landlord to alter the nature of the tenancy, and the *putnidars* would certainly have no other means of relief from a state of things which might be most injurious to all parties. If the *putnidars* are entitled to a partition, the zemindars are, we think, equally so entitled.

"We must therefore refer to a Full Bench the question whether, on the facts as stated, there can be a decree for partition."

Babu *Harendra Narain Mitter* for the Appellants.

Mr. *Woodroffe* and Babu *Tarak Nath Palit* for the Respondents.

The arguments sufficiently appear from the judgment of BANERJEE, J.

The following cases were cited in argument · *Parbati Churn Deb* v. *Ainuddeen* (I. L R, 7 Cal., 577), *Mokunda Lal Pal Chowdhry* v. *Lehuraux* (I. L. R., 20 Cal., 379), *Shama Sundari Debi* v. *Jardine, Skinner & Co.* (B. L. R., Ap. 120: 12 W. R., 160), *Gour Churn Soor* v. *Jugobundhoo Sen* (22 W. R., 437), *Ridai Nath Sandyal* v. *Iswar Chandra Saha* (4 B. L. R., Ap., 57 *note*), *Ajoodhya Persad* v. *Collector of Dhurbunga* (I L.R., 9 Cal., 419), *Heaton* v. *Dearden* (16 Beav., 147), *Baring* v. *Nash* (1 V. & B., 551), *Hobson* v. *Sherwood* (4 Beav., 184), *Gibbs* v. *Haydon* [30 W.R, (Eng) 726], *Sinclair* v. *James* [L. R. (1894), 3 Ch., 554], *Kasumunnissa* v. *Nil Ratan Bose* (I. L. R., 8 Cal., 79), *Padmamani Dasi* v. *Jagadamba Dasi* (6 B. L. R., 134), *Muhammad Baksh* v. *Mana* (I. L R., 18 All., 334), *Sundar* v. *Parbati* (I. L. R., 12 All. 51: L. R, 16 I. A., 186), *Debi Singh* v. *Sheo Lall Singh* (I. L. R, 16 Cal., 203), *Waghela Rajsangji* v. *Masludin* (I. L. R., 11 Bom., 551: L. R., 14 I.A., 89).

The following **opinions** were delivered by the Full Bench (MACLEAN, C.J., and MACPHERSON, TREVELYAN, BEVERLEY and BANERJEE, JJ.)

Banerjee, J.—The facts of this case, as set out in the referring order, are shortly these:

[580] "The plaintiff is the proprietor of an entire estate paying revenue to Government. In 1854 his father gave a *putni* lease of an undivided 6 annas share of the estate to the defendants' predecessors in title. The plaintiff alleges that the land being held *ijmali*, although he and the defendants collect

separately from the tenants their respective shares of the rent, difficulty and inconvenience has arisen in the management of the property, and he brings this suit to have his 10 annas share of the land divided by metes and bounds from the 6 annas of the *putnidars*, the land of the entire estate remaining liable as before for the entire amount of the Government revenue payable in respect of it."

The Court below having made a decree for partition, one of the defendants has appealed against it on the ground that there can be no decree for partition in a suit by a zemindar against his *putnidars*, and the question we are asked to determine is " whether on the facts stated there can be a decree for partition."

I am of opinion that the question ought to be answered in the affirmative. As a general rule, every joint owner of property should be held entitled to obtain partition, or in other words " to be placed in a position to enjoy his own right separately and without interruption or interference " by his co-sharer—see *Shama Sundari Debi* v. *Jardine, Skinner & Co.* (3 B. L. R., Ap. 120 : 12 W. R., 160) and Story's Equity Jurisprudence, section 648. It is against good sense, if not also against good morals, as the Roman law viewed it, to compel joint owners to hold a thing in common, " since it could not fail to occasion strife and disagreement among them." But if partition has the advantage of placing each co-sharer in a position to enjoy his own property without interference by others, it has the disadvantage of subjecting him to expense, and of impairing more or less the value of the joint property by dividing it into comparatively small parts; and where partition is sought by a co-owner whose interest in the property is limited in point of time, the question may arise, whether the temporary advantage to be secured to him is sufficient to outweigh the disadvantage of subjecting the other co-owners to expense and trouble which may in the end lead to no permanent division, the successors of the applicant not being bound by anything done at his instance. The general rule must, **[581]** therefore, be taken subject to many exceptions and qualifications, depending upon the nature of the thing owned jointly, the nature of the interest of the party claiming partition, the nature of the terms and conditions on which the different joint owners hold their respective interests, and various other matters. But I do not see any good and sufficient reason for thinking that the present case should form any exception to the rule. It is not suggested that the property sought to be divided in this case is either impartible, or is from its nature such that the partition asked for will impair the value of any of the shares into which it is to be divided. Nor is it suggested that the applicant for partition has only a limited interest, and that a partition at his instance will not be of any permanent effect. The only grounds upon which the learned Vakil for the appellants rests his contention that there ought not to be any partition in this case are two, namely, *first*, that the plaintiff is precluded from demanding any such partition against the defendants by reason of his predecessor in title having granted a *putni* of an undivided share of 6 annas to the predecessors of the defendants ; and *second*, that there can be no partition between parties who do not own co-ordinate interests, but one of whom owns an interest subordinate to the other.

In support of the first ground, it is urged that the plaintiff's predecessor in title having granted a *putni* of an undivided share of 6 annas in the entire zemindari, to allow the plaintiff to enforce partition and limit the *putni* to a specific portion of the zemindari proportionate to the 6 annas share, would be to allow him to alter the terms of the *putni* lease, against the will of the lessees. A contention somewhat similar to this was raised in *Heaton* v. *Dearden* (16 Beav., 147) on behalf of the defendant whose predecessor in title had agreed to grant a lease of an undivided moiety of certain mines, in a suit for specific

performance of the agreement to lease and for partition, and the contention was disallowed. And there is no reason why a different principle should be followed in this case. The *putni* lease contains no covenant against partition, and even if it did, it is doubtful whether it would have been binding for all time.

The contention on behalf of the appellants proceeds on the [582] assumption that there cannot be any fair and just division of the lands of the zemindari into two portions proportionate to the shares of the parties, and that partition must result in disadvantages to the *putnidars;* but no reason has been given to justify such an assumption, and the Court cannot accept it as *prima facie* well founded.

Moreover it was admitted by both sides in the course of the argument that the plaintiff's father, the grantor of the *putni*, owned only a 6 annas share, and the remaining 10 annas belonged to the plaintiff's grandmother; and that the plaintiff has inherited the 6 annas share from his father, and the 10 annas from his grandmother. That being so, the plaintiff as owner of the 10 annas share is not bound by the terms of the *putni* lease, and that lease can in no way be a bar to his right to obtain a separation of his 10 annas share.

As to the second ground, the only reason that might be urged in its support is, that if partition can be enforced as between co-owners whose interests are not co-ordinate in degree, parties having permanent interests may be put to frequent and needless expense and trouble by having to watch partition proceedings instituted at the instance of co-owners with temporary interest, such proceedings not leading to any division of the property which can have a lasting effect. But in the present case, no such reason can hold good: in the first place, because the party who is asking for partition is the holder of the higher of the two kinds of interest respectively owned by the parties to the suit, his interest being that of a zemindar, so that there can be no apprehension of the division effected not having an enduring effect; and, in the second place, because the interest owned by the party against whom partition is sought, though subordinate to that of the plaintiff, is certainly not of a temporary and qualified character such as would make it undesirable to have a partition against him and to subject him to the trouble and expense of a partition proceeding. He owns a *putni* which by the Law (Regulation VIII of 1819, preamble and section 3) is a permanent tenure at a fixed rent, heritable and transferable; and which is one of those interests which, to use the language of PONTIFEX, J., in *Kasumunnissa* v. *Nil Ratan Bose* (I. L. R., 8 Cal., 79) "are in fact substantial proprie-[583]torial interests, in the grant of which, as in this case, considerable premiums are paid." Of the Indian cases cited the only one that has any direct bearing upon this point is *Mukunda Lal Pal Chowdhry* v. *Lehuraux* (I. L. R., 20 Cal., 379), in which the learned Judges say: "We are not aware of any Indian case in which a person holding a subordinate interest in land has been held to have a right of partition as against the superior holder," and they assign as one of the reasons for holding that the suit for partition had been rightly dismissed, the fact that the interest owned by the plaintiffs was subordinate to that of the defendants. But there were other grounds on which the decision in that case was based; and for the reasons given above I am unable to assent to the view, that as a general proposition of law, there can be no partition as between parties, the interest of one of whom is subordinate to that of the others. I think the Court must in each case determine whether, having regard to the nature of the interests owned by the parties and to all other circumstances necessary to be taken into consideration, the balance of convenience is in favour of allowing partition, and if it determines that question in the affirmative, the mere fact of the parties owning interests which

are not co-ordinate in decree, ought not to be a bar to partition. This view is in accordance, not only with English cases cited in the argument, namely *Baring* v. *Nash* (1 V. and B., 551) and *Heaton* v. *Dearden* (16 Beav., 147), which may be referred to so far as they deal with general principles, but also with the rules of justice, equity and good conscience, which our Courts are directed to follow in cases not provided for by any definite rule of law (see Act XII of 1887, section 37).

For the foregoing reasons, I think that upon the facts stated in the referring order, a decree for partition can properly be made.

Maclean, C. J.—I have had the advantage of reading the judgment of Mr. Justice BANERJEE, and I concur in his conclusion. I desire to add that my decision must be taken to apply only to the particular facts of this particular case.

Macpherson, J.—I agree with Mr. Justice BANERJEE.

Trevelyan, J.—I concur with Mr. Justice BANERJEE.

[584] Beverley, J.—The language used in the case of *Mukunda Lal Pal Chowdry* v. *Lehuraux* (I. L. R., 20 Cal., 379) may not be strictly accurate or very precise, but what was intended to be decided in that case was that mere unity of possession, or as I should prefer to term it mere joint possession, is not enough to entitle the persons so in possession to have the land partitioned by metes and bounds. The right to a partition can only, in my opinion, exist as between co-parceners holding similar interests in the property. How "similar interests" should be defined it may not be easy to say. They should probably be permanent transferable interests. A temporary lease-holder of an undivided portion of an estate ought not, in my opinion, to be allowed to put his lessor to the trouble and expense of a partition. But, however that may be, the question does not really arise in this case. Here it is practically the zemindar of a 10 annas share of the estate seeking partition as against himself as the 6 annas zemindar and the *putnidars* who hold that 6 annas share under him. I can see no objection to a partition in this case, and I would answer the question put to us accordingly.

F. K. D.

NOTES.

[This was followed in (1908) 7 C.L.J., 449 : 12 C.W.N., 670 ; (1904) 1 C.L.J., 40.

As regards joint Hindu families, see (1912) 23 M.L.J., 64.

In (1903) 31 Cal., 214, it was held that a Dayabhaga Hindu widow was entitled to claim partition against her husband's coparceners.

In (1905) 9 C. W. N., 699, it was held that partition should not be allowed when the interests of one or more of the persons owning interests in the property to be partitioned is of a temporary character.

In (1906) 5 C.L.J., 307, one of several co-lessors who had leased the property to the same lessee was held entitled to a partition. See also (1907) 11 C.W.N., 397.]

[24 Cal. 584]

APPELLATE CIVIL.

The 6th April, 1897.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE AMEER ALI.

Jogendra Nath Roy Bahadur............Plaintiff

versus

J. C. Price............Defendant.*

Civil Procedure Code (Act XIV of 1882), section 424—Suit against public officer in respect of acts done by him in his official capacity—Notice of suit—Suit for damages against a public officer—Trespass—Joinder of causes of action—Amendment of plaint.

The plaintiff sued the defendant, a public officer, to recover damages for two distinct acts (viz., wrongful arrest and trespass) alleged to have been illegally and maliciously done by the defendant on two different occasions, and claimed one lump sum as damages for both the acts; no permission to [585] amend the plaint was asked for in the lower Court. On the 21st of October 1895, the paintiff instituted this suit, having, on the 18th of September 1895, served the defendant with a notice under section 424 of the Civil Procedure Code (Act XIV of 1882):

Held,—That the former act (viz., the plaintiff's arrest) was an act done by the defendant in his official capacity and was clearly of the kind contemplated by section 424 of the Civil Procedure Code, under which two months' notice to the defendant would be necessary previous to the institution of the suit; and that the suit was rightly dismissed by the lower Court for want of such notice. *Shahunshah Begum* v. *Fergusson* (I. L. R., 7 Cal., 499) distinguished.

Quære—Whether the latter act (viz., the trespass into the plaintiff's house) on the allegations in the plaint, was an act done by the Magistrate in his official capacity, and whether a notice under section 424 of the Civil Procedure Code would be necessary previous to suing for damages for such an act.

Held, further, that as the two acts were mixed up together in the plaint, and one lump sum claimed as damages for both, and as no permission to amend the plaint was asked for in the lower Court so as to convert the suit into one for damages with reference to the trespass only, the plaint ought not to be allowed to be amended on appeal to the High Court.

THE plaintiff instituted this suit in the Court of the Subordinate Judge of Rajshahye for recovery of Rs. 25,000 in one lump sum as damages from the defendant, alleging that the defendant, while District Magistrate of Rajshahye, after holding the usual preliminary inquiry in a criminal case (in which the plaintiff was one of the accused) committed the plaintiff, on the 21st July 1894, to take his trial before the Court of Session, enlarging him on bail, and after that, while the plaintiff was ill and under medical treatment in Calcutta, without giving the plaintiff any previous intimation of the cancellation of the former order for bail, illegally and maliciously caused him to be arrested by the police, on the 23rd of October 1894,

* Appeal from Original decree No. 149 of 1896, against the decree of Babu Chandra Kumar Roy, Officiating Subordinate Judge of Rajshahye, dated the 17th of February 1896.

under a warrant issued by the defendant, and had him taken to Rajshahye where the plaintiff was again enlarged by the Sessions Judge of that place on furnishing fresh security; and that subsequent to the commitment of the plaintiff to the Sessions and during his absence from home, the defendant, together with others, unlawfully and without any just and reasonable cause trespassed into the plaintiff's house at Nattore without his knowledge and consent and against the protest of his servants; and that by these illegal and malicious acts of the defendant the plaintiff suffered damages.

[586] The suit was instituted on the 21st of October 1895, and although it was set out in the plaint that the aforesaid acts having been done in bad faith and out of malice there was no necessity to serve a notice on the defendant under section 424 of the Civil Procedure Code, a notice under that section had been served on the defendant on the 18th of September 1895.

The defendant contended (*inter alia*) that the suit having been filed on the 21st of October 1895, *i.e.*, before the expiration of two months from the date of delivery (18th of September 1895) of the notice under section 424 of the Civil Procedure Code, and the acts complained of having been done by the defendant in his official capacity and in good faith, it was not maintainable.

The Subordinate Judge dismissed the suit on the ground that the defendant was entitled, as a 'public officer,' to two months' notice under section 424 of the Civil Procedure Code, previous to the institution of the suit, the acts complained of having been done by the defendant in his official capacity.

The plaintiff appealed to the High Court.

Babu *Sri Nath Das*, Babu *Pramatha Nath Sen* and Babu *Hara Prosad Chatterjee* for the Appellant.

Babu *Hem Chunder Banerjee* and Babu *Ram Charan Mitter*, for the Respondent.

The **judgment** of the High Court (**Macpherson** and **Ameer Ali, JJ.**) was as follows :—

The question raised in this appeal is whether the suit could be instituted without the notice, or rather before the expiry of the period of notice, prescribed by section 424 of the Code of Civil Procedure. The case as set out in the plaint, is that the defendant who was the District Magistrate of Rajshahye committed the plaintiff to the Sessions on charges under sections 386 and 109 of the Indian Penal Code, and that the plaintiff was, under an order of the Magistrate, enlarged on bail. The trial at the Sessions Court did not take place on the date fixed, but was postponed on the application of the plaintiff. Subsequent to the postponement, the plaintiff says that, while he was in Calcutta, the defendant caused him to be arrested under a warrant and had him taken to Rajshahye where he was again enlarged on furnishing fresh security. He charges that this act was illegal and malicious **[587]** Then the plaint proceeds to state that, subsequent to the commitment of the plaintiff, the defendant, together with others, trespassed into the plaintiff's house at Nattore without his knowledge and consent and against the protest of his servants. On account of these two illegal acts, the plaintiff prays that a sum of Rs. 25,000 may be awarded to him as damages. It is set out in the plaint that, although no notice was necessary under section 424, a notice had been given.

The defendant admitted that a notice was given, but contended that the suit was not maintainable, as it had been brought before the expiry of the prescribed period, and there is no doubt that this was so. The subordinate Judge has thrown out the case on that ground, and the plaintiff now appeals, contending that, under the circumstances stated in the plaint, a notice was

not necessary, and that even if it was, the Subordinate Judge had no authority to dismiss the suit, section 424 being merely one of procedure. We think there cannot be the slightest doubt that, under the circumstances stated in the plaint, the first act of which the plaintiff complains, viz., his arrest under the warrant, was an act purporting to have been done by the defendant in his official capacity. The defendant was admittedly the Magistrate of the District. In that capacity he had committed the plaintiff to trial, and in that capacity he thought it necessary to have the plaintiff arrested in order that fresh security might be given. We are not concerned with the question whether that was a legal or an illegal act, suffice it to say that it is an act, which, in our opinion, is clearly of the kind contemplated by section 424. The learned pleader for the appellant contends that as the act is said to have been done maliciously, section 424 does not apply, and that that section only applies to acts done inadvertently, and as authority he cites the case of *Shahunshah Begum* v. *Fergusson* (I. L. R., 7 Cal., 499). There certainly are some remarks of Mr. Justice CUNNINGHAM which would lend support to this contention, but that was a case of a very different description from this, and we think the remarks made must be taken in connection with the facts of that particular case, and not as of general application. There the Official Trustee was sued by the plaintiff who claimed a certain interest **[588]** in a trust property which she had failed to get, and in the suit brought by the plaintiff against the Official Trustee, it was held that no notice was necessary. This is a case of a wholly different character, and we are not aware of any instance, certainly no such case has been cited to us, in which it has been held that the section does not apply to the case of a public officer charged with a tortious act done by him in his official capacity. The section does not seem to us to warrant the drawing of any distinction between acts of this kind done inadvertently or otherwise.

Then it is said that the Subordinate Judge had no aurhority to dismiss the suit. But if the law says that "no suit shall be instituted," we fail to see how it is to be tried or what other course than dismissing the suit could have been adopted.

Then as regards the second act in respect of which damages are claimed, viz., trespass into the plaintiff's house, it may be a question whether, on the allegations in the plaint, that act was one done by the Magistrate in his official capacity. But we think it is unnecessary to go into that question. Assuming that as regards it, a notice was not necessary, the suit was not one which in respect of the first act charged could be instituted. The two acts are mixed up together in the plaint, and one lump sum is charged as damages for both. It may be that we could allow the plaint to be amended by striking out of it the cause of action and damages claimed in respect of the arrest so as to convert the suit into one for damages with reference to the trespass only. Even in that case the question would have to be tried whether the defendant in committing the act of alleged trespass was or was not acting in his official capacity, and evidence on that point would have to be taken. We do not think that this is a case in which we ought now to allow the plaint to be amended. The plaintiff persisted throughout that the suit, as framed, was maintainable, and permission to amend the plaint was never asked for in the lower Court. We therefore dismiss the appeal with costs.

B. D. B. *Appeal dismissed.*

NOTES.

[See also (1907) 29 All., 567; (1903) 26 All., 220; (1897) 25 Cal., 239; (1904) 28 Bom., 529, as regards illustrations of acts done in official capacity.]

[589] ORIGINAL CIVIL.

The 9th March, 1897.

PRESENT:

MR. JUSTICE JENKINS.

Amrito Lall Dutt

versus

Surnomoye Dassee.*

Hindu Law—Adoption—Power to adopt—Validity of power to widow and executors to adopt—Exercise of such power by widow with consent of the surviving executor—Construction of Will—Direction for accumulation with proper limitation—Right of adopted son to the corpus and surplus income during the life-time of the adoptive mother.

The testator by his will authorized and empowered his wife to adopt a son in the following words:—" I hereby authorize and empower my wife and executrix, and my executors and trustees, to whom I give full permission and liberty to adopt after my decease a son, and in case of his death during his minority or on attaining his full age, and without leaving male issue, to adopt a second son, and in case of his death during minority or on attaining such age and without leaving male issue to adopt a third son, and no more, &c

Held,—The power of adoption was valid. The testator associated the other executors with his wife for the purpose of ensuring a wise exercise of her discretion in the selection of a son for adoption, and not with the intention of making it an essential condition of adoption that they should take a part in the ceremony of adoption, from which under the Hindu law they were precluded.

Held, also—The power was given to the executors *qua* executors, and therefore survived to the holders for the time being of the office of executors; the death of one of them before the power was exercised did not therefore render the power void.

The power was validly exercised by the wife adopting with the consent of the surviving executor. The mere fact of the surviving executor not having actually and physically taken in adoption was not a failure to comply with the terms of the power.

In the ninth clause of the will the testator, after directing certain payments to be made out of the income of the estate, proceeded as follows: " But in no case shall such adopted son have or exercise any control or dominion over my estate and effects until the death of my wife; after which event I direct my said executors and trustees to make over the whole of my estate and effects, both real and personal, moveable or immoveable whatsoever and wheresoever and of what nature or quality soever, to such adopted son who shall survive my wife, if he shall have attained his age of [590] eighteen years during the life-time of my wife, or on his so attaining such age after her decease, to whom and his heirs I give, devise and bequeath the same."

Held,—The second adopted son was not presently entitled to the surplus income or profits of the properties until the death of his adoptive mother, nor to have the corpus (even after

* Original Civil Suit No. 535 of 1894.

provision being made for the payments mentioned in the will) of the estate made over to him. It is not incompetent for a Hindu testator with proper limitation to direct an accumulation of the income of property which under his will vests in his executors or trustees. In the absence of special provision the limit must be that which determines the period during which the course or devolution of property can be directed and controlled by a testator.

THIS was a suit for the construction of the will of one Hari Das Dutt, a Hindu inhabitant of Calcutta. The portions of the will material to this report are given in the judgment.

The will was dated October 30th, 1875, and the testator died the same day. Of the executrix and executors named in the will only the testator's widow, the defendant Surnomoye Dassee and Dwarka Nath Dutt took out probate. The other executor, Madhu Sudan Dutt, did not take out probate and took no part in the administration of the testator's estate or in the adoptions made to the testator, though he did not actually renounce his office. He died on the 1st of April 1877. The widow Surnomoye Dassee adopted a boy as the testator's son on August 9th, 1876, who died on 29th January 1881, ten years old and unmarried. On February 9th, 1881, the widow adopted the plaintiff, who attained his majority in July 1891, and at the time of the suit had one son living. Both the adoptions were intended to be in execution of the power contained in the will, and were made with the consent of the executor, Dwarka Nath Dutt.

The plaintiff instituted this suit claiming as the validly adopted son of the testator to be entitled to the corpus of his estate after providing for the annuities directed to be paid out of the estate, and in any event to be entitled to the surplus income during the widow's life-time. The defendant, Surnomoye Dassee, denied the validity of the plaintiff's adoption and claimed to be entitled to the estate as the heiress of the first adopted son. The other defendants, who were the daughters and their sons, denied the validity of the plaintiff's adoption.

[591] Mr. *W. C. Bonnerjee*, Mr. *Dunne* and Mr. *K. S. Bonnerjee* for the Plaintiff.

The *Advocate-General* (Sir *Charles Paul*), Mr. *J. T. Woodroffe*, Sir *Griffith Evans*, Mr. *Stephen* and Mr. *Chakrabarti* for the Defendant, Surnomoye Dassee.

Mr. *Jackson* and Mr. *Garth* for the other Defendants.

Mr. *W. C. Bonnerjee*.—The power to adopt was a valid power. The words in clause 8 must be taken distributively. *Dossmoney Dossee* v. *Prosonomoye Dossee* (2 Ind. Jur. N. S., 18) shows that a benignant construction should be put on a power to adopt, and the Court will always try to give reasonable meaning to the language of a will The widow is the only person who can actually adopt, but other persons may be associated with her in selecting a boy to be adopted. The testator must be taken to have known the law, and the language of the will shows clearly that he intended his widow to adopt with the concurrence of his executors. The executors are not mentioned by name anywhere in the will after clause 2, and the widow is only once named after that clause, *viz.*, in clause 8, the adoption clause. This shows clearly that the actual adoption was to be made by the widow, while the executors were to assist her in making a proper selection.

The power was validly exercised. The power was not given to Madhu Sudan Dutt and Dwarka Nath Dutt personally, but to the testator's executors, that is, to those who took out probate of his will and undertook the management

of his estate. The will is governed by the Hindu Wills Act (XXI of 1870) and no title would accrue to the executors named in the will until they had taken out probate. The fact that Madhu Sudan Dutt never took out probate during his life-time is equivalent to his renouncing his executorship. Therefore the adoption by the widow, with the concurrence of the executor who did take out probate, is a valid exercise of the power.

An adopted son occupies exactly the same position as a natural born son in the adoptor's family, and succeeds not only lineally but collaterally to the family of his adoptive father; *Padma Kumri Debi* v. *Court of Wards* [I. L. R., 8 Cal., 302 (311): L. R., 8 I. A., 229 (247)]. The adopted son is heir-at-law of **[592]** the testator and does not require any gift; he is entitled as heir-at-law to the whole of his adoptive father's estate except so far as that estate has been validly given away; *Tagore* v *Tagore* (9 B. L. R., 377: L. R., I. A., Sup. Vol., 47). [JENKINS, J.—Does not the plaintiff at the most take only a partial interest? Suppose he dies in the life-time of the widow without leaving male issue?] Where an estate is vested in a person subject to be divested on the happening of a certain event, the person in whom the estate is vested is entitled to actual possession. The plaintiff takes a vested interest subject only to his estate being divested if he dies in the widow's life-time without leaving male issue. As a validly adopted son he takes as heir-at law and *dehors* the will. The clause restraining his possession is invalid. At any rate he is entitled to the surplus income after sufficient provision has been made for the payment of the annuities.

By the second adoption the widow divested the estate which she took as the heiress of the first adopted son. See *Dhurm Dass Pandey* v. *Shama Soondery Debia* (3 Moo I.A., 229). Where there were two widows and one adopted son that son divested the estate of both widows; *Mondakini Dasi* v. *Adinath Dey* (I.L.R., 18 Cal., 69). The *dictum* of the Privy Council in *Bhoobun Moye Debia* v. *Ram Kishore Acharj Chowdhry* (10 Moo. I. A., 279) at page 311 of the report supports my contention. See also *Bykant Monee Roy* v. *Kristo Soonderee Roy* (7 W.R., 392). [JENKINS, J.—As a matter of fact this point was not raised there between the widow and the son, but the Privy Council *dictum* is cited with approval.] *Ram Soondur Singh* v. *Surbanee Dossee* (22 W. R., 121) goes to the full length of my contention that the second adoption divested the adoptive mother's estate. [JENKINS, J.—But does not this only show that the second adoption would only entitle the adopted son to succeed after the death of his adoptive mother. It is only a declaration regarding the validity of the adoption, and does not deal with the question in whom the property was after the second adoption, whether in the mother or the son.] The circumstances of that case did not require that the question should be decided, but it is submitted that as far as it goes the judgment in that case fully supports my contention. **[593]** In the sequel to *Bhoobun Moye's* case the point did not arise There is another *dictum* of the Privy Council in my favour, *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (I. L. R., 1 Mad., 174: L. R., 4 I. A., 1). Besides these *dicta* there are express authorities in my favour in the Bombay and Allahabad Courts—*Jamnabai* v. *Raychand Nahalchand* (I. L. R., 7 Bom., 225), *Ravji Vinayakrao* v. *Lakshmibai* (I. L. R, 11 Bom, 381) and *Lakhmi Chand* v. *Gottobai* (I. L. R., 8 All., 319). There is one case in which the question was left open, but the point did not really arise there—*Ramasami Aiyan* v. *Venkataramiyan* (I. L. R., 2 Mad., 91: L. R., 6 I. A., 196).

The *Advocate-General*.—The will must be looked at as a whole and the good and the bad parts must be considered together. One must find out the real intention of the testator—*Tagore* v. *Tagore* (9 B. L. R., 377: L. R., I. A.

Sup. Vol., 47). The executors in this case had not been chosen at random; the testator had appointed his father and his uncle; and, what is more, had appointed them trustees. It shows that they were persons in whom he had great confidence. This was a power deliberately given to three persons to adopt. Clause 8 taken with clause 14 *(a)* shows that the consent of the executors cannot be imported into the power. The intention was not that if one executor died the widow and the surviving executor could adopt, but that the widow and the two executors must adopt, and on the death of the widow the two executors were to adopt. The words in clause 8 giving the power cannot be read distributively. A man may give a power to adopt subject to a restriction as has been done in this case, where the widow has been given a power to adopt, but that power is restricted by her being bound to adopt in conjunction with two other persons. She does not stand in a superior position. It is the executors who are the important element in the adoption. Under these circumstances the power is bad in law and cannot be executed. See Golap Chander Sircar's Book on Adoption, pp. 233 and 234. His view seems to be correct. See also *Surendro Keshub Roy* v. *Doorgasoondery Dossee* (I. L. R., 19 Cal., 513: L. R., 19 I. A., 108). A man who has given such an unusual power to adopt must have had some special reasons for making the appointment in the way [594] he did, and must have had special confidence in the persons he has chosen. The death of the father got rid of the whole power of adoption. This is not a case of consent, but a case of a power, and a power given for a reason. In *Beem Churn Sein* v. *Heera Lall Seal* (2 Ind. Jur. N. S., 225) two points were decided, that a deed of adoption must be strictly construed, and that when the assent of an executor is necessary an adoption without such an assent is bad. Powers must be strictly construed; Farwell on Powers, p. 129. A power to adopt is not testamentary in its character, *Bhoobun Moye Debia* v. *Ram Kishore Acharj Chowdhry* (10 Moo. I. A., 279), and because it is contained in a will it does not necessarily become testamentary in its character. A will is the "legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death;" Succession Act (X of 1865), section 3; Probate and Administration Act (V of 1881), section 3. If the will contained nothing more than a power to adopt the power would not be testamentary; probate would not be necessary. An executor is "the person to whom the execution of the last will of a deceased person is by the testator's appointment confided;" Succession Act, section 3, Probate and Administration Act, section 3. When he is named in a power to adopt he has nothing to do with the testator's property; it is a personal trust, and he does not execute the power *virtute officii*. Section 92 of the Probate and Administration Act only refers to powers that can be exercised by executors *quâ* executors; and if my contention is correct its provisions do not affect a power. In this case the power was not given to the executors *quâ* executors. The word "executors" in clauses 8 and 14 (*a*) is merely a word of description. Although the power of adoption is contained in the will and the persons nominated by the will as executors are told to carry it out, this fact does not give them any different powers under the power unless it is shown that it was intended to be exercised by them *quâ* executors.

The words "widow" and "executrix" in clause 8 show that the power was not given to the executors *quâ* executors; and moreover after the due administration of the estate they would hold it not as executors but as trustees. By the word "executors" the testator must have meant the persons named in clause 2. The [595] fact of their names not being repeated is of no importance: and clause 9 shows that it was a matter of personal confidence, and that the executors were not meant to act in the adoption *quâ* executors. The power

cannot be taken distributively. The will was drawn by an English solicitor, and if the intention had been that the power should be taken distributively, some words such as "after her death" would have been inserted. The moment their executorial duties were completed the executors held as trustees. The adoption might have been made at the end of fifty years from the testator's death. The clog was put on the widow's power of adoption, because the testator wanted a proper selection. The potential part in the act of adoption is the selection of a child, and it is a most significant fact that the testator has appointed his father to be one of the people to make the selection.

If the first adoption was good, on the death of the boy the widow succeeded to his estate as his heiress. Can an adoption by her to her husband carry with it another person's estate?

In *Padma Kumari Debi* v. *Court of Wards* (I. L. R., 8 Cal., 302: L. R., 8 I. A., 229) Chundrabali had made a surrender of her estate to the second adopted son. At the most the second adopted son was only the brother of the first adopted son. If you once concede that the estate the widow took on the death of the first adopted son was that son's estate, it cannot be divested from her by the second adoption. *Bhoobun Moye Debia's* case does not affect my contention, because the last time the question arose before the Privy Council they treated it as an open one. *Bykant Monee Roy* v. *Kisto Soonderee Roy* (7 W. R., 392) is clearly in my favour. The head note is wrong, and all that was really laid down was that the second adopted son could succeed after the widow. *Ram Soondur Singh* v. *Surbanee Dossee* (22 W. R, 121) if it has any bearing on this case, is also in my favour, for it goes no further than *Bykant Monee Roy* v. *Kisto Soonderee Roy* (7 W. R., 392). *Mondakini Dasi* v. *Adinath Dey* (I. L. R., 18 Cal., 69) has no bearing upon the present case, because, although the title of an adopted son is a preferential title to that of a widow to his adoptive father's estate, it is not a preferential title to that of a mother succeeding as heiress to her son's estate. *Kally Prosonno Ghose* v. *Gocool Chunder Mitter* (I. L. R., 2 Cal., 295) **[596]** is in my favour. The High Court of Calcutta has never yet decided that a widow by a second adoption divests the estate she has obtained as the heiress of her first adopted son, and the cases cited, I contend, go to show that in its opinion she does not so divest that estate. The decisions of the Bombay and Allahabad Courts cannot bind the High Court at Calcutta: they are really of little more value than American authorities in the English Courts. And as regards the case of *Jamnabai* v. *Raychand Nahalchand* (I. L. R., 7 Bom., 225), the *dictum* of the Privy Council in *Ramasami Aiyan* v. *Venkataramiyan* (I. L. R., 2 Mad., 91: L. R., 6 I. A., 196) was not brought to the notice of the Judges who decided that case, although it was the Privy Council's latest *dictum* on the question, and they followed the earlier one in *Vellanki Venkatakrishna Rao* v. *Venkata Rama Lakshmi* (I. L. R., 1 Mad., 174: L R., 4 I A., 1). This, it is submitted, deprives their decisions of all value as an authority. As regards *Raiji Vinayakrao* v. *Lakshmibai* (I. L. R., 11 Bom., 381), FARRAN, J., felt himself bound to follow the decision in *Jamnabai* v. *Raychand Nahalchand* (I. L. R., 7 Bom., 225). [JENKINS, J.—But he approved of it.] I frankly confess that I am unable to understand the grounds upon which the decision in *Lakshmi Chand* v. *Gottobai* (I. L. R., 8 All., 319) was arrived at. As regards the Privy Council *dicta*, *Bhoobun Moye's* case (10 M. I. A., 279) was decided in 1865, *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (I. L. R., 1 Mad., 174: L. R., 4 I. A., 1) in 1876, and *Ramasami Aiyan* v. *Venkataramiyan* (I. L. R., 2 Mad., 91: L. R. 6 I. A., 196) in 1879, so the *dictum* which is in my favour is the latest and the one pronounced after the point had twice before arisen before their Lordships. [Mr. *Bonnerjee*.—I also rely on *Worthington* v. *Evans*

(1 Sim. & St. 165), *Green* v. *Green* (2 J. & L. 539), and *Dawson* v. *Massey* (L. R., 2 Ch. Div., 758) in support of my contention that the power was validly exercised.] Those cases do not affect the present case. Here there is no question of a legacy with a condition. In addition to this *dictum* *Mayne's* opinion is in my favour. [JENKINS, J.—Mr. *Mayne* does not seem **[597]** to give any definite opinion; see section 179]. He anyhow treats it as an open question; see section 174. [JENKINS, J.—The surplus income is directed to be accumulated until the death of the widow. Is there anything rendering such a direction invalid?] I know of no authority which shows that such a direction is bad. At any rate if the direction to accumulate is bad there was an intestacy as regards such accumulations, and they were inherited by the first adopted son as heir-at-law, and on his death by the widow as his heiress.

Sir *Griffith Evans* on the same side.—The doctrine laid down in *Dawson* v. *Massey* (L. R., 2 Ch., Div., 758) was brought in for the interpretation of legacies with a condition and cannot be applied to powers. It has no bearing on this case where the power was not intended by the testator to be testamentary and was created solely for the purpose of bringing in a heir. It is a mistake to suppose that a Hindu in giving a power to adopt is actuated solely by religious motives. There are many other reasons, such as the perpetuation of the testator's name. Adopted sons frequently prove to be disobedient and dissipate the estate of their adoptive fathers. It was for this reason that the testator selected his father and his uncle to make the adoption in order that a well-behaved child might be adopted. That the testator was not actuated solely by religious motives is clear from clause 14 of the will. If you read the words in clause 8 distributively, then the words "to whom I give full permission to adopt" have no sense or meaning whatever. Although the condition with regard to the power of adoption renders it bad still you cannot give effect to the power without the condition, but the power must be strictly construed. *Surendro Keshub Roy* v. *Doorgasoondery Dossee* (I.L.R., 19 Cal., 513: L.R., 19 I.A., 108). [JENKINS, J.--Do you say that from the language of the will the testator did not intend that the adoption should take place according to Hindu law?] It is not necessary for me to say that. What I contend is that the power was given to the widow and the executors jointly. It was not a power given to the widow to adopt *simpliciter*, but she had to adopt *modo et forma:* and her adoption of the plaintiff with the consent of Dwarka Nath Dutt only is not a compliance with the terms of the power. [JENKINS, **[598]** J.—It seems to me that in *Monemothanath Dey* v. *Onothanath Dey* (2 Ind. Jur. N. S., 24) Sir BARNES PEACOCK drew a distinction between an adoption and the nomination of a *persona designata*. and indicated that it was only in the case of a *persona designata* that a power must be strictly construed. He appears to have particularly distinguished that case from one where an adoption is made under the Hindu law.] The two ideas do not exclude one another. Sir BARNES PEACOCK was only dealing with a testamentary devise, and it was not necessary to consider the effect of a simple permission to adopt. The canon that powers of adoption must be strictly construed was first laid down as far back as 1864 in the case of *Mohindro Lall Mookerjee* v. *Rookiney Dabee* (Cor., 42) and has never been departed from since. A man may give his widow permission to adopt, but he may clog that permission with any restriction he pleases, and if he chooses to add such restrictions, the permission cannot be read as a general permission to adopt. It is not possible to alter the power in this case, or to remove any of the restrictions with which it is clogged.

I also contend in the alternative that if the power is construed as a power to the widow to adopt with the concurrence of the executors, still the

concurrence of both the executors was necessary in order to make a valid exercise of the power. [JENKINS, J., referred to *Eaton* v. *Smith* (2 Beav., 263)].

Mr. *Jackson* for the other defendants.—The proper place for clause 14 (*a*) is directly after clause 8, for what was in the testator's mind was that he could confer a power of adoption upon his executors; and such a power is bad. The testator intended to confer the power of adoption on the three persons named in the will, but that he was unable to do by law. The widow is a trustee—see clause 7 of the will,—and in any event the plaintiff is not entitled to either the corpus or the surplus income until the trusts created by the will are fulfilled. The plaintiff's natural father was fully aware of the provisions of the will, for he was the son of the executor, Dwarka Nath Dutt, and has practically managed the whole of the estate since Dwarka Nath Dutt's death. **[599]** Therefore the plaintiff on his adoption is bound by all the provisions of the will. A child may be taken in adoption, but at the same time the widow can enter into an arrangement with the natural father that the estate which such child would ordinarily take shall be restricted. *Chitko Raghunath Rajadiksh* v. *Janaki* (11 Bom., H. C., 199); *Ravji Vinayakrao* v. *Lakshmibai* (I. L. R., 11 Bom., 381); *Ramasami Aiyan* v. *Venkataramiyan* (I. L. R., 2 Mad., 91: L. R., 6 I. A., 196); *Lakshmi* v. *Subramanya* (I. L. R., 12 Mad., 490); *Bhaiya Rabidat Singh* v. *Indar Kunwar* (I. L. R., 16 Cal., 556: L. R., 16 I. A., 53). The heirs-at-law are entitled to prevent the corpus of the estate being handed over to the plaintiff; and he is not entitled to the surplus income, for at the time of his adoption his natural father knew of the accumulation of the surplus and by the deed of adoption consented to all the provisions of the will being carried out.

Mr. *Bonnerjee* in reply.—It is clear from the language of the plaintiff's deed of adoption that it does not make any agreement restraining the adopted child's rights; so the cases cited by Mr. *Jackson* have no application. The deed of adoption shows clearly that the persons to whom the power was granted took the same view of the manner in which the power was to be exercised, as the one I contend is the right one. The only reasonable construction that clause 8 of the will can bear is that the widow should adopt with the concurrence of the executors. Again, even if the power was a power to all three persons to adopt, which would be illegal, the Court will uphold the power so far as it is good, and reject it so far as it is bad. See *Wayte* v. *Webb* (6 Mad, 71), where under the Mortmain Act the Court upheld a legacy so far as it was valid. But I contend that the power is a power to the widow to adopt with the consent of the executors and is a good power. The part the executors had to take in the adoption was *virtute officii*. This is clear from the language of the will. The widow is expressly named in the power to adopt, while the executors are not. There is also in clause 13 a power to appoint fresh executors who would have exactly the same powers as the original executors. The power **[600]** was validly exercised, and the concurrence of the surviving executor, the other having died, was all that was necessary. *Eaton* v. *Smith* (2 Beav., 236), *Dawson* v. *Massey* (L. R., 2 Ch., Div., 761).

That the widow divests the estate that is in her by a second adoption is based on the principle that a widow has the power to surrender her estate so as to accelerate the next reversioner's estate. A widow can always voluntarily surrender her estate to the next reversioner—see *Nobokishore Sarma Roy* v. *Harinath Sarma Roy* (I. L. R., 10 Cal., 1102). A widow need never adopt, although empowered to do so, and the adoption is purely voluntary on her part. The very act of adoption on her part is a relinquishment and surrender of her estate to the adopted son.

The case of *Ramasami Aiyan* v. *Venkataramiyan* (I. L. R., 2 Mad., 91: L.R., 6 I.A., 196) so strongly relied on by the other side is of very little value. The point does not seem to have been raised in either of the Courts below or in the argument before the Privy Council or to have been in any way considered by them; in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (I. L. R., 1 Mad., 174: L. R., 4 I. A., 1), the point was raised in the Court below, was suggested by Sir JAMES COLVILLE during the argument, was argued upon, and their Lordships must have considered the point carefully before pronouncing their *dictum*.

The direction to accumulate is bad. See *Kumara Assima Krishna Deb* v. *Kumara Krishna Deb* (2 B. L. R., O. C., 11). [JENKINS, J.—That was a direction contravening the rule against perpetuities] The beneficial interest in an estate cannot by Hindu law be held in suspense or remain without an owner. Mayne's Hindu law, section 387; *Bramamayi Dasi* v. *Jages Chandra Dutt* (8 B. L. R., 400), *Mokoondo Lall Shaw* v. *Gonesh Chunder Shaw* (I.L.R., 1 Cal., 104); *Kally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry* (I.L.R., 8 Cal., 878.)

Jenkins, J.—As this action was originally framed, it was alleged that various breaches of trust had been committed and consequent relief was claimed. When, however, the matter first **[601]** came before me as a result of discussion that then took place, the charges of misconduct were withdrawn, and the claim resolved itself into one for construction of the will and administration.

The testator, whose will gives rise to these proceedings, is one Hari Das Dutt, a wealthy Hindu, of the Sudra caste, and a resident of Calcutta, who died in October 1875, leaving a sole widow, the defendant, Sreemutty Surnomoye Dassee, and two married daughters, the defendants, Sreemutty Prommoye Dassee and Sreemutty Ranee Money Dassee. The first named of these daughters at the time of her father's death had three sons, the defendants, Radha Prosad Mullick and Kasi Prosad Mullick, and one since deceased; she also has had two sons born after her father's death, the defendants, Peary Lal Mullick and Behari Lall Mullick. The other daughter, I am told, has had no children.

On the 30th of October 1875, the day of his death, Hari Das Dutt executed his last will, and its contents are set out at length in the second paragraph of the claim. By it he appointed his wife, his father, Babu Madhu Sudan Dutt, and his uncle, Dwarka Nath Dutt, to be his executrix and executors, and of these the testator's wife and uncle alone proved the will. The father apparently never performed any executorial duties or intermeddled in the management of the estate, but at the same time he never expressly renounced probate. On the 9th of August the widow, with the consent of Dwarka Nath Dutt, purported to take a boy of five, named Jatipersaud Mullick, in adoption as the son of the testator in pursuance of a power in the will, to which it will be necessary later to refer at length, but this adopted son died on the 29th of January 1881 when he was only ten years old.

On the 1st of April 1877 the testator's father died, and on the 9th of February 1881 the plaintiff's natural father purported to give and the testator's widow purported to take the plaintiff, then a boy of eight, in adoption as the son of the testator, the executor, Dwarka Nath Dutt, being present on the occasion and consenting. This adoption, like the former, was intended to be in execution of the power contained in the testator's will, and it is admitted that prior to this action the legality of the adoption had never been called in question: on the contrary the plaintiff has throughout been **[602]** brought up and treated as the duly adopted son of the testator. It will here be convenient

to refer to those portions of the will which are especially relevant to the points raised in this case. In clause 2 the testator says :—

"I appoint my wife, Sreemutty Surnomoye Dassee, the executrix, and my father, Babu Madhu Sudan Dutt, of Mullick's street, aforesaid, and my uncle Babu Dwarkanath Dutt of Thuntonneah in Calcutta, aforesaid, the executors and trustees of this my will."

Clause 8 provides as follows : --

"Whereas having no son born to me of my body I am desirous of adopting one in my lifetime, but in case I depart this life before carrying such my desire into effect I hereby authorise and empower my wife and executrix, Sreemutty Surnomoye Dassee, and my executors and trustees to whom I give full permission and liberty to adopt after my decease a son, and in case of his death during his minority or on attaining his full age and without leaving male issue to adopt a second son, and in case of his death during minority or on attaining such age and without leaving male issue to adopt a third son and no more. In any of the above cases of adoption should the adopted son die leaving a son or sons, the power of adoption shall cease or remain in abeyance during the life or livestime of such son or sons of such adopted son, but shall revive on the death of such son or sons during minority."

Clause 9 is as follows : -

"I direct my executors and executrix and trustees to pay out of the income and interest of my estate and effects monthly all necessary household expenses as well as for the worship of our family idol, Sree Sree Radhagovindjee, and to pay my wife monthly during her natural life for her sole and separate use the sum of rupees two hundred, and also the sum of rupees fifty monthly to such adopted son, who shall live and attain his full age of eighteen years, after his so attaining such age of eighteen years during the lifetime of my said wife, provided he remains under her control and bears a good character, and if my said executrix and executors and trustees think fit and are satisfied with his conduct and behaviour, and for the purposes of such monthly expenditure my executrix, executors and trustees shall set apart and retain out of the interest and income of my estate a sum sufficient to meet such expenditure for six months and invest the rest and residue of such income and interest in Government Securities in their joint names, but in no case shall such adopted son have or exercise any control, dominion over my estate and effects until the death of my wife, after which event I direct my said executors and trustees to make over the whole of my estate and effects, both real and personal, or immoveable or moveable whatsoever and wheresoever and of what nature or quality soever to such adopted son who shall survive my wife, if he shall have attained his age of eighteen years during the lifetime of my wife or on [603] his so attaining such age after her decease to whom and his heirs I give devise and bequeath the same. But in case none of such adopted sons survive my said wife or in case of either surviving my said wife and dying under the said age without leaving a son or sons I desire and direct my executors after the death of my said wife or the death of such son after her, but under such age of eighteen years without leaving a son or sons to make over and divide the whole of my estate, both real and personal unto and between my daughters in equal shares to whom and their respective sons I give devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving but leaving my other daughter her surviving then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter. or in case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike."

The 13th clause is in the following terms :—

"I authorise and empower my said executrix, executors and trustees and the survivor of them and the trustee for the time being of this my will to appoint any other person or persons to succeed them or him in the execution of the trusts of this my will."

Clause 14*a* appears to have been added as an after-thought, and by it the testator provides as follows :—

"In case of any accident arising to cause my wife to depart her natural life before adoption of a male child my surviving executors are empowered to act with my full consent and direction to adopt a male issue."

It will be seen from these provisions that until the death of the widow the surplus income of the testator's residue, after providing for certain monthly payments, is directed to be accumulated. In this state of things the plaintiff has contended before me that as the adoptive son, and consequently the heir of his father, he has an absolute interest in his estate, subject only to be divested in certain events, and that as a result he is now entitled to have the whole estate transferred from the trustees to him subject only to adequate provision being made for certain periodical payments and expenses authorized by the will; and he next contends that in any case he is entitled to the enjoyment of the surplus income of the estate until the widow's death. This contention is opposed on the part of the defendants, and the grounds of opposition are—*first*, that there has been no valid adoption of the plaintiff; *secondly*, that the provision for accumulation is valid; and, *thirdly*, that even if there is any interest in the estate which has not been disposed of, then in the events which have happened it is on the widow as heiress of the deceased son, and not on the plaintiff that it has devolved.

[604] For the purpose of disposing of these points the following issues have been formulated:—

1st. Whether the power of adoption is valid at all in law?

2nd.—If so, was it validly exercised?

3rd. -If so, is the plaintiff on the true construction of the will and as the adopted son of the testator entitled—

(*a*) to the surplus income of the property until the death of his adoptive mother?

(*b*) to the absolute interest in the property subject only to the payments mentioned in the will? And I will deal with these issues in the order in which they have been stated.

I. Whether the power of adoption is valid at all at law?

The clauses of the will particularly bearing on this point are the 8th and the 14th, both of which I have already read, and the argument urged against the validity of the power is shortly this: It is said that though a husband can delegate to his widow a power to adopt, still he can delegate it to no one else; consequently it is argued the present power to adopt is bad, because though it is delegated to the widow, still it is not to her alone, but to her in association with others. Now, it is admitted on the part of the defendants, indeed, it is a part of their argument, that though the widow's discretion under a delegated power is absolute in the sense that she cannot be compelled to act upon it, unless or until she so chooses, still any condition or clog can be imposed upon the exercise by her of this delegated power, and it therefore appears to me that so far as the association of the two executors was a fetter on the absolute discretion and choice which might otherwise have existed it cannot have vitiated the power. It may be that the widow alone is capable of performing the actual ceremony of adoption, that her hand alone can receive the child, but I do not find in the phraseology used by the testator any direction requiring or even justifying the inference that he desired or intended that the executors should take a part in the ceremony, from which they are incapacitated by the rules of Hindu law.

It is clear from the prefatory recital with which the 8th clause of the will commences that the testator did desire the adoption **[605]** of a son in accord-

ance with the provisions of the Hindu law, and though it may be unprofitable to speculate as to his motive, I think that he had a purpose beyond the mere designation of a beneficiary to take under his will, and I must decline to put on the language of the will a construction that would render its provisions useless. In my opinion the testator associated the other executors with his wife for the purpose of ensuring a wise exercise of her discretion in the selection of a son for adoption and not with the intention of making it an essential condition of the adoption that they should take a part in the ceremony from which they were precluded, and I therefore hold that the power of adoption is valid.

II. The next issue I have to consider is whether the power of adoption was validly exercised.

The contention of the defendants in this connection is two-fold: for, first it is argued that the power could not be exercised, inasmuch as the father, one of the executors named by the will, was then dead, and the power is not one that passed to the survivors; and next it has been argued by Sir *Griffith Evans* that it is evident from the terms of the deed of adoption, and also from the evidence and admissions in the case, that the surviving executor, Dwarka Nath Dutt, did not take such a part in the adoption as was required of him by the power, so that even if there was a survival of the power still its terms were not observed.

Now, both these points appear to me to be points of construction, so that it is in the first place necessary to determine what the language of the will means, and in that investigation regard must be had to the circumstances of the testator and to every fact, a knowledge of which may conduce to the right application of the words used. Cases are of little use except so far as they express or illustrate a general rule of construction, for the words and circumstances of one will are seldom the same as those of another.

There is, however, a principle to be drawn from decisions which is of importance in relation to the question in hand, and it is this, that where a power is vested in executors (though it may not be one reposed in them by the law), if on the true construction of the will it appears that the power was coupled with the executorial **[606]** office, it will survive to the holders for the time being of the office, as though it were a power attached to the office by law.

It obviously, therefore, is necessary first to determine whether or not as matter of construction the power of adoption contained in the will was not given to the executors in their official capacity.

In my opinion the power of adoption is connected with the office, and in confirmation of that view I may point to the fact that excepting the wife the executors are not named, but are described by reference to their office; and again, though the wife is named, still she is described as executrix in a manner, which points to the conclusion, that the power even in her case was not dissociated from the idea of the office. That is not necessarily decisive of the question whether the power was one that survived; for such inference to that effect that might be deduced from the association of the power with the office might be rebutted by a sufficient indication that the testator desired the selection implied by the power to be entrusted to the three persons named as his executors and to no less a number. But to effect such a result the indication must be one of reasonable clearness drawn from the testator's own words and not merely based on a speculation as to what a man might be imagined to intend in the testator's circumstances. It is suggested that this indication is to be found in the concluding clause of the will, but after the best consideration that

I have been able to give to that clause, together with the rest of the document, I am unable to arrive at that conclusion. That clause appears to me to indicate the testator's strong desire that a son should be adopted; he may be supposed (not merely as a rigid presumption of law but as a matter of notoriety) to have known that a Hindu widow of the Bengal school could, with her husband's assent, adopt; but fearing the contingency of his wife's death he inserted the last clause for what it might be worth.

I should also state that I am not led by this last clause to the conclusion that the testator did not intend that the adoption to be effected under clause 8 should take effect as, and have the results of, an adoption according to Hindu law. In support of the view that the power in question could only be exercised by the three persons appointed as executrix and executors by the will, I have been [607] referred by the learned Advocate-General to two cases. The first is the case of *Surendro Keshub Roy* v. *Durgasoondery Dossee* (I. L. R., 19 Cal., 513: L. R., 19 I. A., 108) which no doubt establishes that the authority delegated to the widow must be followed strictly, so that where the power only authorized the simultaneous adoption of two sons, it was impossible to exercise the power otherwise than in strict compliance with its terms, though he result of an attempted adoption in accordance with the power would be in contravention of the Hindu law and so without any effective result. The second was a case of *Beem Churn Sein* v. *Heeralall Seal* (2 Ind. Jur., N. S., 225), in which the consent of another was required as a condition of the adoption, and it was held that the absence of that consent, though due to death, was a bar to the adoption.

Now, the argument which would apply these cases to the present is open to the comment that I have held as matter of construction that the power contained in this will did in the circumstances of this case survive to those by whom it was exercised, so that in my view of the case the requirements of the power have been observed.

It may, however, be said that the case of *Beem Churn Sein* v. *Heeralall Seal* (2 Ind. Jur., N. S., 225) so clearly resembles this, that I ought in this case to put a corresponding interpretation on this will. In the first place I could not assent to the proposition that there is any real similarity between the two cases, and next I must point out, as I have already done in the course of the argument, that in that case an adoption according to Hindu law could not have been contemplated, the delegation of the particular power then under consideration having been made, not to a widow, but to a son's widow: and on a careful perusal of the judgment it will be seen that Sir BARNES PEACOCK expressly guards himself from expressing an opinion what would have been the result had the adoption intended been one that could have been effective according to Hindu law.

It still remains to notice the argument that the terms of the power have not been complied with, inasmuch as the widow alone, and not in conjunction with the surviving executor, actually took the son in adoption. I have already expressed my view of the meaning of the power, and if that view be right then it follows that this [608] objection cannot prevail; the power does not in so many words say that the ceremony which the law only allows to be performed by the widow must be performed by the others and I, therefore, hold that the mere fact of the surviving executor not having actually and physically taken in adoption is not a failure to comply with the terms of the power, and I accordingly hold that the power was validly exercised.

III. This brings me to the third issue which turns upon the construction to be placed on clause 9 of the will. The testator thereby directs his executors,

executrix and trustees to make out of the income of his estate certain payments, including a monthly payment of Rs. 200 to his wife during her life, and a sum of Rs. 50 monthly to such adopted son who should live and attain the age of eighteen years during the life-time of his wife, provided he remained under her control and bore a good character, and then he proceeds as follows: My executrix, executors and trustees shall * * * invest the rest and residue of such income and interest in Government securities in their joint names, but in no case shall such adopted son have or exercise any control, dominion over my estate and effects until the death of my wife."

Now, it will be seen that there is here a direction to accumulate, and the first point to be decided is whether, according to the law applicable to Hindu wills, this direction is in operation or whether effect can be given to it.

Mr. *Bonnerjee* no doubt treated the point in his opening speech as beyond the realm of argument, but the learned *Advocate-General* declined to accede to that view, and I consequently must examine the point.

Now, accumulation is, with an exception immaterial for the present purpose, absolutely forbidden by section 104 of the Indian Succession Act, but on turning to section 2 of the Hindu Wills Act it will be found that section 104 is one of the few sections not applicable to Hindu wills such as the one under consideration, and consequently there is no statutory prohibition which forbids accumulation directed in a will made by a Hindu.

It becomes, therefore, necessary to examine whether a direction to accumulate is contrary to the provisions of Hindu Law. Prob-**[609]**ably it would be wrong to attribute much force to the fact that section 104 is not made applicable to the will of a Hindu, but I certainly cannot accede to the argument that it is a recognition of the fact that accumulation was never allowed in the case of Hindu wills; for a similar train of reasoning would have excluded the application of other clauses of the Succession Act, which do govern Hindu wills. Now, it unquestionably is the case that a direction to accumulate is from time to time to be found in Hindu wills, and the practice of inserting such a direction is of some standing.

In *Soorjeemoney Dossee* v. *Denobundo Mullick* [6 Moo. I. A., 526 (536)] the will of a Hindu testator who died in 1841 was under consideration, and the case was argued on demurrer before the Supreme Court of Calcutta, and in the course of their judgment the following remarks appear: -

"It was, we apprehend, competent to this testator, if he had been so minded, expressly to provide for the accumulation of the surplus income of his estate within the limits allowed by law, and to make their accumulations subject to the limitation over in the event of any son dying without leaving issue in the male line; but he does not appear to have done so either expressly or by necessary implication."

Again in *Bissonauth Chunder* v. *Bamasoondery Dossee* [12 Moo. I. A., 41 (61)] the following passage is contained in the judgment of the Privy Council: "In the first place it is to be observed that the testator has given no direction to accumulate; it remains, therefore, to be seen whether the Court can find from the words of the will, as was argued, an irresistible inference that such was the intention of the testator. This is the more important because in the case of *Sonatun Bysack* v. *Juggut Soondree Dossee* (8 Moo. I. A., 66) which is relied on as governing this case, there is an express direction to accumulate. It was there directed that the surplus was to be added to capital. There is an absence of that in this case. It is admitted that the testator could not dispose of the property of his son, or prevent the heir of the son from inheriting his property; therefore the only question here is whether the testator has directed the **[610]** accumulations of the property to be added to or made part of his own

property, because if he has not, it was the property of the son, and the testator had no power of disposing of it. In this view of the case their Lordships think that this will, on whichever construction it is taken, shows an absence of any direction to accumulate."

It is true these cases do not decide that a direction to accumulate is good, but it is clear from them that the practice of directing accumulation is of long standing, and that at the time it was considered that such a direction would have effective operation. I asked Mr. *Bonnerjee*, who contends that a direction to accumulate is bad, to refer me to the authorities on which he relied, and I now propose to deal with them The first case is that of *Kumara Asima Krishna Deb* v *Kumara Krishna Deb* (2 B. L. R., O. C., 11), the purport of which is set out in the headnote as follows :—

"A Hindu, by will, attempted to create a trust for the accumulation, for ninety-nine years, of the surplus income (after certain yearly payments) of his estate in the purchase of zemindaries, &c., from time to time; and empowered his trustees to continue such trust after the expiration of the ninety-nine years' term." The will contained no disposition of the beneficial interest in the zemindaries so to be purchased. *Held*, that such trust was void.

Semble.—Perpetuity (save in the case of religious and charitable endowments) is not sanctioned by Hindu law. *Goberdhone Bysack* v. *Shamchand Bysack* (Bourke, 282) explained.

The contention in that case was that the trusts of the will were invalid and void, not only on the ground of perpetuity, but because there was no disposition of the beneficial interest in the estate. The case in the first instance came before Mr. Justice NORMAN, who said at page 24 of the report: "I may add that there is not in the will any disposition whatever of the beneficial interest in the bulk of the testator's property * * * Even at the end of ninety-nine years there is no gift of the beneficial interest to any one. The manager for the time being may go on at his own will and pleasure indefinitely accumulating the estate: no right is given to the heirs of the testator or the persons indicated as such in the will to use the property for their own benefit [611] even at that remote time. The case goes a long way beyond that of Mr. Thelluson's will" (9 Ves., 22).

Then later he says, page 29 :—

"In the case now before me the trust for perpetual accumulation would deprive the parties of all enjoyment of the profits of the estate. I think it clear that the trust for accumulation must be treated as a condition repugnant to the natural rights of every owner of property to the use and enjoyment of it, inconsistent with the nature of property itself and therefore void."

From this decision there was an appeal which came before the Chief Justice, Sir BARNES PEACOCK and Mr. Justice MARKBY.

Sir BARNES PEACOCK says (page 32) :—

"There is no doubt that this will, if construed according to English law, would be void under the law relating to perpetuities. The question is, is it valid under Hindu law?"

Further on he proceeds (pages 35, 36) :—

"The will in the present case gives the residue of the property, which is the subject of dispute, to the grandson and his successors, upon trust that the profits of the estate are not to be beneficially used during a period of ninety-nine years, but are to be laid out in the purchase of fresh estates and the formation of a fund for the payment of Government revenue upon it, and this

provision is to be extended, as I understand, in perpetuity, if the Hindu law allows. I am not aware of any rule of the Hindu law by which grants *inter vivos* or gifts by will in perpetuity are expressly prohibited, but it appears to me to be quite contrary to the whole scope and intention of Hindu law."

In the result the decision of Mr. Justice NORMAN was upheld; but it appears to me, looking at the facts of the case and the judgments delivered, that the true *ratio decidendi* was, that the direction to accumulate was an attempt to create a perpetuity; that thereby it was sought to suspend the enjoyment for a longer period than the absolute vesting could be controlled, and that it consequently was bad. The case did not call for a decision that an accumulation, which did not aim at that which for shortness I may call a perpetuity, is void, and I therefore cannot regard the case as an authority, which even purports to deal with the point before me.

[612] I was next referred to a case of *Bramamayi Dasi* v. *Joges Chandra Dutt* (8 B.L.R., 400), but all that case decides, which can be regarded as material to the present point is, that an attempt to defer the period of payment to or enjoyment by a beneficiary of a vested interest is inoperative.

Then reliance was placed on the case of *Cally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry* (I.L.R., 8 Cal., 378) where the will before the Court contained a present gift of the testator's property to his grandsons followed by provisions postponing payment and directing accumulation, and it was there held, in accordance with principles, which are beyond dispute, that an absolute gift could not be qualified by a direction to postpone payment and accumulate. The legality of a direction to accumulate was not in question in the case.

Mr. Justice PONTIFEX says:—

"But his will containing, as in our opinion it does, sufficiently direct words of present gift, the clauses in it which attempt to postpone the enjoyment of possession and to direct accumulation must be rejected or disregarded as inconsistent or repugnant."

The last case brought to my notice is that of *Mokoondo Lall Shaw* v. *Gonesh Chunder Shaw* (I. L. R., 1 Cal., 104), which decided, that where a Hindu testator gave all his immoveable property to his sons but postponed their enjoyment thereof by a clause, that they should not make any division for twenty years, the restriction was void as repugnant to the gift.

Mr. Justice PHEAR, in the course of his judgment, says: "Now, without saying that a Hindu testator might not give the current profits or income of the property to the trustees and direct them to apply this to the payment of debts throughout a specified period, as twenty years, I do not think it is competent to him to give the corpus of the property to an adult person, and at the same time to forbid that person from enjoying the property in the way which the law allows. The prohibition against receiving and enjoying the income for twenty years appears to me simply to be a condition imposed on the property which is repugnant to the gift. **[613]** It is not merely the giving of one portion of the property to one person or purpose and the remaining portion to another person or purpose, but it is giving the entire property to one person and coupling this gift with a prohibition against his enjoyment." The key to this and the two previous decisions is obvious, and it simply is the repugnancy and consequent invalidity of a condition which attempts to fetter the enjoyment of an absolute gift—a principle which has no application here.

Mr. *Bonnerjee* very fairly admits that beyond these cases he is unable to refer to any decision, or even *dictum*, that a direction to accumulate is

necessarily and under all circumstances void so as to entitle the heirs to claim the interest commensurate with the period of directed accumulation as though it were undisposed of, and I must therefore see whether there is any general policy or principle of law which calls for such a conclusion.

Is there then any principle of public policy which would discountenance accumulation? I take it that for this purpose regard must be had to Hindu and not to English policy, and so far as I am aware such a direction is in accordance with the modes of Hindu life and thought, and agrees in its aims with what is matter of every-day practice and custom. Indeed, had the life estate been given to the widow, then the accumulation, which is directed, would in its practical result be no greater a restraint on the expenditure of income than would have been almost necessarily incident to that situation. Does it then clash with any principle of law? First, it is necessary to see what the effect of the accumulation in this case is. The direction is during the life of the testator's widow to invest the balance of the income, and after her death the trustees are to hand it over to such adopted son who shall survive the widow and shall answer the description given in the will.

It will, therefore, be noticed that apart from any question of legality the accumulations are disposed of so as to vest beneficially on the widow's death. It is true that the object of the testator's bounty is not ascertained at the testator's death, but that in itself is not a necessary indication of illegal remoteness: it is only giving the accumulation to the person who is to take the fund itself, if it could be foreseen who that person is. That person may be the [614] present plaintiff if he survives the widow, or it may be some one adopted in succession to him, but it is clear in either case that the fund itself will be well given, and why not the accumulation? If the testator be permitted to give the fund itself at a future time, it would seem anomalous that he should not be able to give intermediate rents and profits.

If the individual to take on the widow's death were now ascertained, it surely could not be doubted that his title to the intermediate income would prevail against that of the heir-at-law; and how has the heir a better right by reason of that person being at present unascertained? If it be urged that the effect is to create an absolute interest at a future date without limiting an intermediate beneficial interest corresponding and commensurate with the interval, and that therefore the heir-at-law must take the profits to arise during the interval, then this argument, as it appears to me, is met by Mr. *Bonnerjee's* own concession that trustees might be directed to accumulate a fund for the payment of debts, and by the further fact that the trustees are in this case directed to hand over the intermediate income to the individual who is to take the fund from which they spring. I may remark incidentally that this is an objection to accumulation which was put forward in the English Courts, but without success, though the principle on which it is based has as much force in English as in Hindu law. It cannot be said that the adopted son to whom the fund is given on the widow's death is incapable of being a recipient of the bequest, for by section 99 of the Indian Succession Act it is provided, that, if property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall at such later time go to that person. Seeing, therefore, the fact that the right to accumulate has been recognized if not actually affirmed both by the Supreme Court and the Privy Council, and that a direction to accumulate is no new expedient, and having regard to the various

considerations I have discussed, I hold that it is not incompetent for a Hindu with proper limitations to direct an accumulation of the [615] income of property, which under his will vests in his executors or trustees. That, however, is not necessarily conclusive of the present case; for it still remains to consider, whether the particular direction in this case is bad, as being in excess of what the law permits.

Now it appears to me, on principle, that if accumulations are permissible, then in the absence of special provision the limit must be that which determines the period during which the course or devolution of property can be directed and controlled by a testator, and applying that test to the present case I am of opinion that the accumulation directed in the present case during the widow's lifetime is not in excess of that permitted by law.

In the view therefore that I take of the case, I am of opinion that the plaintiff is not presently entitled to the surplus income or profits of the properties until the death of the testator's widow; and that he is not entitled (even after provisions being made for the payments mentioned in the will) to have the corpus of the estate made over to him. The plaintiff asks for an account, and as the *Advocate-General* does not oppose I am willing to accede to this, inasmuch as when the case first came before me certain charges of breach of trust were waived on the understanding that the plaintiff should be entitled to take such objection to the trustees' conduct as might be open on the taking of the ordinary accounts; but I will only direct accounts at the plaintiff's risk as to costs, and as it has been suggested that the accounts will probably not be required the decree for accounts will be conditional.

The decree, therefore, will contain a declaration that the plaintiff has been validly adopted, but that on the true construction of the will he is not entitled during the life of the widow to have the property left by the testator handed over to him, or to receive the rest and residue of the income and interest of the testator's estate by the will directed to be invested; then the decree will direct accounts (at the plaintiff's risk as to costs) of the estate and debts of the testator: but it will be provided that no proceedings are to be taken under this direction without the leave of the Judge in Chambers. There will be an inquiry what is proper to be allowed for all necessary household expenses as [616] well as for the worship of the testator's family Thakoor, Sree Sree Radhagovindjee. Further consideration will be adjourned, and there will be liberty to apply. As it is so desired, the costs of all parties up to and including the trial to be taxed on scale 2 as between solicitor and client will come out of the estate.

Attorneys for the Plaintiff: Messrs. *G. C. Chunder & Co.*

Attorney for the Defendants: Mr. *R. Rutter.*

S. C. B.

NOTES.

[I. There were appeals from the judgment in this case, both to the High Court and the Privy Council. The High Court reversed the judgment here on the ground that there was no valid power conferred by the will, at any rate, such as was exercisable after the death of one of the donees of it, (1898) 25 Cal., 662, and that judgment was affirmed by the Privy Council in (1900) 27 Cal., 996.

II. As regards the time-limit for accumulations, the views of JENKINS, J, in this case have the support of decisions like (1910) 15 C.W.N., 66; (1902) 4 Bom. L. R., 803; (1906) 34 Cal., 5: 11 C.W.N., 65. See also (1901) 26 Bom., 449: 3 Bom., L.R., 857. See also the remarks of Mayne on this decision in his Hindulaw, VII Edn., p. 571.]

[24 Cal. 616]
PRIVY COUNCIL.

The 6th March, 1897.
PRESENT:
LORDS HOBHOUSE, MACNAGHTEN AND MORRIS, AND SIR R. COUCH.

Sheosagar Singh and others............Plaintiffs
versus
Sitaram Singh............Defendant.

[On appeal from the High Court at Calcutta.]

Res judicata—*Civil Procedure Code (Act XIV of 1882), section 13—Proceedings in a prior suit—Fact in issue not heard and "finally decided" therein.*

To support the defence of *res judicata* it is not enough that the parties to the suits are the same and that the same matter is in issue. The matter must have been heard and finally decided: section 13 of the Civil Procedure Code.

In 1885 relations of a deceased proprietor, alleging their right to the inheritance, sued for a declaration that they were his next of kin. The defendant set up a title as direct descendant, claiming to be the son of that proprietor's daughter. The first Court decided that this was his true parentage and dismissed the suit. The High Court maintained the dismissal, not upon the merits, but on the grounds that the suit was defective for want of parties, and that a declaratory decree could not be made. In 1888 the same plaintiffs, having purchased the interest of the parties not joined in the previous suit, brought the present suit, with the same object, against the same defendant, whom the Subordinate Judge (not the same officer that disposed of the former suit), now found not to have been the son of the said daughter. A Bench of the High Court (composed of Judges other than those that heard the former appeal) having examined the record of the former suit, reversed the Subordinate Judge's decision. They declined, however, to decide whether or not the latter suit was barred on the ground of *res judicata*. But intimating that they would have affirmed the judgment of the lower Court in the former suit had it, on the merits, come before them, they preferred that judgment to the one before them, and gave effect to this opinion by reversing the latter.

Held, that the question of parentage had not been heard and finally decided in the suit of 1885. The appeal in that suit had put an end to any [617] finality in the decision of the first Court, and had not led to a decision on the merits. There was, therefore, no *res judicata*; but unless treated as such the judgment in the former suit had little or no bearing on the question as afterwards put in issue in this. That issue had been rightly decided by the Subordinate Judge, on the evidence, and his judgment was accordingly maintained.

APPEAL from a decree (27th July 1891) of the High Court reversing a decree (7th February 1890) of the Subordinate Judge of Gya.

The suit was brought on the 17th July 1888 by three sons of Jawahir Singh, who died before 1882, together with an elder brother now deceased, against the defendant, Sitaram Singh, who was, at the time of this appeal, a minor. He was represented by his guardian, Adit Singh, whom he alleged to be his father, the lawful husband of his mother, Anar Koer, deceased in 1884. The object of the suit, valued at Rs. 6,000, was to obtain a declaratory decree confirming the plaintiffs' title to the possession which they held of a moiety of a revenue-paying *mouza* named Nadaura in Zilla Gya. They claimed to be the nearest collateral relations and heirs, according to the Mitakshara, of Mahipat Singh, brother of their father Jawahir, both having been former owners of Nadaura. Mahipat died on the 28th August 1882, leaving one daughter, Anar Koer, who

died on the 29th November 1884, without, as the plaintiffs averred, leaving a son. The defence of Sitaram was that he was her son, born of her marriage with Adit Singh. Thus, claiming Mahipat Singh for his maternal grandfather, his case was that he made a title in priority over the plaintiffs.

Jawahir Singh, the father of the plaintiffs, and Mahipat Singh, the father of Anar Koer, acquired each a half share in *mouza* Nadaura, Mahipat's half share being the subject of the present suit. On the death of Jawahir Singh in July 1879, the plaintiffs, his sons, succeeded to his moiety. Again, on the death of Mahipat in August 1882, they took possession of his moiety, as against their cousin, Anar Koer, who contested their right. The question was whether her father and Jawahir had been joint under the Mitakshara, or divided in estate. On the 15th March 1883, Jawahir's sons obtained an order in their favour for *dakhil kharij* of Mahipat's share, and thenceforth retained possession **[618]** down to this suit. Thereupon, on the 3rd September 1883, Anar Koer sued the present appellants to obtain her father's moiety, which she alleged to have been his separate acquisition. On the 26th January 1884, the Subordinate Judge of Gya decreed in her favour. These appellants appealed to the High Court, and pending that appeal, Anar Koer died on the 28th November 1884. On an application by her opponents for the suit to be treated as abated on her death, the High Court declined to decide on that mere petition whether Anar Koer left a son or not. On the 8th June 1885 these appellants, together with their since deceased brother, Sheobalak, filed their plaint against the present respondent, through his next friend, Adit Singh, asking a declaration that Anar Koer died without issue, male or female. One of the defences to this suit was that two persons alleged to be descended through Anar Koer named Baijnath Singh and Shoosarain should have been made parties. That was the suit referred to in the judgment of the High Court now under appeal, of which suit the record was imported into the present record. On the 30th November 1885 the first Court dismissed that suit, placing the burden of proof on the plaintiffs and finding no proof that Anar Koer died childless. An appeal from this was dismissed by the High Court on the 22nd March 1886 without any decision as to whether or not Sitaram Singh was the son of Anar Koer, on the ground that Baijnath Singh and Sheosarain Singh, who were equally interested in Mahipat's estate (supposing Anar Koer to have left no son) should have been made parties.

On the 31st May 1888 these appellants purchased their interest for Rs. 1,200, and instituted this suit on the 17th July following. Meantime, in a way not explained, Sitaram's name had been placed on the record of the suit decided in favour of Anar Koer on the 26th January 1884, and liberty to him to execute was granted. He, however, did not, and whether or not he had title by being the son of Anar Koer remained in dispute. The Subordinate Judge decided the issue in favour of the plaintiffs on the 7th February 1890. He disbelieved the evidence for the defendants considering it to have been shown that Anar Koer had passed the age of child-bearing at the date of Sitaram's birth.

On appeal a Divisional Bench of the High Court (PETHERAM, C.J., and BEVERLEY, J.) were of opinion that the conclusion arrived **[619]** at by the Subordinate Judge, taking into consideration all the facts and the history of the litigation between the parties, could not be sustained. Consequently, upon the merits of the case and upon the facts, they decreed the appeal and dismissed the suit.

They referred to the former suit between the parties decided on the 22nd March 1886, and the following is that part of the judgment in which their reasons are given :—

"The record and the judgment and the other proceedings were before the Court when it tried this suit; and when the appeal was argued before us the whole of the paper-book in that case was referred to on both sides. We have come to the conclusion that it is necessary, in the interests of justice, that we should see the whole of the paper-book, and as it has been referred to, we see no reason why we should not deal with it as part of the record, and as being before us, inasmuch as it is clear that everything in it could have been made evidence if the necessary proceedings had been taken.

"Then, with reference to the present appeal, we have gone through the judgment, and we have gone through the evidence in this case very carefully, and if the oral evidence taken there had stood alone, it appears to us that it would have been very difficult for us to interfere with the decision, because the reasoning of the Subordinate Judge upon the evidence, as it appeared there, appears to be quite sound, and the reasons given for the conclusion he came to that Anar Koer, at the time when this person Sitaram was said to have been born, was a woman of such an age as to be past the age of child-bearing, appear to be well founded.

"Then comes the question how the proceedings in the former suit for the same relief bear upon this suit. It must be borne in mind that that suit was brought in the middle of the year 1885. The present suit was brought in the middle of the year 1888. Anar Koer died in the year 1884, and the consequence of that is that the first suit was brought almost immediately after the death of the woman, when all the facts connected with her would be much more easy of proof than three years later; and in reading those two records, the thing which strikes one most strongly is, not only that in the second case a totally different set of witnesses is called to support the plaintiffs' case from what was called to support it in the first case, but the case is rested on a totally different ground. In the first case, which was brought a year after the death of Anar Koer, a number of witnesses were called who state that this person was not the son of Anar Koer; they state that at the time of her death she left no son surviving her, though they say she had a number of children, and one of the witnesses, called on behalf of the plaintiffs, says that she had a child fourteen years before her death, which would be almost practically inconsistent with the case relied upon now by the plaintiffs, that at the time of her death Anar Koer was 62 or 63 years old.

That was the evidence which was produced in the first suit. The evidence was simply that she died childless, and upon that evidence the Subordinate [620] Judge came to the conclusion that he could not act upon it; and he, thinking that, upon the whole, this person Sitaram had been proved to be the child of Anar Koer, came to the conclusion that the suit must be dismissed, and the suit was dismissed; and reading the evidence in that case, we have come to the conclusion that if that case had stood alone, and the plaintiffs' case had come before us on appeal, it would have been impossible for us to interfere in that case or reverse that judgment. And the same issue was tried here, which was tried by the two Subordinate Judges, one of whom came to one conclusion and another to another conclusion, and practically we have to say which of these two, in this state of things, is right. We think that, having regard to the fact that this was in fact a second trial, and a second trial after an enquiry which had disclosed to the plaintiffs exactly what the defendant's case was, before a decree can be made in favour of the plaintiffs in a suit of this kind, a very different kind of case must be made out, and evidence of a very different kind must be given from that which has been given here.

But, in addition to that, we find here the fact, which I mentioned just now, that not only are a different set of witnesses called by the plaintiffs in the second case from that which they called in the first, but they make a totally different case now from what they made then. They rest the present case on the allegation that at the time this boy is said to have been born this woman was so very old as to have been past the age of child-bearing, no such case having been made by them at the first trial."

They added :—

" Certain points were taken here with reference to the matter being *res judicata*. In the view that we take of it, we do not think it necessary for us to decide that question, and I think it better that we should be understood as not expressing any opinion upon the point one way or the other."

As to costs, the order below went with the rest of the decree ; but on this appeal no order was made as to costs.

On the appeal of the plaintiffs—

Mr. *J. D. Mayne* for the appellants argued that even if the record of the suit decided on the 22nd March 1886 had been properly referred to in order to compare the judgment of the Subordinate Judge in the present suit with the judgment of that former date no such variances were to be found, no such differences in the cases put forward appeared, and no such inferences arose from comparison of the evidence, as the judgment now appealed from suggested. The case made by the appellants was the same in both cases, the [621] evidence in the latter indicating more completely why Sitaram Singh was shown not to be the son of Anar Koer, viz., because her age was too advanced for her to have borne a son, who would at the date of the hearing be so young as he was. The cases set up were identical on both occasions ; and if on the first, the appellants did not go into evidence as to her age, it was because the boy had not been seen by them, and was not in Court. Afterwards they made this their principal proof of what had been on both occasions alleged. The High Court had only touched on the question whether the defence of *res judicata* was maintainable, without deciding it. It should have decided that there was no *res judicata*.

In effect the High Court in the judgment of 22nd March 1886 had affirmed a state of things on which the issue, son or no son of Anar Koer, could not be decided on the state of things before the Court, viz., owing to the want of the necessary parties to the suit. Therefore the question in issue was not only left undecided, so that it was not heard and determined, but the judgment was that it could not be heard or determined. Reference was made to *Kali Krishna Tagore* v. *The Secretary of State for India* (I. L. R., 16 Cal., 173). The decree in favour of this one, or that, of the parties, did not constitute *res judicata* which to be a bar must be a matter finally heard and determined. The evidence supported the appellants' case.

Mr. *C. W. Arathoon*, for the respondent, contended that the present suit was barred by the decision in the former one. As matters stood, the decree of the Subordinate Judge, dated 30th November 1875, was on the record of this present suit, unaltered and unreversed. On this he relied as a final adjudication, and argued that it could not be got rid of by a judgment in reference to it in the present suit. The merits were with the respondent.

Counsel for the appellant was not called upon to reply.

Afterwards on the 6th March 1897 their Lordships' **judgment** was delivered by

Lord Macnaghten.—The question in this appeal is whether the infant respondent Sitaram Singh is or is not the son of one Anar Koer who died in November or December 1884.

[622] Upon the answer to this question the title of the appellants to a moiety of certain shares in *mouza* Nadaura depends.

Anar Koer was the wife of Adit Singh, the guardian on the record, and alleged father of Sitaram, and she was the only child and heiress of Mahipat Singh.

Mahipat Singh and a cousin of his, one Jawahir Singh, had purchased the shares in question on their joint account and had registered them in their joint names. Mahipat, who survived Jawahir, died in August 1882. On his death the plaintiffs, who were sons of Jawahir, applied for registration on the ground that the family was joint, and that the succession belonged to them. The Deputy Collector on a summary application decided in their favour. Anar Koer then brought a regular suit to recover her father's moiety. In that suit it was held that the family was not joint, and this decision was confirmed on appeal. But the registration in the Collector's books was not altered, and possession of the whole property has remained with the plaintiffs ever since.

In the present suit, which was commenced in 1888, the plaintiffs asked to have it declared that Sitaram was not the son of Anar Koer or the grandson by the daughter of Mahipat, and that Anar Koer did not leave any child behind. The Subordinate Judge of Gya made a declaration to that effect. The High Court (PETHERAM, C.J., and BEVERLEY, J.) reversed this decision and dismissed the suit. From that reversal the present appeal is brought.

There had been a previous litigation begun in 1885 between the same parties in which the very same issue was raised. The Additional Subordinate Judge of Gya, by whom the case was tried, a different person from the Subordinate Judge in the present suit, attached little or no weight to the oral evidence on the part of the plaintiffs. Holding that the burden of proof lay on the plaintiffs and that they had not discharged it he dismissed the suit. On appeal the learned Judges of the High Court (MITTER and AGNEW, JJ.) affirmed the decree. They did not, however, deal with the real question at issue between the parties. They held that the suit could not be maintained in the absence of certain persons in the same interest as the plaintiffs. **[623]** And apart from that objection they were of opinion that under the particular circumstances of the suit before them the Court ought not, in the exercise of its discretion, to make a declaratory decree. Whether the view of the learned Judges on these points was right or wrong the judgment proceeds expressly on the footing that it was "not necessary to come to a decision" on the question of Sitaram's parentage. And so the appeal was dismissed.

The plaintiffs then bought up the interests of the persons not represented in the first suit and commenced fresh proceedings. It was objected that the plaintiffs were precluded from bringing a second suit by the decision in the suit of 1885. In a preliminary judgment the Subordinate Judge disposed of that point without any hesitation. On the 7th of February 1890 he delivered judgment on the main question. He carefully reviewed the evidence and all the circumstances of the case. He was not so much impressed by the oral testimony on the part of the plaintiffs as he was by the way in which the defendant's case had been conducted and by the absence of evidence which, if the defence were an honest one, would, he thought, certainly have been forthcoming. He held that the plaintiffs had made out "a sufficient *primâ facie* case," and that the defendant had altogether failed to meet it.

It is not necessary for their Lordships to do more than express their concurrence with the Subordinate Judge in his view of the question as it was presented to him, because to that extent the learned Judges of the High Court adopt the reasoning and conclusion of the Court below.

"We have," they say, "gone through the evidence in this case very carefully and if the oral evidence taken there" (that is in the Subordinate Court) "had stood alone, it appears to us that it would have been very difficult for us to interfere with the decision, because the reasoning of the Subordinate Judge upon the evidence as it appeared there, appears to be quite sound, and the

reasons given for the conclusion he came to that Anar Koer, at the time when this person Sitaram was said to have been born, was a woman of such an age as to be passed the age of child-bearing appear to be well founded."

[624] The way in which the learned Judges of the High Court disposed of a decision which upon the evidence adduced at the trial they themselves thought well founded was perhaps rather summary. It seems that at the trial the parties had put in evidence the judgment and the decree and such of the depositions in the first suit as they considered material. But the learned Judges on appeal were not satisfied with so meagre an instalment of past history. They held it "necessary in the interests of justice" that they should see the whole of the paper-book in the suit of 1885 and deal with it as part of the record before them. Reading the two records they found that the witnesses on the part of the plaintiffs in the two suits were not the same, and they assumed rather hastily that the plaintiffs were making "a totally different case" from that which they had made originally. Taking the evidence in the first suit by itself they pronounced an opinion that if that suit had come before them on appeal it would have been impossible for them to have reversed the judgment of the Subordinate Judge who had dismissed the plaintiffs' suit "thinking," they said, "that upon the whole this person Sitaram had been proved to be the child of Anar Koer." The same issue, they added, had been tried by two Subordinate Judges; the question was which of the two was right. Under the circumstances they preferred the earlier decision—a decision nearer the time of Anar Koer's death—to the result of a second trial after an inquiry which had, they thought, "disclosed to the plaintiffs exactly what the defendant's case was."

Their Lordships cannot think this mode of dealing with the matter at all satisfactory. The reason why the plaintiffs called a different set of witnesses on the second trial is perhaps not far to seek. In the first case the Subordinate Judge had put aside the evidence of the plaintiffs' witnesses on the ground that they were all either biased by relationship in favour of the plaintiffs or prejudiced against Adit Singh by former disputes. The plaintiffs can hardly be blamed for not choosing to rely a second time upon witnesses thus discredited. Nor is it correct to say that in the second suit the plaintiffs set up "a totally different case." In both suits their case was the same. They averred that Anar Koer died without issue. But when the time of Sitaram's birth was fixed the question was brought within [625] a narrower compass. It was enough for the plaintiffs then to prove if they could that at that time Anar Koer was past child-bearing. The case they made originally was established beyond question if they could shew that at the time when the alleged offspring of Anar Koer was born it was impossible for Anar Koer in the course of nature to become a mother.

It is quite true that on the first trial the plaintiffs did not make it part of their case that Anar Koer was past child-bearing in the latter years of her life. Apparently they had no reason to anticipate that so recent a date would be fixed for the birth of the rival heir who has never yet been produced in Court. They seem to have expected an older claimant. When the defence was opened and Adit Singh, who was the first witness for the defendant, pledged himself to the date of Sitaram's birth, the importance of the question became apparent, and thenceforth every witness for the defendant who did not state on examination-in-chief that he was ignorant of Anar Koer's age was cross-examined closely on the subject. No one, however, could tell how old Anar Koer was at her marriage, or how old she was at Mahipat's death. One and all they professed to know nothing whatever about her age. Moreover, it is to be

observed, that two of the plaintiffs' witnesses on cross-examination stated that Anar Koer had reached an age which makes child-bearing impossible, or at least very improbable. One said she was 55 at the date of Mahipat's death. Another who gave his age as 48 said she was older than he was. So that the first statement as to Anar Koer's age came from the camp of the plaintiffs before the exact position of the defendant was declared. And if on the first enquiry the plaintiffs gained information useful to them by having the date of Sitaram's birth fixed, the defendant's advisers were made aware of the case they would have to meet in the event of a second trial. And it was an easy case for them to meet if their story was true. However, instead of producing evidence as to Anar Koer's age at Mahipat's death, or as to the birth of a child of her womb, Adit Singh contented himself with the repetition of his former evidence and the allegation that Anar Koer was only his second wife. He had been married before he said to a woman with whom he had lived in wedlock for more than twenty years and he married Anar Koer after [626] her death. So much he remembered and swore to positively. But he could remember nothing more about the first wife. He could not even recall her name, and the Subordinate Judge, who saw him under cross-examination, came to the conclusion that that part of his story, at any rate, was a fiction.

It may perhaps be doubted whether the learned Judges of the High Court were right in assuming on the mere perusal of the evidence in the first suit to decide a case which was not before them and on which they could not have heard any argument. However that may be, it is obvious that by the course which they took they gave the effect of a judgment conclusive between the parties to a decision which was superseded on appeal, and which in the opinion of the only tribunal competent to rehear the case ought never to have been pronounced. Indeed, unless the matter of the decision of the Subordinate Judge in the first suit be treated as *res judicata*, it can have little or no bearing on the question at issue. Granted that the first decision of the lower Court was right it by no means follows that the second must be wrong.

It was argued or contended with much persistence before their Lordships that the decision in the first suit might support a plea of *res judicata*. That contention did not commend itself to their Lordships. It met with rather more favour in the High Court, though it did not quite find acceptance there. The learned Judge who delivered the judgment of the Court expressed himself as follows —

"Certain points were taken here with reference to this matter being *res judicata*. In the view we take of it we do not think it necessary for us to decide that question, and I think it better that we should be understood as not expressing any opinion upon the point one way or another."

Their Lordships are unable to understand what advantage there can be in treating such a point as open to argument, and thus throwing doubt upon the meaning of an enactment which in this part of it at least seems to be expressed in tolerably clear language. To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been "heard and finally decided." If there [627] had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of Appeal. And the only thing finally decided by the Court of Appeal was that in a suit constituted as the suit of 1885 was, no decision ought to have been pronounced on the merits.

Before their Lordships certain judgments in proceedings in execution were appealed to as sufficient to raise or eke out the plea of *res judicata*. But in

each case on turning to the judgment it appears that the Court expressly guarded itself against being supposed to decide the question of Sitaram's parentage.

Their Lordships agree with the High Court in thinking that the Subordinate Judge came to a right conclusion upon the evidence and the circumstances of the case before him. They do not, however, think that there was anything in the evidence in the first suit or in the judgment of the Additional Subordinate Judge or in what the learned Judges term "the history of the case" to suggest any doubt as to the propriety of the decision which they overruled.

Their Lordships will therefore humbly advise Her Majesty that the decision of the High Court should be reversed, and the appeal from the decision of Subordinate Judge of Gya dismissed with costs. The respondent will pay the costs of this appeal.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondent. Mr. *H. G. Dallimore.*

C. B. *Appeal allowed.*

NOTES.

[As regards the rule of '*might and ought*' see also **(1912) 37 Mad., 70**, on appeal from (1911) 35 Mad., 216 : 21 M L.J., 344.

See also (1912) 15 I C, 229 (Mad), where it was held that there was no *res judicata* in respect of issues on which the Appellate Court omitted to record a finding on the ground that it was *unnecessary*.]

[24 Cal. 627]

The 24th February and 20th March, 1897.

PRESENT:

LORDS WATSON AND DAVEY, SIR R. COUCH, AND SIR F. JEUNE.

Mary Tug Company............Plaintiff

versus

British India Steam Navigation Company............Defendants.

[On appeal from a Court of Admiralty held by the Recorder of Rangoon.]

Collision—Damage by a ship under way colliding with another at anchor—Burden of justifying duty of ship at anchor.

Where a ship under way comes into collision with another at anchor in a proper place, and showing, at night, an anchor light, it is obvious that the burden of justifying is heavily cast on the ship under way. At the same **[628]** time there is an obligation on the anchored ship to keep a competent watch, to show an anchor light, and to do everything to avert a collision and lessen the damage from it. If, as was the case here, the damaged ship is placed in a difficulty entirely by the erroneous course, or conduct, of the other, and is obliged to take a step on the instant, she is entitled to claim from a Court a favourable consideration for her action, even if that should afterwards appear not to have been the best possible.

A steamship, entering the fairway of a river with the tide flowing, collided with the respondent's tug at anchor in a proper place, and showing an anchor light. Near the tug was a pilot brig, astern of which the steam ship wanted to round, attempting to pass between the tug and the brig. She could, however, have taken a course astern of both. At the

approach of the steamship both the anchored vessels, heading against the tide, hove on their anchors, and drifted back.

The justification set up by the owners of the steam ship was that she was misled by the pilot brig's drifting, the anchor light of the latter having been kept up. Blame to a third ship, if blame there were, was *held* to be no excuse for the colliding ship, as against the tug's complaint.

The main charge against the tug was that she did not slack away chain as soon as there was danger, but hove on her anchor. It was found, however, that if the tug were already drifting when the collision took place, there was no reason to suppose that by slacking away chain at the earliest possible moment, the collision would have been averted, or lessened in force.

On the other hand, the facts against the impugnants' steamship were : (1) that her course could, without difficulty, have been directed so that, by going astern of the tug from the port side instead of crossing her bows, all risk of collision would have been avoided ; (2) that there was a want of sufficient look-out on board the steam ship, especially as regarded the tug ; (3) that there was possibly also a miscalculation on the part of the steam ship of the room to pass, with reference to the force and set of the tide. She was, accordingly, alone held to blame, and her owners liable in damages.

APPEAL from a judgment and decree (8th January 1896) of the Recorder of Rangoon exercising Admiralty jurisdiction.

This suit was brought by the appellants to recover a sum of Rs. 13,182 as damages resulting from a collision between their tug the *Mary* and the respondent's steam ship the *Meanatchy*. This occurred about 10-30 P.M. on the 8th February 1895 at the entrance of the Rangoon river, and was alleged by the appellants to have been caused by the negligent navigation of the *Meanatchy*.

The respondents counter-claimed from the appellants Rs. 15,125 for damages sustained by the *Meanatchy* in the collision which **[629]** they attributed to the negligence of the master and crew in their management of the *Mary*.

The Recorder of Rangoon dismissed the suit in a Court of Admiralty, which he held in accordance with the provisions of the Act relating to "Colonial Courts of Admiralty, 1890." This is the statute 53 and 54 Vic., c. 27, entitled "An Act to amend the law respecting the exercise of Admiralty jurisdiction in Her Majesty's dominions and elsewhere out of the United Kingdom." This Act repealed the Vice-Admiralty Courts Acts of 1863 and 1867, besides other Acts.

The question on this appeal was, which of the two, the steamship *Meanatchy* or the tug *Mary*, was to blame.

The appellant Company, the promovents, owning the tug *Mary*, alleged that those in charge of the *Meanatchy* had been in fault for failure to keep a good look-out, for having taken an unnecessary course, difficult under the circumstances, and for having failed to slow, or reverse, until the moment of collision.

The respondents alleged that the crew of the tug failed to keep a good look-out, not having a proper watch, and not having, at the time, a competent officer in charge of her. They also alleged that those on board the tug had not paid out the anchor chain, but had hove on the anchor, the latter not being the proper way to avoid the collision, or diminish the force of it.

The questions put by the Recorder to his nautical Assessors, with the answers, are set forth in the judgment of their Lordships, who also had the assistance of Assessors.

The judgment of the Court of Admiralty was as follows :—

"It appears that on the night of the 8th February the *Mary* was anchored near the pilot brig at the mouth of the river. The evidence is not very clear as to the exact distance between two vessels. In fact, it could hardly be so. But the vessels appear to have been four hundred or five hundred yards apart. It appears that the pilot brig was ahead of the *Mary*. Mr. Warwick, the pilot in command of the pilot brig, gave evidence that they were almost abreast of each other. But the evidence of Mr. O'Brien, the master of the tug, and that of the other witnesses in the case, goes to show that the tug was astern of the pilot brig. While they were in these positions the S.S. *Meanatchy*, came within sight, and she directed her course towards the pilot brig, whence she had to take up a pilot. The evidence shows that she was going in a direct course towards these two vessels, and their lights ahead of her. Both vessels were carrying anchor lights. The evidence of the [630] captain of the *Meanatchy* and his officers shows that it was the intention of the captain to steer between these two vessels, which he saw at anchor, and to round up under the stern of the pilot brig in order to take the pilot on board. When he arrived close to the *Mary* and was rounding too, the captain found that he was close upon her and that collision was inevitable. The captain of the tug was, at the time the *Meanatchy* was sighted, on board the pilot brig, and he remained there for some little time longer, and when the *Meanatchy* was not very far off he went off in his boat to his vessel, and at the time of the collision was apparently about one hundred yards astern of her. He saw that the collision was going to occur and he gave orders to heave short. The effect of that would be, first, to draw up the tug on towards the anchor. When the anchor was lifted the vessel would begin to drift, but the immediate effect would be what I have just stated, so that the vessel would not drift at once. The *Meanatchy* struck the tug and caused certain damages for which compensation has been claimed."

The judgment then stated the questions put to the Assessors and their answers (all of which are quoted in their Lordships' judgment), and concluded with :—

"That being so, the suit fails and must be dismissed with costs."

Of the counter-claim by the impugnant Company (Rs. 15,125) Rs. 6,213 were allowed, and decreed with costs thereon, in favour of them as owners of the *Meanatchy*.

Mr. *Joseph Walton*, Q.C., and Mr. *Butler Aspinall* for the Appellants.—The facts found in the judgment of the Court below are not such as to have justified that Court in pronouncing the *Mary* to be solely in fault. The argument for the appellant was that the collision was caused by acts and omissions on the part of the *Meanatchy* alone. That ship taking an imprudent course between the *Mary* and the pilot brig, improperly, and at wrong time, starboarded her helm, attempting to cross the bows of the *Mary*. A good look-out, as the evidence showed, was not kept on board the *Meanatchy*, though it was her duty to watch both the tug and the pilot brig. Nor did the *Meanatchy* stop or reverse her engines in due time, nor did she reduce her speed, nor did she properly conform to article 18 of the "Regulations for preventing Collisions at Sea." On the other hand, all reasonable precautions were taken on board the *Mary* to avert and lessen the force of the collision, which was due to the fault of the *Meanatchy* alone.

Sir *Walter Phillimore*, Q.C., and Mr. *Lawriston Batten* for [631] the respondent Company.—The finding of the Court below, and the opinion of the Assessors, with which the judgment of the Court was in accord, were correct. According to the evidence, the original positions of the tug and the brig were such that the course steered by the *Meanatchy* was right and safe at the commencement. The relative positions of the anchored vessels to one another had, however, been changed before the collision by their own acts. They had shove on their

anchors, and drifted, and the pilot brig when drifting had kept up her anchor light, as though she were stationary. There was, on the other hand, no evidence of the want of ordinary skill or care in the navigation of the *Meanatchy*, and, on the contrary, the evidence showed that the latter when in the difficulty that had suddenly arisen, and when a collision was imminent, took all the steps which she could reasonably be expected to take. The pilot brig's light was misleading to the *Meanatchy*. The *Mary* tug, instead of paying out anchor chain at the near approach of the steamship, when collision appeared to be imminent, hove on her anchor. To have slackened out chain would probably have caused her to take the collision on her beam instead of on her stem, as the evidence tended to show; and would have, at all events, lessened the damage. The master of the tug was returning to the tug in a boat, and the tide was against him; from the boat he gave the order, and when the tug drifted it would have been easier for the boat to approach. In reference to the duties of a ship at anchor in danger of a ship under way colliding with her, the *Clara* (12 Ohio., 200) decided in 1880 in the Supreme Court of the United States was cited. In that case an anchored vessel was held to blame and liable.

Mr. *Joseph Walton*, Q.C., replied.

Afterwards, on March 20th, their Lordships' **judgment** was delivered by

Sir Francis Jeune.—This is an appeal from the Court of the Recorder of Rangoon, sitting as a Colonial Court of Admiralty in an action between the Mary Tug Company, Limited, as owners of the tug *Mary*, and the British India Steam Navigation Company, Limited, as owners of the S.S. *Meanatchy*. The **[632]** appellants claimed, and the respondents counter-claimed, in respect of a collision which took place between the *Mary* and the *Meanatchy* at the entrance of the Rangoon river on the night of the 8th February 1895.

The *Mary* was lying at anchor heading to the flood tide which was running with a force which is differently estimated by the witnesses, but which was certainly considerable. A pilot brig, the *Samson*, was lying also at anchor in a position which the learned Recorder considered was ahead of the tug, and at a distance of between 400 to 500 yards from her. The *Meanatchy* was coming up the Rangoon river, and sighted first the pilot brig a little on her port bow, and, shortly after, the *Mary* at a distance which her captain puts at about four miles. At about one mile, according to the evidence of her captain and the third officer who was on watch (though the evidence of the helmsman and the man at the look-out indicates that this distance was much less) the *Meanatchy* starboarded, her purpose being to pass between the *Mary* and the pilot brig, and round up under the stem of the latter, in order to take a pilot. While the *Meanatchy* was at some distance, the pilot brig hove short, and the learned Recorder has found that she dragged to a position more nearly abreast of the *Mary*, the object of her doing so no doubt being to keep nearer to the boat in which the pilot would be dropped. The anchor lights of the pilot brig were not changed. The *Meanatchy* under her starboard helm, with her starboard bow about 20 feet from her stem, struck the stem of the *Mary*, doing, and receiving, damage. The case put forward on behalf of the *Meanatchy* was that her course was misled by a belief that the pilot brig was stationary.

It was also urged on behalf of the *Meanatchy* that the *Mary* was anchored in an improper place having regard to the position of the pilot brig, that there was no proper look-out on board the *Mary*, and that the captain of the *Mary* committed an error in the management of his vessel, namely, in heaving short instead of at once slacking out the chain of his anchor before the collision.

The learned Recorder asked six questions of his Assessors :—

[633] (1) Were the pilot brig and the *Mary* moored in proper position?

(2) Was the captain of the *Meanatchy* justified in navigating his vessel as he did?

(3) Was the pilot brig properly navigated?

(4) If not, did such improper navigation tend to cause the collision?

(5) If a proper look-out had been kept on the *Mary* could a collision have been avoided?

(6) Did the captain of the *Mary* act properly in giving the order to heave short, or ought he to have ordered the chain to be slacked?

The replies given by the Assessors to these questions were as follows :—

(1) The *Mary* was anchored in a dangerous position.

(2) Yes. If the brig had remained stationary the captain of the *Meanatchy* would have been able safely to round under her stern without going near the tug. Moreover, the captain of the *Meanatchy* was misled by the fact that the commander of the pilot brig kept his anchor light up when the ship was under way.

(3) No.

(4) Yes.

(5) If there had been a proper look-out the collision might have been avoided, or its effects mitigated. In our opinion the master of the tug was not justified in leaving her without a properly qualified person in charge.

(6) He ought to have paid out chain as the *Meanatchy* was so close to him.

On this advice, the learned Recorder gave judgment for the respondents on the claim and counterclaim.

Their Lordships will first consider the conduct of the *Meanatchy*. It is beyond question that the *Mary* was at anchor and exhibiting a proper light, that the *Meanatchy* sighted the riding light of the *Mary* a considerable time, and at a con-[634] siderable distance, before the collision, and that by starboarding her helm in the endeavour to pass between her and the pilot brig she came into collision with her. When a vessel under way comes into collision with a vessel at anchor exhibiting a proper light, it is obvious that she has a heavy burden cast on her to justify her conduct. In this case the burden is the more serious because their Lordships are advised by their Assessors that, with a tide such as was running up, and, to some extent, across, the Rangoon River, to endeavour to pass between two vessels in the position of the pilot brig and the *Mary* was a proceeding not without risk even in the daytime, still more at night, and that it would have been safer seamanship to have gone round under the sterns both of the *Mary* and of the pilot brig. The justification put forward on behalf of the *Meanatchy* is that she was misled by the movement of the pilot brig, and her omission to change her riding light for the lights of a vessel underway. Their Lordships do not desire to express any opinion of the conduct of this vessel, but assuming that she drifted substantially in the way alleged on behalf of the *Meanatchy*, their Lordships are of opinion that the *Meanatchy* cannot successfully plead that she was misled by the movement of the light of the pilot brig in order to excuse her collision with the *Mary*.

Their Lordships think that those on the *Meanatchy* should have noticed both the actual movement of the light of the pilot brig, and also that movement

in relation to the light of the *Mary*. But they are also advised, and entertain no doubt, that the observation on board of the *Meanatchy* should have been directed to the *Mary* as well as to the pilot brig, and that, had such observation been effective, the course of the *Meanatchy* could, without difficulty, have been so directed as to avoid collision with the *Mary*. Their Lordships are of opinion that it was the want of sufficient look-out on board the *Meanatchy*, especially as regards the *Mary*, and possibly also a miscalculation of distance owing to the force and set of the tide, which brought about the collision, and for these errors the *Meanatchy* cannot be excused.

The case against the *Mary* turns mainly upon the omission to slack away chain as soon as there was risk of collision. There are, however, other charges with which it will be convenient to **[636]** deal first. It is alleged that the *Mary* was brought to anchor in an improper position. But this their Lordships think cannot be sustained. There is no rule prescribing any special place of anchorage for vessels in that part of the Rangoon River, and their Lordships are advised that neither as regards the circumstance that the ship near which the *Mary* lay was a pilot vessel, nor as regards the berth taken up by the *Mary* in relation to that vessel is any fault to be found. On the latter point, the evidence of the Assistant Port Officer appears to their Lordships to be conclusive. It is also urged that there was a want of look-out on board the *Mary*. In so far as this charge takes the form of an allegation that there was no one on the look-out, or that there was no properly qualified person in charge, the case does not appear to their Lordships to be made out. Their Lordships think that it would not be proper to hold that the captain was necessarily to blame for leaving his own vessel at anchor and going on board the pilot brig, and they see no reason to doubt that the engineer left in charge was competent to perform the duties of an anchor watch, and was attending to them.

The facts as to the action of the *Mary* appear to be that shortly before the collision, and, in consequence, as their Lordships think, of the approach of the *Meanatchy*, the captain of the *Mary*, who was then in a boat alongside, or astern, of his vessel, ordered her to be hove short on her cable with the intention, which was accomplished, of making her drift astern. The *Mary* by this process first moved forward about 30 feet, and then dragged astern, so that possibly she was not quite so far astern at the collision as she would have been had the anchor chain been paid out at once.

Their Lordships entertain no doubt that in the case of a vessel at anchor there is an obligation to keep a competent person on watch, and that it is his duty, not only to see that the anchor light or lights are properly exhibited, but also to do everything in his power to avert or to minimize a collision. Many such things may no doubt be done, and it is necessary also to be prepared to summon aid for any needful purpose. The case of the *Clara* (12 Ohio, 200) decided in the Supreme Court of the United States on which **[636]** reliance was placed by the learned Counsel for the respondents does not appear to their Lordships to go beyond a recognition of this general principle. It would appear that the Supreme Court, in appeals from the Circuit Courts, has jurisdiction limited to a determination of questions of law raised on the record, or by bill of exceptions. The Circuit Court found, as facts, that the plaintiff's ship, the *Julia Newell*, with which the *Clara* came into collision, was improperly lying at anchor, without a watch on deck, that a storm was increasing, and set in about the time the *Clara* came to anchor, and was a very severe snow storm, that if the *Julia Newell* had had a sufficient watch on deck the accident might have been prevented, and that the *Clara* was well manned and had proper lights and a proper look-out; and the Circuit Court held that the failure to keep a

watch on the deck of the *Julia Newell* was the cause of the collision. It cannot be ascertained from the report, nor was it material to be stated, as only questions of law could be considered, what particular course might have been adopted on board the *Julia Newell* to have prevented the collision. The Supreme Court held that the *Julia Newell* was alone to blame; but this decision affords no aid in the present enquiry, because it proceeds on the assumption of such negligence, and its results, as in the present case, constitute the very issues in controversy.

Not only, however, is the general obligation as to an anchor watch insufficient to dispose of the questions raised in this case, but, even if it be conceded that the person in charge was guilty of an error of judgment, other considerations arise. It has to be considered whether, had the course, which is suggested as the best, been taken, the result as to the collision would have been materially affected; and their Lordships are advised that there is no reason to suppose that had the chain been slacked away at the earliest moment at which such action would have been proper, the collision would have been averted, or its results mitigated. But even were this more doubtful than their Lordships think it is, another point of importance remains. A competent sailor, as their Lordships are advised, would have been justified till a very late moment in assuming that the *Meanatchy* would, as she easily could, have abstained from an [637] attempt to cross his bows; and so long as there was a reasonable possibility that the *Meanatchy* would go under his stern, he would not have aided, but, on the contrary, might have hampered such a manœuvre by causing his own vessel to drift astern. Being thus placed, entirely by the erroneous conduct of the *Meanatchy*, in a position of difficulty in which an instant step was imperative, he became entitled, as this and other tribunals have often held, to claim a favourable consideration for the action which he decided to take, even if it should afterwards appear that such action was not the best possible.

It was suggested by the Counsel for the respondents that the order by the captain of the *Mary* to heave short was given without reference to the approach of the *Meanatchy*, before any risk of collision, and merely in order to bring his vessel nearer to the boat in which he was lying. As above stated, in their Lordships' opinion, this was not so in fact, but, if it were, it is all the more probable that the *Mary* had at the time of the collision drifted astern as far as if her chain had been paid out just before it; and, indeed, if the vessel was already drifting it would have become of little or no use to pay out chain.

For these reasons, their Lordships are of opinion that the *Meanatchy* must be held alone to blame for the collision.

Their Lordships will humbly advise Her Majesty that the decision of the Court of the Recorder should be reversed, and judgment entered for the appellants on the claim and counterclaim, and the case remitted in order that the damages due to the appellants may be ascertained. The respondents must pay the appellants the costs of this appeal, and the costs of the claim and counterclaim in the Court below.

Appeal allowed.

Solicitors for the Appellants: Messrs. *Lattey & Hart.*

Solicitors for the Respondents: Messrs. *Walton, Johnson, Bubb & Whatton.*

C. B.

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[638] CRIMINAL REFERENCE.

The 10th May, 1897.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE WILKINS.

G. Benbow...........Complainant

versus

W. Benbow...........Defendant.*

Maintenance, order of Criminal Court as to—Criminal Procedure Code (Act X of 1882), sections, 488 and 177—Complaint by a wife against her husband for maintenance—Issue of summons—Jurisdiction of Presidency Magistrate.

If a person neglects or refuses to maintain his wife, the proper Court to take cognizance of the complaint of the wife is the Court within the jurisdiction of which the husband resides.

REFERENCE by the Chief Presidency Magistrate of Calcutta under section 432 of the Criminal Procedure Code. The facts of the case and the question referred for the opinion of the High Court appear from the following letter of reference:—

"In this case the husband is living at Assansol and the wife in Calcutta.

"The question for determination is whether I can issue a summons calling upon the husband to attend in my Court and shew cause why he should not maintain his wife. It is a question of jurisdiction.

"The Legislature does not contemplate an exercise of jurisdiction by a Magistrate outside the area to which he is appointed by the Government, and the Code, by section 177†, lays down a fundamental principle that the competency of a forum to take cognizance of an enquiry into an 'offence,' as defined by section 4 of the Code, is determined by the place in which the offence may have been committed.

"It is doubtful if the failure to maintain can strictly be called an 'offence,' as defined by section 4, in cases where there is no order for maintenance in existence, inasmuch as there is no penalty attaching to the breach of duty, the penalty only arising under section 488 if a husband refuses to maintain *after* an order is passed for him to do so. It is an offence to disobey a Magistrate's order for maintenance, but there is no penalty attaching to the refusal to maintain in the first instance. Such a refusal is a breach of duty which gives the wife a right to a summons. It is the duty of a wife to reside with her husband, and her co-relative right to be maintained by him under his roof. The first process calling on the husband to maintain his wife should therefore be sought in the district in which the obligation is *prima facie* to be fulfilled, *i. e.*, in the district in which the husband resides. [639] I do not think that such duty and co-relative right can be altered by anything stated *ex-parte* by the wife when applying for a summons.

* Criminal Reference No. 1 of 1897 made by T. A. Pearson, Esq., Chief Presidency Magistrate of Calcutta, dated the 4th of May 1897.

Ordinary place of inquiry and trial. † [Sec. 177:—Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.]

"There are cases bearing on the question, one; *In re the Petition of Fakrudin* (I. L. R., 9 Bom., 40) decided by the Bombay High Court by two learned Judges, which lays down that the application for a summons for maintenance should be made in the district in which the husband resides, the learned Judges remarking that the words of section 488 point to its being only the Magistrate in whose jurisdiction the person against whom complaint is made resides who has jurisdiction; and they further support their view by arguments of convenience.

"On the other hand, there is a decision of the Allahabad High Court, *In re the Petition of Decastro* (I. L. R., 13 All., 348), which takes a different view, but it is a decision of a single Judge. It will be noticed that the application in the present case is drawn up so as to fall within the facts of the Allahabad case above referred to, and in the Allahabad case the learned Judge, Mr. Justice KNOX, decided that under the circumstances of that case the wife had a right to choose her own residence, and to apply for a summons in the Court in whose jurisdiction she resided, and the learned Judge cited the case of *In re Todd* (5 N. W. P. H. C., 237) as supporting that view. The ruling in *In re Todd* is not a very satisfactory authority, as no arguments are given in the report, and the matters mentioned by the Bombay High Court case above referred to do not appear to have been raised.

"I am inclined to follow (as has always been the practice in such applications in the Presidency Magistrate's Courts) the view taken by the learned Judges of the Bombay High Court in preference to the ruling of the single learned Judge in the Allahabad case, but as the matter is one of some difficulty, and one as to which a definite ruling for the Presidency is required, there being, so far as I am aware, no decision on the point by the Calcutta High Court, I refer for the opinion of the learned Judges of the High Court the question, whether this Court or the Assansol Court is the proper Court from which the summons asked for should be issued."

The **judgment** of the High Court (**Ghose** and **Wilkins, JJ.**) was as follows:—

We think that the Presidency Magistrate has taken a right view in the matter. "It is the duty of the woman," as observed by WEST, J., in *In re the Petition of Fakrudin* (I. L. R., 9 Bom., 40), "to reside with her husband, and it is her co-relative right to be maintained by him under his roof." And when the husband fails in his duty, the proper Court to take cognizance of the com-**[640]** plaint of the wife is the Court within the jurisdiction of which he may reside. The language of section 488 of the Code of Criminal Procedure itself favours this view; and it seems to us that, if the principle which underlies section 177 of the Code may be applied to this case, the complaint should be enquired into by the Court within the local limits of whose jurisdiction the husband neglected or refused to maintain his wife. Let the record be sent back with this expression of our opinion.

S. C. B.

NOTES.

[In view of the conflict of decisions between cases like 24 Cal., 638 and those like 13 All., 348, the Legislature in the Criminal Procedure Code, 1898, sec. 488, inserted clause (9) to the effect that "the accused may be proceeded against in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child."]

[24 Cal. 640]

APPELLATE CIVIL.

The 28th May and 28th June, 1897.

PRESENT:

MR. JUSTICE O'KINEALY AND MR. JUSTICE HILL.

Grish Chunder Sasmal............Defendant

versus

Dwarka Nath Dinda and others............Plaintiffs.*

Parties—Adding parties to Suit—Civil Procedure Code (Act XIV of 1882), section 32—Court adding a defendant—Limitation.

No question of limitation arises where a Court, of its own motion, under section 32 of the Civil Procedure Code, adds a party defendant to a suit. *Oriental Bank Corporation* v. *Charriol* (I. L. R., 12 Cal., 642), followed

THIS suit was brought to recover money due on a mortgage bond, dated the 12th Jaista 1288 (24th May 1881). On the 25th Baisack 1294 (7th May 1887) the appellant, defendant No 7, took a usufructuary mortgage of the equity of redemption in the mortgaged lands and of certain other properties. When the suit was instituted he was not made a party, but he was added by the order of the Court under section 32 of the Civil Procedure Code. He put in a written statement, pleading that the suit was barred by limitation. The Munsif allowed the plea, and dismissed the suit as against that defendant, and the defendant No. 6, who had improperly been made a party to the suit, but decreed it as against the other defendants. On appeal to the [641] Subordinate Judge, the decree was varied, the Subordinate Judge holding that the suit was not barred, as there had been an acknowledgment of the debt by the other defendants in a bond dated 28th Assin 1292 (13th October 1885), and that the plaintiffs were entitled to count limitation from that date.

The defendant No. 7 appealed.

Babu *Jagat Chunder Banerjee* appeared for the Appellant.

Mr. *H. E. Mendes* for the Respondents.

C.A.V.

The **judgment** of the Court (**O'Kinealy** and **Hill, JJ.**) was as follows:—

This is a suit for money due on a simple mortgage bond dated the 12th Jaista 1288, and the only point in the appeal is in regard to the defendant No. 7, who became the mortgagee of the equity of redemption after the plaintiffs' mortgage. This defendant was not originally on the record, but was, in the course of the suit, added by the first Court under section 32 of the Code.

It has been held in the case of *Oriental Bank Corporation* v. *Charriol* (I. L. R., 12 Cal., 642) that where a Court, acting on information brought to its notice, adds a party who, it thinks, is necessary for the disposal of the suit, no question of limitation arises.

The defendant No. 7 in this case was, under the Transfer of Property Act, a party necessary for the final disposal of the suit. We, therefore, think that

* Appeal from Appellate Decree No. 1645 of 1895, against the decision of Babu Rajendro Kumar Bose, Subordinate Judge of Midnapur, dated the 31st July 1895, reversing the decision of Babu Debendro Mohun Sen, Munsif of Contai, dated the 18th February 1895.

no question of limitation arises; and the mortgage in suit must be enforced against the defendant No. 7, as well as the other defendants, except the defendant No. 6.

The appeal is, therefore, dismissed with costs.

H. W. *Appeal dismissed.*

NOTES.

[This was followed in (1899) 27 Cal., 540 but disapproved in (1906) 33 Cal., 613: 10 C.W.N., 551: 3 C.L.J., 576; (1903) P.R., 25; (1903) 32 Cal., 580; (1903) 28 Bom., 11; (1903) 5 Bom. L.R., 618, and finally overruled in (1907) 35 Cal, 619 F.B.: 11 C.W.N., 350: 5 C.L.J., 242. See also C.P.C., 1908., O. 1., R. 10., cl. 5.]

[642] *The 10th May, 1897.*

PRESENT:

MR. JUSTICE RAMPINI AND MR. JUSTICE STEVENS.

Ambika Pershad............Plaintiff

versus

Chowdhry Keshri Sahai and others............Defendants.*

Right of Occupancy—Transfer of Right—Suit for registration of name in landlord's serishta—Right of Suit—Notice—Tenancy Act (VIII of 1885), section 73.

Under the Bengal Tenancy Act (VIII of 1885) the transferee of a holding of a *raiyat*, with right of occupancy transferable by custom, cannot maintain a suit for registration of his own name in the landlord's *serishta* by expunging that of his vendor.

A declaration that the transferee, and not the old tenant, is responsible for the rent of the holding cannot be obtained without service of notice as prescribed by section 73 of the Act.

THE plaintiff in this case alleged that a certain ancestral *guzasta kasht*, with right of transfer, was held by defendant No. 3 under his landlords, the defendants Nos. 1 and 2; that the defendant No. 3 sold it to the plaintiff under a registered deed of sale, dated 6th August 1889, and put him in possession thereof; that in Jeith (May) 1890 he applied for registration of his name in the landlord's *serishta* by expunging the name of his vendor, and offered to pay the *salami* and the year's rent, and although the defendant No. 2 received the *salami* and rent, defendant No. 1 refused to do so; that suits for rent were brought by defendant No. 1 against defendant No. 3, in which the plaintiff was compelled to deposit the decretal amounts, and his prayer to be made party to the suits was disallowed. The plaintiff, accordingly, prayed that declaration be made of his title to get his name registered by expunging that of the defendant No. 3; and that his name might be caused to be so registered in the *serishta* of defendant No. 1.

The lower Courts found the tenure to be transferable by custom, but held that the plaintiff had failed to prove his title by purchase, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court

* Appeal from Appellate Decree No. 261 of 1896, against the decree of B. C. Chatterjee, Esq., District Judge of Arrah, dated the 7th of December 1895, affirming the order of Babu Chunder Coomar Roy, Munsif of that District, dated the 27th of June 1895.

[643] Moulvie *Mahomed Yusuf* (for Mr. *C. Gregory*) and Babu *Raghunandan Prasad* for the Appellant.

Babu *Saligram Singh* and Babu *Mahabir Sahai* for the Respondents.

The **judgment** of the High Court (RAMPINI and STEVENS, JJ.) was delivered by

Rampini, J.—This is a suit brought by a person who alleges that he is the transferee of an occupancy holding against the landlord of the *jote*, and who seeks to have it declared that he is entitled to have his name registered in the *serishta* of defendant No. 1, and to have the name of defendant No. 3, his transferor, expunged.

The lower Courts have gone into the merits of the case, and they have dismissed the suit, on the ground that the plaintiff has not established his purchase of the *jote* in question against defendant No. 3.

The only point found in favour of the plaintiff is that the *jote* is a transferable one. The plaintiff now appeals to this Court and impugns the finding of the Lower Appellate Court. We do not, however, think it is necessary to enter into the merits of this case, as it appears to us that the suit is not maintainable under the provisions of the Bengal Tenancy Act. The plaintiff is, on his own showing, an occupancy *raiyat*. He is not a permanent tenure-holder, nor a *raiyat* holding at a fixed rate, but is merely a *raiyat* with a right of occupancy, which the Lower Appellate Court has found to be transferable.

Under these circumstances we think that he is not entitled to the relief asked for, viz., to have his name registered in his landlord's *serishta*, and to have the name of defendant No. 3 expunged.

The lower Courts have apparently overlooked the fact that such a suit is not maintainable under the Bengal Tenancy Act. It is no longer compulsory for the zemindar to register the names of any tenants in his *serishta*. The Act provides for the official registration of transfers of the rights of permanent tenure-holders and *raiyats* holding at fixed rates. But the transfers of occupancy rights are not so registered, and there is no provision [644] of law by which they can be registered in the landlord's *serishta*. When occupancy rights, transferable by custom, have been transferred, it is no doubt open to the transferees to sue under the Specific Relief Act to have it declared that they have acquired certain rights; but it is clear that if it is the object of such a suit, as it apparently was of this suit, to have it declared that the old tenant is no longer responsible for the rent, and that the transferee is so responsible to the landlord, such a declaration cannot be obtained without the service of the notice prescribed by section 73. Now, it is not alleged in this case that any such notice was served, and this would seem to be a further reason for dismissing this suit. However this may be, it is plain that it must be dismissed on the ground that the suit, as brought, is not maintainable under the provisions of the present law.

We, therefore, dismiss the appeal with costs.

S. C. C. *Appeal dismissed.*

NOTES.

[See also (1898) 3 C.W.N., 19 ; (1905) 10 C.W.N., 176 : 4 C.L.J., 68 ; (1900) 27 Cal., 545.

See also (1909) 37 Cal., 75 : 13 C.W.N., 1110 as regards the representative character of the recorded tenant.]

[24 Cal. 644]

The 27th May and 28th June, 1897.

PRESENT :

MR. JUSTICE O'KINEALY AND MR. JUSTICE HILL.

Sachitananda Mohapatra............Plaintiff

versus

Baloram Gorain and others ....Defendants.*

Right of suit—Benamidar—*Suit for foreclosure of mortgage—Beneficial owner—Parties—Transfer of Property Act (IV of 1882), section 85.*

A suit for foreclosure of a mortgage may be brought by the person named in the mortgage deed as the mortgagee, although he was, in fact, only the *benamidar* of the beneficial owner, and such a suit should not be dismissed because the beneficial owner is not added as a party.

THIS was a suit for foreclosure and for possession of certain lands mortgaged to the plaintiff under a *kut-kobala* mortgage. The defendants pleaded that the plaintiff was only the *benamidar* of his grandfather, who had advanced the money and was in fact the beneficial owner; that the plaintiff was incompetent to bring the suit; and that they had not received the full amount for which the mortgage had been given.

[645] Both the lower Courts found that the plaintiff was a mere *benamidar*, and held that he was incompetent to bring the suit.

The plaintiff appealed.

Babu *Dwarkanath Chuckerbutty* for the Appellant.

Babu *Jogesh Chunder Dey* for the Respondents.

C. A. V.

The **judgment** of the Court (**O'Kinealy** and **Hill, JJ.**) was as follows :—

This is a suit for foreclosure and for possession of the land mortgaged. The answer of the defendants was that, although the mortgage bond was executed in the name of the plaintiff, the money was the money of Bissonath Misser, the grandfather of the plaintiff. They further said that Baloram Gorain, who executed the mortgage, had not received the full amount for which the mortgage was executed. Both the lower Courts have held that Bissonath Misser was the beneficial owner, and not the plaintiff in whose name the mortgage is said to have been executed.

In a case, very similar to this, the same point was brought for decision to this Court; and it was decided that the contract could be enforced by the parties who had entered into it, and that the suit should not be dismissed because the beneficial owner was not added as a party.

Whether Baloram Gorain got the money from Bissonath Misser or not, the transfer of the mortgaged property was by the deed made to the plaintiff. And as the contract was made for good consideration, we think that the defendants should not be allowed to turn round and say that the terms of that document are all incorrect, and the person from whom the money was received, but to whom the document conveys no interest, must be brought in.

We, therefore, set aside the decrees of the lower Courts, and remand the case for trial on its merits. Costs to abide the result.

H. W. *Appeal allowed. Case remanded.*

* Appeal from Appellate Decree No. 1597 of 1895, from the decision of Babu Kedar Nath Mozumdar, Subordinate Judge of Manbhoom, dated the 15th June 1895, affirming the decision of Babu Soshi Bhushan Chatterjee, Munsif of Purulia, dated the 28th January 1895.

NOTES.

[This was followed in (1899) 21 All., 380, (1913) 19 C.L.J., 193; (1909) 1 I.C., 522 (Cal.), (1910) 8 I.C., 166 (Cal.), (1902) 30 Cal., 265, as regards maintainability of suits by the benamidar on mortgages, whatever be the rule as regards ejectment.]

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[646] *The 9th February, 1897.*

PRESENT.

MR JUSTICE BANERJEE AND MR JUSTICE RAMPINI.

Bhoba Tarini Debya and another .....Defendants

versus

Peary Lall Sanyal (Plaintiff) and others......Defendants.*

Hindu law—Will—Construction of Will—Devise of immoveable property—Bequest to Widows—Life interest—Succession Act (X of 1865), section 82—Hindu Wills Act (XXI of 1870), section 3—Gift over.

A Hindu testator gave a twelve annas share of his property to his two wives by clause 2 of his will which was as follows —

"My first and second wives shall together be entitled to twelve annas of all the properties left by me and *D* and *R* sons of my father's sister's son *R N C*, deceased, who have been living in commensality from the time of my predecessor, shall be entitled to a four annas share in equal shares, according to the following rules" Clause 4 was as follows: "If there should be any dispute or disagreement between my two wives, or if there be any disagreement between either or both of them and the executors abovenamed, she or they live in my family dwelling house, or according to the rules of Hindu religion in some holy place, maintaining a good character, then each of them shall receive a monthly allowance of Rs 10 for maintenance, but if otherwise she shall be entirely deprived of her right." Clause 9 provided that no person of the family of the fathers of his two wives should be able to exercise any control over the money and property left by the testator Clause 5 provided for the education of the testator's sister's son The gift over was to the effect that any one acting contrary to the terms of the will should be deprived of his interest which should in due course devolve on the other heirs

It was found on the evidence that forfeiture under clause 4 of the will had been incurred by the defendant *B*, the younger widow of the testator, by reason of her having broken the condition relating to residence

Held, that section 82 of the Indian Succession Act (X of 1865), which enacts that "where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him," applied to the case

Held, also, that the will gave only a restricted interest to the widows, and that clause 2 of the will should be construed as giving to the widows, as joint tenants, a life interest in a twelve annas share of the estate with the right of survivorship.

The clause in the will as to residence was valid and binding.

* Appeal from Original Decree No 111 of 1895, against the decree of Babu Krishna Chunder Das, Subordinate Judge of Pubna and Bograh, dated the 4th of February 1895.

[647] *Held*, further, that the plaintiff, the son of testator's sister, who was in existence at the date of the testator's death, and who was the next reversionary heir after his widows, was entitled to take under the gift over, and not the heirs to the *stridhana* of *P*, the elder widow of the testator.

THE facts of this case are fully stated in the judgment.

Dr. *Rash Behari Ghose*, Babu *Saroda Churn Mitter*, and Moulvi *Mahomed Habibullah*, for Babu *Haran Chunder Banerjee*, for the Appellants.

Babu *Srinath Dass*, Babu *Golap Chunder Sircar* and Babu *Hurro Prashad Chatterjee* for the Respondents.

The **judgment** of the Court (**Banerjee** and **Rampini, JJ.**) was as follows :—

This was a suit for the construction of the will of one Chandra Nath Maitra, for a declaration that since the death of Peyari Sundari, his elder widow, a twelve annas share of the estate left by him has vested by inheritance in the plaintiff, his sister's son, for a further declaration that defendant No. 1, Bhoba Tarini, the younger widow of the testator, has forfeited all her rights in the estate of her husband, that the *putni* granted by her in favour of defendant No. 2, Kailash Chandra Shah, is inoperative as against the plaintiff, and that defendant No. 1 is in any case incompetent to manage the estate, and for recovery of possession of certain properties and for confirmation of plaintiff's possession in certain others. The main allegations of fact upon which the suit was based are, that on the death of Chandra Nath Maitra, his widow Peyari Sundari, and Modhu Sudan Chakravarti, took out probate of his will and managed his estate ; that on the death of Modhu Sudan Chakravarti and Peyari Sundari, the defendant No. 1 obtained letters of administration in respect of the estate of the testator , that the defendant No. 1, by reason of her disagreement with her co-widow and the executor to the will, left the family-dwelling house of her husband, and she has been leading an unchaste life, and her right to the estate of her husband has consequently become extinguished under the terms of the will ; that of the twelve annas share of the testator's estate, which was bequeathed to his two widows, the six annas share obtained by Peyari Sundari devolved on the plaintiff by inheritance on her death, and the six annas obtained by the defendant **[648]** No. 1 has also devolved on him as the next heir of the testator by reason of the extinguishment of her right ; and that the *putni* of this last-mentioned share granted by defendant No. 1 to defendant No. 2 is invalid. Doorga Nath Chuckerbutty and Rojoni Nath Chuckerbutty, sons of the testator's father's sister's son, who have obtained a four annas share of the estate under the will, have been made defendants 3 and 4.

The suit was contested by defendants 1 and 2 who filed separate written statements ; and the substance of their defence was, that the twelve annas share of the estate bequeathed to the two widows had become vested in the defendant No. 1 ; that the plaintiff's allegation that the defendant No. 1 had forfeited her right by reason of her disagreement with her co-widow and the executor, her change of residence and her unchastity, was unfounded and untrue; that the *putni* granted to defendant No. 2 was valid and binding as being an alienation for legal necessity ; and that the plaintiff was not the legitimate son of the testator's sister, and consequently not the next reversionary heir.

Upon these pleadings several issues were raised ; and the Court below, having found them all in favour of the plaintiff, has given him a decree as prayed.

Against that decree defendants 1 and 2 have preferred this appeal, and it is contended on their behalf,

first, that the Court below is wrong in holding that the widows of the testator took a limited estate, whereas it ought to have held that they took an absolute estate under the will;

secondly, that the Court below should have held that the widows took the bequest as joint tenants, and that on Peyari Sundari's death the whole estate bequeathed devolved on defendant No. 1 by survivorship;

thirdly, that even if they took the bequest as tenants in common, the Court below should have held that the share obtained by Peyari Sundari passed on her death to the heirs to her *stridhana* and not to the plaintiff;

fourthly, that the Court below is wrong in holding that defendant No. 1 has forfeited her interest in her husband's property, whereas it ought to have held that the clause in the will relating **[649]** to forfeiture was void for vagueness; and that the evidence adduced in the case was insufficient to prove the unchastity of defendant No. 1, and the other contingencies upon the happening of which forfeiture was to follow: and

fifthly, that the Court below should have held that the gift over under which the plaintiff claims was invalid.

On the first point, it is contended for the appellants, that under section 82 of the Indian Succession Act, which the Hindu Wills Act makes applicable to the will in this case, the two widows of the testator must be held to have acquired the same interest in the twelve annas share of the estate bequeathed to them that he had, that is an absolute interest; and it is further argued that, quite irrespectively of that section, they took an absolute interest under the terms of the will.

On the other hand, the learned Vakils for the respondents contended that, having regard to the last proviso to section 3 of the Hindu Wills Act and to the provisions of the Hindu law as laid down in the Dayabhaga, chapter IV, section 1, § 23 which governs this case, section 82 of the Succession Act cannot have any application here: and that, even if it was applicable, still the will should not be construed as giving the widows any absolute interest. And several cases have been cited in support of the argument on each side.

The clause in the will bequeathing a twelve annas share to the two widows runs thus: "My first and second wives shall together be entitled to 12 (twelve) annas of all the properties left by me and Doorga Nath Chuckerbutty and Rojoni Nath Chuckerbutty sons of my father's sister's son Radha Nath Chuckerbutty, deceased, who have been living in commensality from the time of my predecessor, shall be entitled to a four annas share in equal shares, according to the following rules." And there is nothing in the will either in what follows or in what precedes, expressly stating that the widows are to take an absolute estate.

If this stood alone, and section 82 of the Indian Succession Act was not applicable to the case, then as the bequest (which in this respect follows the same rule as a gift) was one of immoveable property by the husband to his wives, they would take a **[650]** limited estate under the Dayabhaga. They would take the property without having any power to alienate it; and property over which they have not the power of alienation, cannot constitute their *stridhana* or absolute property (see Dayabhaga, chapter IV, section I, 18, 19 and 23), and must on their death pass to the heirs of their husband. (See Colebrooke's Digest, Bk. V, 515, Commentary). On the other hand, if section 82 of the Indian Succession Act applies to this case, then, unless the will

shews that a restricted interest was intended to be created, they must be held to have acquired an absolute estate.

Now, the only ground upon which it can possibly be said that section 82 does not apply here is, that the last paragraph of section 3 of the Hindu Wills Act makes it inapplicable. But does it really make the section inapplicable to the present case? It does not, like the corresponding provision of the Transfer of Property Act in section 2, enact that nothing contained in the Act "shall affect any rule of Hindu law," but it merely says that nothing contained in the Act "shall authorise a Hindu to create in property any interest which he could not have created before." But a Hindu husband was never incompetent to create in favour of his wife an absolute interest in immoveable property bequeathed by him to her, though it was necessary, in order to create such interest, to use express language to that effect. The application of section 82 to a case like the present cannot therefore be said to be barred by section 3 of the Hindu Wills Act. Nor do the cases of *Cally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry* (I. L. R., 8 Cal., 378) and *Alangamonjori Dabee* v. *Sonamoni Dabee* (I. L. R., 8 Cal., 637), cited for the respondents, bear upon the present question, the sections of the Indian Succession Act, of which the appllication to Hindus was held in those cases to be restricted by section 3 of the Hindu Wills Act, having really the effect of authorising the creation of an interest in property which a Hindu could not create before, namely, an interest in favour of an unborn person. We feel bound to add, however, that, though we are unable to construe section 3 of the Hindu Wills Act as making section 82 of the Succession Act inapplicable to a case like the present, yet we think it very doubtful whether the attention **[651]** of the Legislature was directed to the point that the application of section 82 to Hindu Wills might have the effect of partially abrogating the rule of Hindu law that a gift by the husband of immoveable property to the wife without express words creating an absolute estate, conveys only a limited interest

Section 82 of the Indian Succession Act being, in our opinion, applicable to this will, it becomes unnecessary to examine at length the cases cited on either side upon the first point, as they were decided without reference to the provisions of that section. We only wish to observe with regard to those cases, that an important distinction, which is sometimes lost sight of, may reconcile the apparent conflict in some of them. The rule of Hindu law referred to above is based upon a text attributed to Narada cited in the Dayabhaga, chapter IV, section I, 23, and is limited to the case of gift of immoveable property to the wife, and it is to this particular case that the decision in *Koonj Behari Dhur* v. *Prem Chund Dutt* (I. L. R., 5 Cal., 684) relates, while in *Kollany Koer* v. *Luchmee Pershad* (24 W. R., 395), the question for decision was whether a gift to the daughter conveyed an absolute estate, and what the learned Judges held was that there was nothing in the Hindu law to show that a gift to a *female* means a limited gift.

But though section 82 of the Indian Succession Act applies to this case, we think it appears from the will, amply within the meaning of that section, that only a restricted interest was intended to be created in favour of the widows. In construing a document like this, which is the will of a Hindu, "it is not improper," observe their Lordships of the Privy Council in *Mahomed Shumsul Huda* v. *Shewakram* (L. R., 2 I. A., 7: 14 B. L. R., 226), "to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as

a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." And these notions and wishes are amply and emphatically indicated in the will before us. For, though the bequest to the two widows of the testator, and that in favour of his **[652]** father's sister's grandsons, are contained in one and the same clause of the will (namely, the second) the estate granted to the former is made defeasible upon the happening of certain events specified in clause 4 which, according to Hindu notions, imply dereliction of duty on the part of a widow. Again in the 9th clause the testator says: "No person of the family of the fathers of my two wives shall be able to exercise any control over the money and property left by me." This would be wholly inconsistent with an intention to give the wives an absolute estate, as in that case their estate must, in the absence of lineal descendants of whom there were none, pass to their brothers and parents; (see Dayabhaga, chapter IV, section III, 29). Moreover, if the widows were intended to take an absolute estate, the testator's sister's son, who was the next reversionary heir, and who, as the 5th clause of the will shows, was an object of affection to him, would get nothing. Such an intention would, therefore, be extremely unlikely, especially when we find that the testator left a four annas share of the estate to the sons of his father's sister's son. We are, therefore, of opinion that the widows took only life estates under the will. We may observe that the view we take is quite in accordance with the cases of *Punchoo Money Dossee* v. *Troylucko Mohinee Dossee* (I. L. R., 10 Cal., 342) and *Hirabai* v. *Lakshmibai* (I. L. R, 11 Bom., 573).

In support of the second contention it is argued for the appellants that where a bequest is made in favour of two persons without any specification of their shares, they take as joint tenants with right of survivorship and not as tenants in common: and section 93 of the Indian Succession Act, and the judgment of COUCH, C.J., in *Mahomed Shumsul Huda* v. *Shewakram* (7 B. L. R., 700 note: L. R., 2 I. A., 11) are relied upon. It is further urged that, while in the bequest in favour of the two grandsons of the testator's father's sister, it is expressly said that they are to take the four annas given to them in equal shares, the bequest of the twelve annas to the widows in the same clause (the second) makes no mention of the shares in which they are to take; and that this indicates an intention that they are to take as joint tenants.

With reference to the first branch of this argument, **[653]** though the view contended for is in accordance with the rule of English law (see Jarman on Wills, 5th edition, p. 1115), yet there is not much in reason to commend it for acceptance. Where any property is bequeathed to two or more persons without any specification of shares, the natural presumption is that they are intended to take in equal shares; and when the estate bequeathed is one of inheritance, it is far more reasonable to suppose that each legatee and his heirs are the objects of the testator's bounty, than that he intends that the legatees should take by survivorship, and the heirs of the last surviving legatee should take the whole. We may observe that even in English law the leaning has been in favour of tenancy in common; and "the Court," as Lord THURLOW remarked in *Jolliffe* v. *East* (3 Brown's C. C., 35), "decrees a tenancy in common as much as it can." Section 93 of the Succession Act, which only relates to the case of one of two legatees dying before the testator, does not touch the present question. Nor does the judgment of Sir R. COUCH in *Mahomed Shumsul Huda* v. *Shewakram* (7 B. L. R., 700 note: L. R., 2 I. A., 11), in which the Privy Council did not think it necessary to decide the point, lay down the broad rule that the appellants contend for, the learned Chief Justice distinctly observing, as a reason for construing the bequest as creating a joint tenancy, that "it is only by this construction that the estate can be

kept in the testator's family," an intention to keep the estate in the testator's family being indicated by the language of the will and by surrounding circumstances. On the other hand, the Privy Council in *Rewun Persad* v. *Radha Bibee* (4 Moore I. A, 137) held that joint legatees in such a case would take as tenants in common. The second branch of the argument is, however, in our opinion, sound; and we think we must construe the second clause of the will as giving to the widows as joint tenants a life interest in a twelve annas share of the estate, with the right of survivorship. If the intention had been that the widows should take the twelve annas as tenants in common, their shares would have been specified in the same way as those of the testator's father's sister's grandsons in the same clause. But after all, in the view we **[654]** have taken of the bequest in favour of the widows upon the first contention of the appellants, namely, that it creates only a life estate, the question whether they took as joint tenants or as tenants in common is not of much practical importance. For, even if they took life estates as tenants in common, upon the death of either, the property bequeathed to her for her life must pass to the surviving widow as the next heir of the testator, who would acquire a widow's estate in the same as upon an intestacy, unless such estate is defeated by some other provisions of the will.

In the view we have taken of the bequest in favour of the widows, namely, that they took as joint tenants a life estate in the property bequeathed, with the right of survivorship, the third contention of the appellant does not arise.

We now come to the consideration of the fourth contention of the appellants which involves two questions, namely, what is the meaning and effect of the fourth clause of the will which provides that the widows shall forfeit their right upon the happening of certain events? And how far have those events happened? The fourth clause of the will, of which the translation, as given in the paper-book, is slightly inaccurate, runs thus: "If there be any dispute or disagreement between my two wives, or if there being any disagreement between either or both of them and the executor above named, she or they live in my family-dwelling house, or according to the rules of Hindu religion in some holy place, maintaining a good character, then each of them shall receive a monthly allowance of Rs. 10 for maintenance; but if otherwise she shall be entirely deprived of her right." The construction of this clause is not altogether free from difficulty. We think it means this, that if the two widows quarrel with each other, or if either or both of them quarrel with the executor and live either in the testator's family dwelling-house or in some holy place, observing the rules of Hindu religion and leading a chaste life, then each of them shall receive as maintenance Rs. 10 a month, but if they act otherwise, that is, if they neither live in the testator's family dwelling-house, nor in a holy place, according to the rules of Hindu religion, leading a chaste life, they shall be entirely deprived of their rights; so that, according to this clause of the will, either widow forfeits **[655]** her right if she quarrels with her co-widow or with the executor, and does not reside in the testator's family dwelling-house, nor in a holy place, according to the rules of Hindu religion, leading a chaste life.

If, therefore, it is proved that the testator's younger widow, the defendant No. 1, quarrelled with the elder widow, Peyari Sundari, and with the executor, and has been residing neither in the testator's family dwelling-house, nor in any holy place, but in her father's house, then in our opinion forfeiture has been incurred quite apart from the question whether she has been leading an unchaste life, which the Court below has answered in the affirmative. The learned Vakil for the appellants contends upon the authority of *Fillingham* v. *Bromely* (1 T. and R., 530), and the judgment of Lord CRANWORTH in *Clavering*

v. *Ellison* [7 H. L. C., 707 (726)], that the clause in the will requiring residence at certain places is void for uncertainty and unreasonableness, that there cannot therefore be any forfeiture for breach of such a condition, and that the finding of the Court below upon the question of unchastity is not warranted by the evidence.

We are of opinion that there is nothing uncertain or unreasonable in the condition to make it void. For reasons best known to him, the testator, as the ninth clause of the will clearly shows, had either no liking for, or no confidence in, the paternal relations of his wives; and so he naturally insisted upon his widows residing in his family dwelling-house, or, should mutual disagreement or disagreements with the executor make that inconvenient, then in some holy place, according to the rules of Hindu religion. And considering the habits and mode of life of Hindu widows, none of the difficulties adverted to in the cases cited can arise with reference to the condition in the will now under consideration. On the other hand, a condition, requiring residence in a certain house to entitle the legatee to the estate bequeathed, was considered valid by the Judicial Committee of the Privy Council in *Ganendro Mohun Tagore* v. *Juttendro Mohun Tagore* (L. R., 1 I. A., 397: 14 B. L. R., 60); and the Bombay High Court in *Mulji Bhaishankar* [656] v. *Bai Ujam* (I. L. R., 13 Bom., 218) and *Girianna Murkundi Naik* v. *Honama* (I. L. R., 15 Bom., 236) held that a condition in the husband's will requiring residence in a certain place to entitle the widow to maintenance was valid in law; and though the learned Judges in both these cases held that breach of the condition for just cause would not defeat the widow's right, no question of just cause can arise here, seeing that the will itself provides that when residence in the family-dwelling house may become inconvenient, the widow may live in any holy place, nor is there any suggestion that there was any just cause for not complying with this alternative condition. The condition being in our opinion valid and binding, let us next see whether it has been broken. The answer to this question need not detain us long. The defendant No. 1, Bhoba Tarini, admits in her deposition that, after Peyari Sundari, her co-widow, had obtained probate, she instituted proceedings for revocation of the probate and lost the case; and that she instituted another case for *nikas* or accounts against Peyari Sundari. She also admits that she had misunderstanding with Modhu Sudan Chakravarti, the executor named in the will And though Bhoba Tarini and some of her witnesses, such as her brother Chandra Nath Chakravarti and her *naib* Girish Chandra Shikdar, say that she lives sometimes at her husband's house at Kalagachi and sometimes at her father's at Bachra, we agree with the Court below in thinking that their evidence is unreliable, and insufficient to rebut the evidence of the witnesses examined for the plaintiff, two of whom, Modhu Sudan Maitra and Prasanna Kumar Nundi, who are men of some position and respectability, and appear from the tenor of their depositions to be perfectly fair and straightforward witnesses, we see no reason whatever to disbelieve. These two witnesses prove that for the last six or seven years Bhoba Tarini has been living at her father's house at Bachra, and though they say that she may have occasionally gone to her husband's family dwelling-house, that cannot amount to her residing there. Bhoba Tarini's admission that she had quarrels with Peyari Sundari, with Modhu Sudan Chakravarti, with the plaintiff and his mother, and in fact, with almost everyone of her husband's relations, goes clearly to corroborate the evidence on the plaintiff's side that [657] she had left her husband's abode, and has been residing at her father's house at Bachra. We, therefore, find, on the evidence, that the condition about residence has clearly been broken, and the forfeiture mentioned in the fourth clause of the will incurred.

In this view of the case it is not necessary to consider the question of unchastity. But as the finding of the Court below upon that question must seriously affect the defendant No. 1, and as the evidence on the point has been fully discussed before us, and is, in our opinion, insufficient to warrant that finding, we deem it desirable to state our reasons for disagreeing with the Court below on this point. We may observe that the evidence shews that there has been for some years a good deal of scandal in the village of Bachra concerning defendant No. 1, arising out of her reckless want of modesty in general, and her unusual familiarity with defendant No. 2, Kailash Chandra Shah in particular. We should add that we consider the evidence adduced for the defendants to show that Kailash Chandra Shah never goes to see Bhoba Tarini at Bachra is unreliable, as it is opposed, not only to the evidence of the witness Prasanna Kumar Nundi, whom we consider to be perfectly reliable, but also to the probabilities of the case, Kailash Chandra Shah being the person who has taken a *putni* of the share of Bhoba Tarini, and who is looking after her affairs. But though that is so, the question still remains whether the evidence is sufficient to prove the charge of unchastity; and to that question the answer should, we think, be in the negative. The witnesses chiefly relied upon by the Court below upon the point are Madhub Chandra Chakravarti, his son Purnendu, his nephew Umesh, his priest Modhu Sudan Maitra, and the pleader Doorga Kanto Chakravarti. But Modhu Sudan Maitra, whom we consider a truthful witness, says: "I have not myself seen anything against Bhoba Tarini's character, but I have heard." As for what Doorga Kant Chakravarti says in his deposition in this case and his former deposition put in and admitted by him to be correct, it is by no means very clear evidence of unchastity, the statements and conduct imputed to Bhoba Tarini being quite reconcilable with innocence, and being evidence only of want of modesty. The witnesses Madhub, his son and his nephew no doubt depose to facts which, if true, would be evidence of unchastity, but considering the ill-feeling existing between Bhoba **[658]** Tarini and Madhub, as is admitted by Madhub himself, we think it would be unsafe to hold upon their evidence that the serious charge of unchastity brought against Bhoba Tarini has been established. The remaining witnesses on the point do not call for any special remark. We may observe that their statements, and in particular those of Modhu Sudan Singh, are of an improbable character, the last-named witness evidently attempting to prove too much. Upon the whole evidence, then, we find the charge of unchastity brought against defendant No. 1 not established. Forfeiture under clause 4 of the will is, however, as we have said above, incurred by her by reason of her having broken the condition relating to residence.

But though that is so, what she has forfeited under the will she may claim by inheritance as the next heir of the testator, unless there is any valid gift over. This brings us to the consideration of the question raised in the fifth and last contention of the appellants, namely, whether the gift over under which the plaintiff claims is valid. The clause in the will relating to this gift over is the one at the end of the first paragraph, which, as translated in the paper-book, runs thus: " And any one acting contrary thereto [that is to the terms of the will] should be deprived of his interest which shall in due course devolve on the other heirs." We should note here that the word in the original, which is here translated as "his," is in the common gender, and may mean either " his" or " her," and the word rendered as " heirs " is in the singular number in the original. It is contended by the appellants that the clause relating to the gift over is void as infringing, if not in its application to the actual event in the present case, at any rate, in the possible range of its application, the rule of Hindu law that the *donee* must be a sentient being that is not an unborn per-

son. There is no dispute that in the actual event that has happened, that is, on the date that the forfeiture under clause 4, as found above, was incurred, the plaintiff who is the sister's son of the testator was the next heir after the widow, and that he was in existence at the date of the will and of the testator's death, being in fact the person referred to, though not by name, in the fifth clause of the will. But it is argued that it was possible that at the date the forfeiture was incurred, some one not in existence at the tes- **[659]** tator's death, but subsequently born, might have been the next reversionary heir, and if that was so, the gift over, it is said, is void. In support of this argument the case of *Lord Dungannon* v. *Smith* (12 Cl. and F., 546) is relied upon. In that case the testator bequeathed certain leasehold estates to trustees in trust to pay the rents and profits to his grandson during his life, and after his death in trust to permit the person who for the time being should take by descent, as heir male of the body of his grandson, to take the rents and profits until the time that some one of such persons should attain the age of twenty-one years, and then to convey the premises to that person with a further gift over, if no such person should live to attain the age of twenty-one, in favour of certain other descendants of the testator in succession. At the death of the grandson his son, who was twenty-one years, entered into possession of the leasehold estates. But on a bill filed against him by the next of kin it was held that the gift over under which he claimed was void for remoteness, because, though in the actual event the property bequeathed might have vested within a life in being and twenty-one years afterwards, yet at the date of the testator's death it could not be said that in any possible event the property must vest, if at all, within the time allowed by law, that is, a life or lives in being and twenty-one years and nine or ten months afterwards; and the opinion expressed by two of the learned Judges that the gift over might be regarded as a series of separate gifts to the eldest son of the grandson if he attained twenty-one years, if not, then to other male heirs of the body of the testator's grandson in succession, was not accepted as correct, because there was no gift to the eldest son, except as one of a series of persons, and there was no authority for splitting the bequest in the manner suggested.

It is contended that this case is authority for the position that in order to determine whether a gift over violates any rule of law, we must look, not to actual events at the date when the benefit of the gift is claimed, but to possible events at the date of the testator's death. We are unable to accept this broad contention as correct. The decision in the case cited is based upon the ground that it is a settled rule of English law affirmed by a long series of decisions that a bequest is void for remoteness unless it necessarily vests, if **[660]** at all, within a life or lives in being or twenty-one years and nine or ten months afterwards. Is there any similarly settled rule of law applicable to this case that a bequest is void unless it necessarily is in favour of persons all of whom are in existence at the testator's death? If there is, the gift over will fail, unless it is possible to construe it as a series of gifts over, one or more of which may be valid and the rest void. If not, there is no reason why the gift over should not be valid, so far as it enures to the benefit of the plaintiff, who unquestionably was in existence at the date of the testator's death. It was at one time thought that there was such a rule of law applicable to bequests by Hindus, and it was held in the cases of *Soudamney Dossee* v. *Jogesh Chunder Dutt* (I. L. R., 2 Cal., 262) and *Kherodemoney Dossee* v. *Doorgamoney Dossee* (I. L. R., 4 Cal., 455), following *Leake* v. *Robinson* (2 Mer., 363), that a bequest to a class, some of whom may come into existence after the testator's death, was wholly void. But it has now been authoritatively settled by the decision of the Privy Council in *Rai Bishen Chand* v. *Asmaida Koer* (I. L. R., 6 All.,

560: L. R., 11 I. A., 164) that this view is incorrect, being supported neither by the Hindu law, nor by any of the provisions of the Indian Succession Act which have been made applicable to Hindus. In that case their Lordships of the Judicial Committee held that a gift in favour of the donor's "grandson Satrujit and the brothers of Satrujit that may be subsequently born" was valid, so far as Satrujit's interest was concerned. And following that case this Court held in *Ram Lal Sett* v. *Kanai Lal Sett* (I. L. R., 12 Cal., 663) that a gift by a Hindu to his two living grandsons and to their brothers that may be born afterwards conveyed a valid title to the two living grandsons. If that is so, there is still greater reason why the plaintiff, who was in existence at the date of the testator's death, and was and is the next reversionary heir after his widows, should be held entitled to take under the gift over. He is not one of several *joint donees*, some of whom are incompetent to take, but is one of a *series of persons* of whom he, who is the next reversioner at the date that the widow's interest ceases, is intended to take; and he answered that description at the time when that interest ceased **[661]** It was clearly the intention of the testator that in the event which has happened he should take the estate; and there is no reason why effect should not be given to that intention.

The grounds urged before us therefore all fail, and the decree appealed from must be affirmed, except as regards costs. But seeing that the question about the construction of the will is not altogether free from difficulty, and seeing also that the charge of unchastity brought against defendant No. 1 has not been established, we think the defendants, though unsuccessful, should not be made liable for the costs of the plaintiff. The result then is that the decree of the Court below will be affirmed, except so far as it makes the defendants liable for the costs of the plaintiff; and the parties will bear their own costs in this Court and in the Court below.

F. K. D. *Appeal dismissed.*

NOTES.

[It has been finally settled by the Privy Council that in gifts to a class, the gift is valid as regards those capable of taking though it may fail as regards others —(1911) 38 Cal., 468 P.C.; see also (1905) 32 Cal., 992; (1910) 38 Cal, 188.

A condition of defeasance on ceasing to use a house is valid.—(1912) 17 C.W.N., 39

As regards ordinary Hindu notions being taken into consideration, see (1899) 27 Cal., 44; 649; (1902) 30 Cal., 20.

As regards sec. 82, Indian Succession Act, see also (1903) 5 Bom. L.R., 334; (1904) 9 C.W.N., 309; **(1908) 35 Cal., 896 P.C.**, on appeal from (1906) 33 Cal., 917 10 C.W.N., 695: 3 C.L.J., 502; (1905) 32 Cal., 1051.]

[24 Cal 661]

The 27th April, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Hamidunnissa Bibi and another............Plaintiffs

versus

Gopal Chandra Malakar............Defendant.*

Valuation of Suit—Designed exaggeration of valuation—Suits Valuation Act (VII of 1887), section 11—Munsif, Jurisdiction of—Code of Civil Procedure (Act XIV of 1882), section 578—Jurisdiction—Provincial Small Cause Courts Act (IX of 1887), section 15, sub section 3.

A suit was brought in the Munsif's Court for money as well as for damages valued at Rs. 1,004. The Munsif gave the plaintiff a decree for Rs. 900, but dismissed the claim for

*Appeal from Appellate Decree No. 1425 of 1895, against the decree of Babu Purna Chunder Shome, Subordinate Judge of 24-Pergunnahs, dated the 29th of May 1895, reversing the decree of Babu Moti Lall Haldar, Munsif of Alipur, dated the 19th of November 1894.

the balance, which was for damages. On appeal the Subordinate Judge was of opinion that the claim had been designedly exaggerated, and he therefore held that the suit was one cognizable by the Small Cause Court, and directed the plaint to be returned to the plaintiff for the purpose of presenting it to the proper Court.

Held, that as the suit was tried on its merits by the first Court, and the over-valuation of the suit was not found by the Appellate Court to have prejudicially affected the disposal of the suit on its merits, the objection as to jurisdiction should not have been given effect to, and therefore the Court below was wrong in directing the plaint to be returned.

[662] *Mohee Lall* v. *Kheta Ram Marwary* (25 W. R., 76) followed; *Nanda Kumar Banerjee* v. *Ishan Chandra Banerjee* (1 B. L. R., Ap 91) and *Bonomally Nawn* v. *Campbell* (10 B L.R., 193) distinguished.

THE facts of this case and the arguments appear sufficiently from the judgment of the High Court.

Dr. *Rash Behary Ghose* and Moulvie *Abdul Jawad* for the Appellants.

Babu *Nil Madhub Bose* and Dr. *Ashutosh Mookerjee* for the Respondent.

The **judgment** of the High Court (BANERJEE and RAMPINI, JJ.) was delivered by

Banerjee, J.—This appeal arises out of a suit brought by the plaintiffs, appellants, to recover a sum of Rs. 1,004, on the allegation that the plaintiff No. 1 gave to the defendant a currency note for Rs. 1,000 for change, believing, under a mistake, that it was a note for Rs. 100 only; that the defendant shortly afterwards returned to plaintiff No. 1 a note for Rs. 100 making her believe that it was the identical currency note which she had made over to the defendant, and saying that he was unable to change it, that subsequently, upon the mistake being discovered on the return of the husband of plaintiff No. 1, the defendant was asked to give back the currency note for Rs. 1,000, but he denied having received it, that not having had in their hands this note for Rs. 1,000, the plaintiffs, to meet the expense for the construction of their house had to borrow Rs. 800 on interest, and thus had been made liable to pay interest, to the extent of Rs. 104; and that the plaintiffs were, therefore, entitled to recover from the defendant Rs. 900, being the difference between the Rs. 1,000 note made over to him, and the Rs. 100 note received from him, together with Rs 104 as damages.

The defence was that the defendant was not liable for the plaintiff's claim; and that, on the face of the plaint, the claim could only have been for Rs, 900, and it had evidently been exaggerated with the object of ousting the jurisdiction of the proper Court in which the suit should have been brought.

The parties went to trial upon the following issues: "*First*, **[663]** whether the Court has jurisdiction to try the suit? *Second*, whether the defendant misappropriated the proceeds of a Rs. 1,000 note belonging to the plaintiff? *Third*, whether the plaintiffs are entitled to any and what damages?"

The first Court, after having found upon the third issue that the claim for damages was not made out, in its decision upon the first issue, said this: "The plaintiffs' claim, as stated in the plaint, is composed of two portions: one for Rs. 900, being the proceeds of their Rs. 1,000 note alleged to have been misappropriated by the defendant, and another for Rs. 104, being the amount of damages claimed. It has been observed above that the latter claim for Rs. 104 is not made out. The plaintiffs' case is now confined only to the first portion of their claim, namely, for Rs. 900. The question which is now pressed before the Court by the learned pleader for the defendant is that the plaintiffs' claim, which is now reduced below Rs. 1,000, should be tried by the Small Cause Court at Sealdah and not by this Court, the plaintiffs being not at liberty, by

making an unwarrantable addition to their claim, to bring the present suit within the cognizance of this Court, ousting the jurisdiction of the Small Cause Court." And a little further on it observed: "In the present case, plaintiffs very legitimately claimed damages, but they failed to make them out. This failure on their part will not oust the jurisdiction of this Court." And then having found the second issue for the plaintiffs, the first Court gave them a decree for Rs. 900.

On appeal the Lower Appellate Court has reversed that decree, and ordered the plaint to be returned to the plaintiffs for the purpose of being presented to the proper Court, on the ground that the suit properly lay in the Court of Small Causes, and not in the Court of the Munsif, the claim having been designedly exaggerated, with the view of bringing the suit in the Munsif's Court. In support of its decision, the Lower Appellate Court refers to the cases of *Nanda Kumar Banerjee* v. *Ishan Chandra Banerjee* (1 B. L. R., Ap., 91), *Bonomally Nawn* v. *Campbell* (10 B. L. R., 193) and *Lakshman Bhatkar* v. *Babaji Bhatkar* (I. L. R., 8 Bom., 31).

[664] In second appeal it is contended for the plaintiffs that the decision of the Lower Appellate Court is wrong in law, and that the cases relied upon in that decision are distinguishable from the present; and in support of this contention, section 11 of the Suits Valuation Act (VII of 1887), and the cases of *Mohee Lall* v. *Kheta Ram Marwary* (25 W. R., 76) and *Damodhar Timaji Gosavi* v. *Trimbak Sakharam* (I. L. R., 10 Bom., 370) are relied upon.

We are of opinion that the appellants' contention is correct. This is how the matter stands. Under sub-section 3 of section 15 of Act IX of 1887, the local Small Cause Court has jurisdiction to try suits for money, where the amount does not exceed Rs. 1,000, and by section 19, sub-section 2, of Act XII of 1887, the local Munsif has jurisdiction to try suits where the value does not exceed Rs. 2,000. In the present case, therefore, if the claim had been only for the sum of Rs. 900 decreed by the first Court, the Small Cause Court, and not the Court of the Munsif, would have had jurisdiction to try the suit, and the question is whether, although the suit was valued at Rs. 1,004, that is, at an amount which exceeded the jurisdiction of the Small Cause Court, and made the suit triable by the Munsif, the fact of this valuation being the result of a designed exaggeration of the claim for the purpose of evading the jurisdiction of the Small Cause Court and bringing the suit in the Munsif's Court, as the Lower Appellate Court has found, makes the suit really one cognizable by the Court of Small Causes, and the plaint liable to be returned to the plaintiff for presentation to that Court, notwithstanding that the suit was tried by the Munsif on the merits, and notwithstanding that the Appellate Court does not find that the over-valuation has prejudicially affected the disposal of the suit on its merits.

We are of opinion that, having regard to the provisions of section 11 of the Suits Valuation Act, this question ought to be answered in the negative. That section enacts that, "Notwithstanding anything in section 578 of the Code of Civil Procedure, an objection that by reason of over-valuation or under-valuation of a suit"—we quote only so much of the section as is applicable to the present case—"a Court of First Instance, which had not **[665]** jurisdiction with reference to the suit exercised jurisdiction with respect thereto, shall not be entertained by an Appellate Court unless (*a*) the objection was taken in the Court of First Instance on or before the first hearing, or (*b*) the Appellate Court is satisfied, for reasons to be recorded by it in writing that the suit was over-valued, and that the over-valuation thereof has prejudicially affected the disposal of the suit on its merits." And the section goes on to

enact that, "if the objection was taken in the manner mentioned in clause (*a*) of sub-section 1, but the Appellate Court is not satisfied as to both the matters mentioned in clause (*b*) of that sub-section, and has before it the materials necessary for the determination of the other grounds of appeal itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of First Instance."

Now in the present case, although the objection was taken in the first Court before the first hearing, and although the Appellate Court was satisfied that the suit was over-valued, it does not say that it is satisfied that the over-valuation has prejudicially affected the disposal of this suit on its merits. The Appellate Court, therefore, has not here proceeded in conformity with sub-section 2 of section 11, as it ought to have done.

It was argued by the learned Vakil for the respondent that section 11 of the Suits Valuation Act has no application to this case, because the Act is intended, as its preamble shows, only to prescribe the mode of valuing certain suits, and that section 11 is limited in its operation to those cases where the change of jurisdiction is from a higher to a lower Court of the same class, that is, from a Subordinate Judge's Court to a Munsif's Court, or *vice versâ*, and not where it is from a Court of exclusive jurisdiction, like a Court of Small Causes, to that of a Munsif.

We do not think that this argument is sound. Though the object of the Act is to prescribe the mode of valuing certain suits, section 11 comes under Part III of the Act which is headed as a part relating to supplemental provisions; and there is nothing in the language of the section to limit its operation in the way contended for. We are, therefore, of opinion that section 11 of the Suits Valuation Act applies to this case, and [666] that the Court of appeal below was wrong in reversing the decree of the first Court and directing the return of the plaint, without complying with the provisions of that section.

The two cases cited from the Bengal Law Reports are both distinguishable from the present; first, because they were decided before the Suits Valuation Act was passed; and, secondly, because the principle upon which they are based has no application to this case. That principle is this, that the plaintiff cannot give jurisdiction to or take away jurisdiction from a Court by adding to his claim something to which he was not entitled upon any view of the case, and that such unwarrantable addition to his claim must be struck out, and the jurisdiction of the Court determined with reference to the rest of his claim.

Can this be said of the claim for damages to the extent of Rs. 104 in this case? A claim for damages like this is not absolutely untenable as a matter of law; and it is only because the evidence, in the opinion of the Courts below, was insufficient to substantiate this part of the claim that it has to be dismissed. In our opinion this case is much more analogous to that of *Mohee Lall* v. *Kheta Ram Marwary* (25 W. R., 76), which we see no reason to dissent from, and which, we think, we ought to follow.

As for the case of *Lakshman Bhatkar* v. *Babaji Bhatkar* (I. L. R., 8 Bom., 31), there the first Court had returned the plaint on the ground that it had no jurisdiction to try the suit by reason of its value, and the High Court confirmed the first Court's decision. It is true that Mr. Justice WEST in his judgment observed: "An exaggerated claim thus brought for the purpose of getting a trial in a different Court from the one intended by the Legislature is substantially a fraud upon the law, and must be rejected, whether it arises from mere recklessness or from an artful design to get the adjudication of one Judge instead of that of another." This was a mere *obiter dictum* of the learned Judge; and having

regard to the provisions of the Suits Valuation Act, which was passed some years after the date of this decision, and to the fact that in a later case, namely, that of *Damodhar Timaji Gosavi* v. *Trimbak Sakharam* (I. L. R., 10 Bom., 370), **[667]** which was governed by Act XI of 1865, the Bombay High Court declined to follow this *dictum*, we do not think that it would be right to apply that principle to this case. It is, no doubt, a sound rule that Courts should not allow parties to evade the law relating to matters of jurisdiction, and that, where it is found that a party has intentionally exaggerated his claim in order to bring his suit in a Court which otherwise would not have jurisdiction to try it, before the merits of the claim have been gone into the plaint should be returned to be presented to the proper Court. But this rule must be taken with qualifications; and one important qualification is that embodied in section 11 of the Suits Valuation Act, which is this, namely, that where the suit has been tried on its merits by the first Court, and the over-valuation or under-valuation of the suit is not found by the Appellate Court to have prejudicially affected the disposal of the suit on its merits, there the objection as to jurisdiction should not be given effect to. A plaintiff who alters the valuation of his suit for the purpose of evading jurisdiction may be punished by having no costs allowed to him; but it would not, in our opinion, conduce to promote the ends of justice, if an Appellate Court were to set aside a decision which is found to be correct on the merits, simply because the value of the suit had been designedly increased, or diminished, to evade jurisdiction.

For these reasons we are of opinion that the decision of the Lower Appellate Court must be set aside, and the case remanded to that Court in order that it may dispose of the appeal, having regard to the provisions of section 11 of the Suits Valuation Act. The costs of this appeal will abide the result.

S. C. G. *Appeal allowed. Case remanded.*

NOTES.

[The provisions of sec. 11 Suits Valuation Act, 1887 apply, even if the plaintiff designedly exaggerates or under-states the value of the claim for the purposes of choosing his own forum:—(1913) 21 I.C., 52 (Oudh); (1901) 31 Cal., 819; (1898) 2 O.C. 103.

See also the distinction drawn in (1912) 19 I.C. 870 (Sindh)]

[668] *The 26th April, 1897.*

PRESENT:

MR JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Raj Lakhi Ghose............Plaintiff

versus

Debendra Chundra Mojumdar, Minor, represented by his certificated Guardian and Receiver (Peary Lall Dass) and another... .. ..Defendants.*

Registration Act (III of 1877), section 77—Suit for registration of a conveyance—Power of Court to inquire into the genuineness as well as the validity of a document, Effect of—Execution of conveyance by a certificated guardian in contravention of the terms of permission granted by the District Judge—Guardians and Wards Act (VIII of 1890), section 30

In a suit under section 77 † of the Registration Act a Court cannot go into any matter affecting the validity of a document apart from its genuineness The question of its validity must be determined in a suit properly framed for that purpose

Balambal Ammal v *Arunachela Chetti* (I L R 18 Mad 255), approved.

Where, therefore, a document was executed by the certificated guardian of a minor in contravention of the terms of permission accorded by the District Judge *Held*, the Court could under section 77 direct its registration, if only the document was proved to be genuine, although the document was voidable at the instance of the minor under section 30 ‡ of Act VIII of 1890

THE facts of the case, so far as they are necessary for the purposes of this report, are fully set out in the judgment of the High Court.

Babu *Hori Mohan Chakravarty* for the Appellant

Babu *Bassant Coomar Bose*, Dr *Asutosh Mookerjee* and Babu *Jnanendra Nath Bose* for the Respondent

Babu *Hori Mohan Chakravarty*.—The Courts below have taken an erroneous view of the scope of a suit under section 77 of the Registration Act. The Courts below, having found that the document had been executed by the guardian, should have ordered its registration, irrespective of the question whether or not the registered document would be binding against the minor; see *Balambal Ammal* v *Arunachala Chetti* (I L R, 18 Mad, 255).

[669] Babu *Bassant Coomar Bose*—In a suit under section 77 of the Registration Act the Court is entitled to inquire into the genuineness as well

* Appeal from Appellate Decree No 1363 of 1895, against the decree of Babu Amrita Lal Pal, Subordinate Judge of Dacca, dated the 8th of May 1895, affirming the decree of Babu Nogendra Nath Dhur, Munsif of Munshigunge, dated the 28th of June 1894,

† [Sec 77 —Where the Registrar refuses to order the document to be registered, under section 72 or section 76, any person claiming under such document, or his representative assign or agent, may, within thirty days after the making of the order of refusal, institute in the Civil Court within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office, if it be duly presented for registration within thirty days after the passing of such decree, and the provisions contained in the second and third paragraphs of section 75, shall, *mutatis mutandis*, apply to all documents so presented, and notwithstanding anything contained in this Act, the document shall be receivable in evidence in such suit.]

(Margin: Suit in case of refusal)

‡ [Sec. 30.—A disposal of immoveable property by a guardian in contravention of either of the two last foregoing sections is voidable at the instance of any other person affected thereby.]

(Margin: Voidability of transfers made in contravention of section 28 or section 29)

as the validity of the document. In this case the guardian had admittedly exceeded the authority conferred on him by the Judge, and, therefore, the deed cannot bind the minor.

Dr. *Asutosh Mookerjee* on the same side —The question is whether there has been an execution of the document within the meaning of section 73 of the Registration Act, admittedly the document was not executed by the minor defendant; his guardian, as such, had only limited authority to execute a deed on his behalf, and if, as in the present instance, the guardian put his signature in excess of his authority, that ought not to be held to be execution by the minor or on his behalf within the meaning of section 73, the suit, therefore, ought to be dismissed against the minor

Babu *Hori Mohan Chakravarty* replied

The **judgment** of the High Court (**Bannerjee** and **Rampini, JJ**) was as follows —

This appeal arises out of a suit brought by the plaintiff appellant under section 77 of the Indian Registration Act (III of 1877) for a decree directing the registration of a conveyance executed on behalf of the minor, defendant No. 1, by his mother, defendant No 2, who was for the time being his guardian appointed under Act VIII of 1890, the Sub Registrar and the Registrar on appeal having refused to register the document The defendant No 2 having been removed from guardianship, the defendant No 1 is represented by Peary Lall Das who has since been appointed his guardian

The two defendants filed separate written statements, both denying the genuineness of the conveyance set up by the plaintiff, and, further, urging that, as the permission granted by the District Judge under Act VIII of 1890 was for selling the property covered by the conveyance for Rs 400, and as the sale to the plaintiff was for Rs 200, even if the conveyance was genuine, it was invalid by reason of its being executed in contravention of the terms of the permission

The first Court held that the conveyance was a genuine document, but it dismissed the suit on the ground that it was [670] invalid, as it was executed by the guardian of the minor in disregard of the terms of the permission granted by the Judge, and on appeal the Munsif's decision has been affirmed by the Subordinate Judge

In second appeal it is contended for the plaintiff -

First, that the Courts below have misconstrued the order of the District Judge granting permission to sell the property in question in holding that the sale that was sanctioned was to be for a certain price when the order makes no mention of price, and, *secondly*, that granting that the sale was in contravention of the Judge's permission, the Court in a suit under section 77 was bound to inquire only into the question of the genuineness of the conveyance, and the finding upon that question being in favour of the plaintiff, the Courts below are wrong in law in dismissing the suit

The first point need not detain us long In the view we take of the scope of a suit under section 77 of the Registration Act, it is unnecessary to determine this point. We may only incidentally observe that, though the order of the District Judge granting permission does not, it is true, make any mention of the price, the order must be read along with the petition upon which it was passed, and reading the order and the petition together, we think the Courts below were quite right in the view taken by them that the sale to the plaintiff was in contravention of the terms of the permission The first contention of the appellant must therefore fail.

The question raised in the second contention, namely, whether in a suit under section 77 of the Registration Act, the Court can go into any matter affecting the validity of a document, apart from its genuineness, is not alogether free from difficulty. After giving our best consideration to it, we think the question ought to be answered in favour of the appellant.

The suit contemplated by section 77 of the Registration Act is, to use the words of the section, "a suit for a decree directing the document to be registered," and not a suit for a decree declaring the validity or the binding character of the document. What then is the Court to inquire into in such a suit? Is it simply the question of the genuineness of the document, or that of its **[671]** genuineness and validity as well? We are of opinion that it is only the former. For it is only the question of execution, together with the connected question whether the executant is a minor, an idiot, or a lunatic, that the Registering Officer is required to inquire into, under sections 34 and 35 of the Act, when a document is presented for registration; and the inquiry in a suit under section 77, which is the last step that may be resorted to, to enforce registration, should be held to be limited to the same question.

Where, as in this case, the document is one that is required by section 17 of the Registration Act to be registered, section 49 of the Act makes it inadmissible as evidence of any transaction affecting immoveable property, unless it has been registered; and the object of a suit under section 77 is to obtain registration of the document so as to remove the bar to its admissibility in evidence, the question of its validity being left to be determined in a proper suit. This view, we may add, is in accordance with the case of *Balambal Ammal* v. *Arunachala Chetti* (I. L. R., 18 Mad., 255).

It may no doubt appear at first sight somewhat anomalous, that a document of which the invalidity is evident, as it is in this case, should, nevertheless, have to be ordered to be registered, if the view we take of section 77 is correct. But a little consideration will show that a much greater anomaly might result if the opposite view were accepted. For the party propounding a document may, notwithstanding its invalidity, be entitled to collateral relief in the form of refund of consideration and the like, which the limited scope of a suit under section 77, which is only for a decree directing the document to be registered, may prevent the Court from granting. The case before us is an instance in point. Though the document here is voidable under section 30 of Act VIII of 1890, the plaintiff is entitled to a refund of the consideration money which he has paid; but the Court cannot grant him that relief in this suit.

The document is found to have been executed by the guardian of the minor for the time being. It is true it was executed in contravention of the terms of the permission accorded by the District Judge, but the law (section 30 of Act VIII of 1890) only declares that the document is voidable. That being so, in the **[672]** view we have taken of the scope of a suit under section 77 of the Registration Act, the plaintiff is entitled to succeed.

The decrees of the Courts below must, therefore, be set aside, and the plaintiff's suit decreed with costs in all the Courts.

S. C. G. *Appeal allowed*

NOTES.

[As regards the scope of sec., 77 Registration Act 1877, this was followed in (1903) P.R., 11; (1904) P. R., 13; (1907) 29 All., 284; (1909) 14 C.W.N., 12.

As regards the voidable character of mortgages executed by agreement without the sanction of the Court, see also (1899) 22 Mad., 289; (1906) 3 C.L.J., 260.]

[24 Cal. 672]

The 10th March 1897.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Pareman Dass and others............Defendants

versus

Bhattu Mahton and others............Plaintiffs.*

Hindu Law—Joint family—Joint Hindu family under Mitakshara Law—Sale of joint family property in execution of decree against father—Decree for damages for theft or misappropriation—Antecedent debt—Pious duty of sons to pay father's debt—Bona fide *purchaser, Equities of.*

In execution of a decree for damages for theft or misappropriation against *M* and *S*, two of the members of a joint Hindu family under the Mitakshara Law, ancestral property of the family was sold and the purchasers took possession. In a suit by the sons of *M* and *S* and several other members of the family for recovery of their interests in the property,

Held, that there was no "debt antecedent" to the decree in this case, that even if the right to obtain damages for the theft or misappropriation could be said to have created a "debt," the debt was tainted with illegality or immorality, the sons were not under a pious duty to pay the debt, and the interests of the sons did not pass by the sale.

Held, also, that the purchasers in this case were not entitled to the equities of a *bona fide* purchaser, as the decree, if examined, would have put them upon inquiry.

THE property in question in this suit was ancestral land of a joint Hindu family governed by the Mitakshara Law, which had been sold in execution of a decree against some of the members. The family consisted of three brothers: Mangru Mahton, Darshan Mahton, Sobha Mahton and their wives and sons; of these, Darshan died before the present action was brought. The decree in execution of which the sale took place was passed in a suit for damages for theft or misappropriation of paddy by Mangru and Sobha Mahton and other persons unconnected with the family. The plaintiffs in the case who claimed to recover their interests in the joint-property were the wife and sons of Mangru, the widow [673] and sons of Darshan, Sobha himself, and his wife and sons. The defendants 1 to 4 were the purchasers in execution, and Mangru Mahton was defendant No. 5, and the decree-holder, defendant No. 6. The sale certificate did not specify whose property was sold, but the names of the parties in the original suit for damages were mentioned. The principal question argued was what was the extent of interest which passed by the sale. The facts are fully given in the judgment of the High Court.

The defendants 1 to 4 appealed to the High Court.

Babu *Karuna Sindhu Mukerjee*, Babu *Tarit Mohan Das* and Moulvi *Mahomed Habibullah* for the Appellants.

Babu *Umakali Mukerjee* for the Respondents.

Babu *Karuna Sindhu Mukerjee.*—The decree and sale proceedings against Mangru and Sobha are binding upon the family, as they were the heads of the family, and the family had the benefit of the wrongful act. The purchaser was not bound to go behind the sale proceedings and to make inquiry; he had no notice. In *Suraj Bunsi Koer* v. *Sheopersad Singh* (I. L. R., 5 Cal., 148: L. R., 6 I. A, 88) after referring to *Girdharee Lall* v. *Kantoo Lall* (14

* Appeal from Original Decree No. 266 of 1895, against the decree of Moulvie K. S. Fukhruddin Hassain, Subordinate Judge of Patna, dated the 28th of June 1895.

B. L. R., 187 : 22 W. R., 56 : L. R., 1 I. A., 321) the Privy Council held that the purchaser is not bound to go further than to see that there was a decree properly given against the father. A *bonâ fide* purchaser like the appellant is protected against the claim of the sons. The sons have a pious duty to pay the father's debts. There is no difference between a liability to damages and other debts of the father. In *Nanomi Babuasin* v. *Modhun Mohun* (I. L. R., 13 Cal., 21 : L. R., 13 I. A., 1) the decree was for mesne profits. *Beni Parshad* v. *Puran Chand* (I. L. R., 23 Cal., 262). The next point is that the purchaser being the landlord, the present suit for the recovery of possession against him is barred by two years' limitation under Art. 3, Sch. III of the Bengal Tenancy Act. The suit is also barred by one year's limitation, as a claim or objection made in execution was rejected before the present sale. The position of Sobha Mahton at all events is clearly the same as that of Mangru, and he is not entitled to a decree.

[674] Babu *Umakali Mukerjee* for the Respondents.—The decree was for damages for theft or misappropriation; it cannot be said that it was for a "debt" contracted by the father; much less can it be said that the sons were liable for such damages, on the ground of their pious obligation as sons. None of the cases cited authorize such a proposition. It does not make any difference here that the purchaser was a stranger; he was bound to make inquiry. As to Sobha Mahton, the defendants do not appear to have questioned his right or proceeded against him in the lower Court; they proceeded against Mangru there, and cannot ask for Sobha's share in appeal. Then as to limitation, the Tenancy Act does not apply to this case, as the suit was not between a *raiyat* and his landlord as such, and the point was not taken below. One year's limitation also cannot apply, as there is nothing on the record to show that the claim case was regularly tried and decided.

Baba *Karuna Sindhu Mukerjee* in reply.

The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ.**) was as follows:—

This suit was brought by all the members of a Mitakshara family except one, namely, Mangru Mahton, who was the fifth defendant, for the purpose of obtaining possession of property which had been sold in execution of a decree obtained against Mangru Mahton and also against Sobha Mahton, his brother, the fifth of the plaintiffs The family consisted of three brothers and their wives and sons. The suit in which the decree was obtained which led to the sale was brought for the purpose of recovering damages for *dhan* which had been stolen by the defendants in that suit. The defendants in that suit included Mangru Mahton and Sobha Mahton. We may mention in passing that the decree in that suit describes the claim as being for the recovery of Rs. 561-14-6 as damages on account of the price of the grains appropriated by the defendants. That statement is important, having regard to the chief question which has been argued in this appeal.

No evidence has been given in this case as to any of the proceedings in execution, and all we have to look at is the certificate of sale which has been put in and the decree. The certificate of sale **[675]** is headed with the names of the parties, and it certifies the sale of this particular *kasht*, without describing to whom it belongs.

It is contended on behalf of the purchaser that the effect of this sale was to dispose of the rights of the whole family in this *kasht*. On the other hand, it is urged on behalf of the appellants that only Mangru Mahton's right passed thereby.

We may at once dispose of the rights of the children of Darshan Mahton, who was one of these three brothers, and of the widow of Darshan. The argument addressed to us was based entirely upon the duty of a Hindu son governed by the Mitakshara Law to pay the debts of his father, and there is nothing in this case which could possibly bind the family by any acts of a manager. In the first place, it is not shown that either Mangru or Sobha was the manager of the family, and the particular debt, if it was a debt, which was created, was not one which was contracted by the manager as such or in any way for the family. We say "if it was a debt," because as a matter of fact it was not a debt at all. There is no way in which Darshan Mahton's descendants are bound. So far as they are concerned therefore the appeal must fail.

To proceed with the others, we think it must be accepted that this sale was held in execution of a decree both aginst Mangru Mahton and Sobha Mahton. The sale purports to have been made in the suit as against all the defendants, and unless the contrary is shown, we must suppose that the judgment-creditor took proceedings against both Mangru and Sobha who were defendants in that suit and were interested in this *kasht*. In the plaint it is alleged that the proceedings were only against Mangru Mahton; but that allegation might easily have been substantiated by proof. In the absence of any proof we must take it that the certificate of sale was in pursuance of proper proceedings against both brothers. That being so, it follows that as far as Sobha Mahton is concerned his suit must fail.

But the case with regard to the others is very different. Although the sale certificate purports to pass the whole of the property, still the sons would not be liable, unless it is shown that there was a proper decree made against their father in respect of an antecedent debt which was not contracted for illegal or [676] immoral purposes That, to put it very shortly, is the result of the authorities on the matter. In the first place, we do not think that there was any antecedent debt at all. The cases cited refer to transactions which have been entered into by way of a contract or something approaching a contract between the father and some other person, and the debt which was so contracted it became the pious duty of the sons to pay off. But here there was no debt antecedent to the decree. There was merely a right to damages for a wrongful and criminal act; and so those cases would have no application to the present case. But even if it could be said that *that* right to damages created a debt before the suit was brought, still it is difficult to see how such a debt was not tainted with either illegality or immorality. The origin of this debt, if debt it was, was a theft committed by those persons who were sued.

It is contended that the purchaser being a *bonâ fide* purchaser, was not compelled to go so far back as to ascertain those facts. On an authority which was cited to us it is argued that he need not go behind the decree. At any rate it is suggested that he ought not to investigate the decree which led up to the sale. Certainly a purchaser of property under these circumstances, when he is shown to be aware that the persons who on suing were members of a family, would act very unwisely if he did not examine at least the decree. The decree would either give the purchaser notice or put him on inquiry. This is not a case where the decree recites a debt which *primâ facie* was one binding a family or one properly contracted, but it is a case distinctly which, to say the least of it, would put the purchaser upon inquiry.

There is one more matter which it is necessary for us to refer to. It was argued at the beginning that this suit was barred by limitation, *firstly*, on the ground that a claim had been preferred to the property in execution. The

petition of claim has not been put in, and on the evidence on the record it appears that no decision was come to on that claim. The claim was put in too late, and nothing was done with regard to it.

Then it is said that under the Bengal Tenancy Act two years' limitation applies. But this is not a suit by an occupancy *raiyat* **[677]** against his landlord as such, but against a person who may happen to be his landlord, and who is being sued as purchaser of the occupancy right and in consequence of that purchase.

These are all the matters necessary for our consideration in this case.

The result is, that we must vary the decree of the lower Court by disallowing to Sobha Mahton the share which he claims. So far as he is concerned, therefore, the suit must be dismissed Subject to this modification the decree will be affirmed.

The appellants must pay to the respondents the costs of this appeal.

S. C C *Appeal allowed in part. Decree varied.*

NOTES

[The subject of what are '*illegal or immoral debts*' has been exhaustively dealt with by *Mookerjee, J*, in **(1911) 39 Cal, 862 15 C. L J., 228** with reference both to case-law and the texts See also (1908) 32 Bom, 318, (1900) 3 Bom L R., 322; (1903) 27 Mad., 71; (1912) 18 C L. J, 43, (1912) 16 I C, 410 (Cal) *per* MOOKERJEE, J.

A distinction has been drawn between accountability based upon civil liability and that constituting criminal offence, see (1912) 16 I C, 410 (Cal) and (1911) 39 Cal., 862]

[24 Cal 677]

The 2nd March, 1897.

PRESENT

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Luchmeshar Singh..........Plaintiff

versus

Dookh Mochan Jha and another............Defendants.*

Mortgage—Usufructuary mortgage—Sudbharna bond—Covenant to repay—Construction of mortgage bond—Suit for money and for sale—Transfer of Property Act (IV of 1882), section 67.

In a *sudbharna* mortgage bond it was stipulated, "having paid the principal money in the month of Chait 1297 we shall take back the document and the land. In case we fail to repay the principal money at due date the *sudbharna* bond shall remain in force."

Held, that there was in this contract no agreement to repay the principal money, and no such agreement was implied by the provisions as to taking back the document and the land, and therefore there was no right to a money decree.

Held, that under section 67 of the Transfer of Property Act (IV of 1882) an usufructuary mortgagee cannot as such (*i. e.*, unless there is anything in the contract which would imply the right) sue either for foreclosure or for sale.

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* Appeals from Appellate Decrees Nos. 531 and 738 of 1895, against the decree of Babu Jagaddurlabh Mozumdar, Subordinate Judge of Tirhoot, dated the 3rd of January 1895, reversing the decree of Babu Gyanendra Chandra Banerjee, Munsif of Modhubani, dated the 14th of June 1894.

Umda v. *Umrao Begam* (I. L. R., 11 All., 367); *Chathu* v. *Kunjan* (I. L. R., 12 Mad. 109); and *Ramayya* v. *Guruva* (I. L. R., 14 Mad., 232) referred to. *Venkatasami* v. *Subramanya* (I. L. R., 11 Mad., 88) not followed.

[678] THESE were suits for recovery of money due upon *sudbharna* bonds, whereby the *bharnadar* or mortgagee retained possession of the mortgaged property in lieu of interest. In appeal No. 531, the suit was also for "making the mortgaged property liable for the debt" as well as the person and the other properties of the defendant, mortgagor. The bond in case No. 531, after stating that the consideration money had been received, proceeded:—

"We therefore declare and give out in writing that in lieu of interest we give in *bharna* 6 bighas 4 cottahs of *kamshareh* (low rate) *kasht* land as per boundaries for a term of three years from 1294 to 1296 F. S. situate in *mouza*. * * * That the said *bharnadar* should hold possession over the *bharna* property and appropriate the proceeds thereof till the term of the bond. We shall pay the rent payable by us year after year in the zemindari *cutchari*, and the *mahajan* shall have no concern with it, and having paid the principal money in the month of Chait 1297 we shall take back the document and the land If the principal sum be not paid at the time fixed, then all the terms of his *sudbharna* will remain in force till the repayment of the sum.

The facts are sufficiently stated in the judgment of the High Court.

The plaintiff appealed to the High Court.

Babu *Ram Charan Mitra* for the appellant argued that a liberal construction should be put upon the document, and it should be held that there was an agreement to repay the money The law (Transfer of Property Act, section 67) did not take away the right to a decree for sale of the mortgaged property in this case He cited Dr Rash Behary Ghose on Mortgage, 2nd edition, page 373, and the case of *Venkatasami* v *Subramanya* (I L. R., 11 Mad., 88).

Moulvie *Mahomed Mustafa Khan* for the respondent contended that there was no covenant to pay, and a decree for money or for sale could not be passed in these cases. He cited sections 58, 67, 68 and 62 (*b*) of the Transfer of Property Act and the following cases *Umda* v *Umrao Begam* (I L. R., 11 All., 367), *Chathu* v. *Kunjan* (I. L R, 12 Mad, 109), *Ramayya* v *Guruva* (I. L. R., 14 Mad., 232), *Gopalasami* v *Arunachella* (I. L R, 15 Mad., 304).

[679] Babu *Ram Charan Mitra* in reply.

The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ.**) was as follows.—

Although these two cases were tried together in the Lower Appellate Court and before us, they are not in every respect similar

They are both suits brought to recover money alleged to be due upon usufructuary mortgages, and in both cases the mortgagee alleged that he had given up possession of the property mortgaged. In No 531 the plaintiff asked for and obtained from the first Court a decree for sale. In No 738, he only asked for a money decree, which was given to him in the first instance The Lower Appellate Court has set aside both decrees and dismissed the suits on the ground that the contract does not give a right to sue for the money. We have heard the appeals argued at some length, and are of opinion that they must be dismissed.

The question depends partly upon the construction which is to be placed upon the particular contract, and partly upon the construction which is to be placed upon certain sections of the Transfer of Property Act.

To take first the contract in appeal No. 531, after a recital of the necessity for a loan of Rs. 124 the bond declares that in lieu of interest the executants

give in *bharna* certain land for a term of three years from 1294 to 1296 F. S. "That the said *bharnadar* should hold possession over the *bharna* property and appropriate the proceeds thereof till the term of the bond. We shall pay the rent payable by us year after year in the zemindari *cutchari*, and the *mahajan* shall have no concern with it, and having paid the principal money in the month of Chait 1297 we shall take back the document and the land. In case we fail to repay the principal money at due date this *sudbharna* bond shall remain in force."

There is in this contract no agreement to repay the principal money, and therefore there would be no right to a money decree. It was contended that the provision as to taking back the document and the land on payment of the principal implied an agreement to repay the money. This is not so. That provision **[680]** is merely what is generally known as a proviso for redemption. It fixes the minimum time within which the mortgagor can redeem. It does nothing more. This bond is, we think, an usufructuary mortgage within the meaning of section 58 (*d*) of the Transfer of Property Act. That clause is as follows:—

"Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest and partly in payment of the mortgage money, the transaction is called an usufructuary mortgage, and the mortgagee an usufructuary mortgagee."

This is exactly what has been contracted for here. The mortgagor delivered possession of the mortgaged property to the mortgagee, and authorised him to retain possession until payment of the mortgage money, and to receive the rents and profits in lieu of interest.

It remains to be seen what is the remedy of an usufructuary mortgagee. This is to be found in section 67, which, after detailing the general right of a mortgagee to foreclosure or sale, proceeds to except three cases from this general right. A simple mortgagee cannot sue for foreclosure; a mortgagee by conditional sale cannot sue for sale; an usufructuary mortgagee cannot as such, *i.e.*, unless there is anything in the contract which would imply the right, sue either for foreclosure or for sale. This is, we think, the natural meaning of the terms of section 67. Although the section speaks of instituting a suit, we are of opinion that those words do not so much relate to the form in which the suit is to be brought as to the remedy to which the plaintiff is entitled. It could not be that the words "to institute a suit for foreclosure or sale," would only debar an alternative prayer and not bar either relief.

It remains to be seen whether there is anything in this bond which would exclude the operation of section 67. There is no express contract to submit to a decree for sale or to one for foreclosure. Can such a contract be implied? We are unable to see in this bond anything, from which we may infer any such agreement.

[681] Several cases on the subject were brought to our notice, and it may be well to refer to some of them.

The case of *Umda* v. *Umrao Begam* (I. L. R., 11 All., 367) is an express authority that the present suit is not maintainable. Three decisions of the Madras High Court were referred to. The first of these is *Venkatasami* v. *Subramanya* (I. L. R, 11 Mad., 88), and it seems to hold that an usufructuary mortgagee is entitled to a decree for sale. The terms of the mortgage are not given in that case, and the general proposition thus laid down was not followed.

In *Chathu* v. *Kunjan* (I. L. R., 12 Mad., 109) a Bench which included one of the learned Judges who decided the case in *Venkatasami* v. *Subramanya* (I. L. R., 11 Mad., 88) arrived at an opposite conclusion, and held that an usufructuary mortgagee cannot, in the absence of a contract to the contrary, sue either for sale or for foreclosure.

In *Ramayya* v. *Guruva* (I. L. R., 14 Mad., 232) another Division Bench held that where there was a covenant for payment of the money the mortgagee could bring the property to sale. These cases shew that, where the bond in question amounts to nothing more than an usufructuary mortgage as defined in section 58, there is no remedy either by way of sale or foreclosure. There being nothing in the present bond to differentiate it from a simple usufructuary mortgage as defined in the Act, we must hold that the suit fails.

In the other case all that is asked for is a money decree. There is not in the bond any provision by which the mortgagor binds himself to pay the money, and none of the conditions of section 68* of the Transfer of Property Act are fulfilled. The plaintiff is not entitled to a money decree.

It is not necessary for us to express any opinion as to whether he is entitled to any other decree, as up to now he has never asked for any other.

Both appeals are dismissed with costs.

S. C. C. *Appeals dismissed.*

NOTES.

[" It has been said that a mortgage is not an usufructuary mortgage within the meaning of the Transfer of Property Act if it contains a covenant to pay ; for it then ceases to be a pure usufructuary mortgage. [(1896) 19 Mad., 411 ; (1902) 13 M.L.J., 2 ; (1903) 26 Mad., 662 ; (1903) 27 Mad., 526 ; (1892) 17 Bom., 425 ; distinguish (1903) 27 Bom., 600 ; but see (1843) S.D. N.W.P., 6 ; *cf.* (1881) 11 Cal., 237 ; (1895) 21 Bom., 267 ; (1897) 24 Cal., 677 ; (1901) 3 Bom. L.R., 156 ; (1905) 28 All., 157].

It is, however, difficult to see how a mere personal covenant to pay, unless it is accompanied by an hypothecation of the property, can give the usufructuary mortgagee a right of sale, (1905) 28 All., 157 ; *cf* (1862) Marsh., 209 ; (1866) 6 W.R., 283 ; (1878) 1 All., 611; (1891) 16 Bom., 303 ; (1891) 15 Mad., 174 ; (1892) 17 Bom., 425 ; (1895) 20 Bom., 296 ; (1903) 5 Bom. L.R., 119 "—*per* Dr. Rash Behari Ghosh in his Mortgages, IV Edn., (1911) p. 269.

See also (1907) 6 C.L.J., 143 ; (1910) 6 I.C., 153 (Cal.) ; (1911) 13 I.C., 336 (Cal.).]

Right to sue for mortgage-money.

* [Sec. 68.—The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only : —

(*a*) where the mortgagor binds himself to repay the same :

(*b*) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor :

(*c*) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in section sixty-six, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money.]

[682] *The 26th April, 1897.*

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE AND MR. JUSTICE BANERJEE.

Khetter Nath Biswas............Auction-purchaser

versus

Faizuddin Ali and another, Decree-holders,............and others Judgment-debtors.*

Sale in execution of decree—Sale under mortgage decree—Sale in execution of a money decree, effect of, before the sale in execution of mortgage decree confirmed——Code of Civil Procedure (Act XIV of 1882), sections 310A, 311, 312, 314, and 316— Effect of sale not being set aside either under section 310A or 311 of the Code.

A certain property was sold on the 16th August 1895 in execution of a mortgage decree, dated 9th December 1892, and was purchased by *A*. In the meantime an eight annas share of the said property was sold in execution of a money decree and was purchased by *B* on the 22nd May 1893. On the 10th September 1895 the judgment-debtor applied to set aside the mortgage sale under section 311 of the Code of Civil Procedure, and on the 14th September 1895 a similar application was made by *B*. On the 28th March 1896 both these applications came on for hearing before the Subordinate Judge who passed no order; and on the same date *B* presented a petition, asking the Court to set aside the sale held in execution of the mortgage decree upon payment by him of the mortgage money, with interest and costs, and also to declare that he might be entitled to redeem the property. On the 30th March 1895 the Subordinate Judge allowed the petition and ordered the sale to be set aside upon the aforesaid terms.

Held, that, inasmuch as under section 312† of the Code of Civil Procedure *A* was entitled to have an order confirming the sale of the 16th August 1895, unless the sale were set aside under section 310A or section 311 of the Code of Civil Procedure, and as the sale was not set aside under either of these sections, the Court below had no jurisdiction to set aside the sale upon payment by the applicant of the mortgage money with interest and costs. *Brij Mohun Thakur* v. *Uma Nath Choudhry* (I. L. R., 20 Cal., 8) referred to.

THE facts of the case and the arguments appear sufficiently from the judgment of the High Court.

Babu *Karuna Sindhu Mookerjee* for the Appellant.

The Respondents did not appear.

The **judgments** of the High Court (MACLEAN, C.J., and BANERJEE, J.) were as follows:—

[683] Maclean, C.J.—I regret that in this case we have not had the advantage of hearing the case argued on behalf of the principal respondent, who is the purchaser under the sale of the 15th March 1893.

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* Appeal from order No. 208 of 1896 against the order of Babu Biprodas Chatterjee, Subordinate Judge of Moorshedabad, dated the 30th and 31st of March 1896.

† [Sec. 312:—If no such application as is mentioned in the last preceding section be made, or if such application be made and the objection be disallowed, the Court shall pass an order confirming the sale as regards the parties to the suit and the purchaser.

Effect of objection being disallowed and

of its being allowed.

If such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale.

No suit to set aside, on the ground of such irregularity, an order passed under this section shall be brought by the party against whom such order has been made.]

The facts which are necessary for our decision in this case may be stated shortly as follows: On the 9th December 1892 the plaintiff in the mortgage suit obtained a mortgage decree, and on the 22nd of May 1893 a decree for sale absolute was made in that suit. In the meantime, on the 15th of March of the same year, the respondent, who, in the course of the argument, has been referred to as the principal respondent, purchased an eight annas share of the property which was on mortgage, under a sale in execution of a money decree. On the 16th August 1895 the mortgaged property was put up for sale in pursuance of the decree absolute, to which I have referred, of the 22nd May 1893. Under that sale the present appellant became the purchaser. On the 10th September 1895, that is to say, within a very short period after the sale under which the present appellant bought, the judgment-debtor applied to set aside the sale under section 311 of the Code of Civil Procedure, and on the 14th September of the same year the principal respondent made a similar application under the same section.

These applications came before the Subordinate Judge who heard them out on the merits, and on the 28th March 1896 reserved judgment, but upon that day the principal respondent presented a petition, which was accepted, that the sale of the 16th August 1895 might be set aside, upon payment by him of what was due for principal, interest and costs under the mortgage, and that, on such payment being made, the sale might be set aside and he might be declared entitled to redeem the property On the 30th March of the same year, the learned Subordinate Judge assented to the view of the principal respondent, granted the prayer of that petition, and ordered the sale to be set aside, upon the footing to which I have here referred. In the view taken by the learned Subordinate Judge, he seems to have considered that he was bound by the decision in the case of *Premchand Pal* v. *Purnima Dasi* (I. L. R., 15 Cal., 546), which, however, does not appear to have commended itself to his mind.

[684] Upon these facts the question we have to decide is whether the learned Judge, whose opinion, as I said before, would appear not to have been in consonance with the case to which I have referred, but by which he considered, and rightly considered, he was bound, was right in point of law. The real question is, whether upon the application of the principal respondent of the 28th of March 1896, the Judge in the Court below ought to have set aside the sale of 16th August 1895 under which the appellant had purchased, I think that, in arriving at the conclusion that he ought, he arrived at a conclusion which was erroneous. The view I take of the position is this: The appellant was the purchaser under the sale of the 16th August 1895. Under the provisions of section 312 of the Code, he was entitled to ask the Court for an order to confirm the sale, unless the sale were set aside under section 310A or section 311 of the Code. No application was made under section 310A, so that we may dismiss that from our minds. Two applications were made to set aside the sale under the provisions of section 311 of the Code, but we must take it, and do take it, for the purposes of this judgment, that those applications were negatived. The applications were made, but no decision was given upon them; they were practically abandoned. A fresh application on the 28th of March 1896 to set aside the sale on payment of what was due to the judgment-debtor was substituted in their place. What jurisdiction was there to make any such order? It seems to me that under section 312 of the Code, the purchaser, the appellant, was entitled to have an order confirming the sale unless the sale were set aside under one of the sections to which I have referred.

This view seems to me to be consistent with the decision of the Privy Council in the case of *Brij Mohun Thakur* v. *Rai Uma Nath Chowdhry* (I. L. R., 20 Cal., 8) in which Lord HANNEN (at page 10 of the report) says this: "Here there was an order for sale, and the property was put up for sale, but there was no order confirming the sale. Under section 312, if no such application, as is mentioned in section 311, is made, there is only one duty left to the Court, namely, to pass an order confirming the sale as regards the parties to the suit and the purchaser. The Subordinate Judge **[685]** refused to do that, and set aside the sale, and directed the purchase money to be refunded on certain terms." It seems to me that the present case is in accordance with the principle laid down in that case. No doubt section 314 says that no sale of immoveable property in execution of a decree shall become absolute until it has been confirmed by the Court, and section 316 says that the title to the property sold shall vest in the purchaser from the date of such certificate and not before; but if the purchaser under the sale of 16th August 1895, there having been no application under section 310A and no successful application under section 311, did become, as I think he did become, entitled to an order confirming the sale, I fail to see what power there was in the Court below to set aside that sale upon the terms upon which it did set it aside. I may point out here that this is not a question between the mortgagor and mortgagee, but it is a question between two third parties, two outside purchasers. The learned Vakil for the appellant has drawn our attention to the case by which the learned Judge in the Court below thought he was bound, the case of *Premchand Pal* v. *Purnima Dasi* (I. L. R., 15 Cal., 546). In the head note it is stated that the right to redeem property exists until the sale has been actually confirmed; but the point was not necessary for the decision of that case, and did not arise in that case. The date of sale there was the 17th August and the date of confirmation of the sale was the 18th of December 1883, but there was no offer to redeem before the date of confirmation. The question which now arises did not arise in that case, nor was it necessary for the purposes of the decision. No doubt there are *obiter dicta* to the effect which I have mentioned, namely, that the right to redeem subsists until the sale has been confirmed, though even that proposition is put in a very qualified manner by Mr. Justice BEVERLEY at page 554, where he says this: "If the judgment-debtor deposit the amount of the decree between the date of purchase and the date of confirmation of sale, it is possible that the sale might be set aside." That is very cautious language: I do not think there is anything in this judgment which conflicts with the actual decision in the case by which the learned Judge in the **[686]** Court below thinks he was bound. I regret, as I said before, that we have not had the advantage of hearing the opposite view urged before us on the part of the respondent, but in the view I take, I think the Subordinate Judge was wrong. The appeal will be allowed, and the appellant will have the costs of the appeal.

Banerjee, J.—I concur.

S. C. G. *Appeal allowed.*

NOTES.

[See also (1907) P.R., 92.]

[24 Cal. 686]

APPELLATE CRIMINAL.

The 16th March, 1897.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE GORDON.

Pachkauri and another............Appellants

versus

Queen-Empress............Respondent.*

Rioting—Unlawful assembly—Right of private defence of property—Causing grievous hurt in furtherance of common object—Penal Code (Act XLV of 1860), sections 97, 99, 147, 149, 325.

The accused, receiving information that the complainant's party were about to take forcible possession of a plot of land, which was found by the Court to be in the possession of the accused, collected a large number of men, some of whom were armed, and went through the village to the land in question. While they were engaged in ploughing, the complainant's party came up (some of them being armed) and interfered with the ploughing. A fight ensued, in the course of which one of the complainant's party was grievously wounded and subsequently died, and two of the accused's party were hurt.

Held, that if the accused were rightfully in possession of the land and found it necessary to protect themselves from aggression on the part of another body of men, they were justified in taking such precautions as they thought were required and using such force or violence as was necessary to prevent the aggression.

Held, also, that under such circumstances they could not rightly be held to be members of an unlawful assembly.

Queen-Empress v. *Narsang Pathabhai* (I. L. R., 14 Bom., 441), *Birjoo Singh* v. *Khub Lall* (19 W. R., Cr., 66), *Shunkur Singh* v *Burmah Mahto* (23 W. R., Cr., 25), followed; *Ganouri Lal Dass* v. *Queen-Empress* (I. L. R., 16 Cal., 206), distinguished.

THE appellants were convicted by the Sessions Judge of Gya [687] of committing offences under sections 147, 149 and 325 of the Penal Code, namely, being members of an unlawful assembly, using force and violence in the prosecution of the common object of that assembly, and causing grievous hurt to some one or other of the party of the complainants in furtherance of that common object. There was a dispute between certain Babhuns and Mahomedans about certain lands, of which it was found by the Sessions Judge, the Mahomedans, who were the accused, obtained possession five or six years previously, and continued in peaceful possession until October 1895. The accused, the Mahomedans, also contended that they were lawfully engaged in ploughing the land, when the complainant's party came and attacked them.

The complainants, on the other hand, alleged that their employer, in execution of a rent decree (*ex parte*) against a third party, purchased the land and obtained possession of it in September 1895, and that on 4th July 1896, a few days after, they had sowed the plot with *nowaj-dhan*; while they were engaged in ploughing the fields, the accused, with a large number of armed men, came and attacked them, and in consequence one of their men was grievously hurt and died four days afterwards. The Sessions Judge, holding that there was an

* Criminal Appeal No. 87 of 1897, made against order passed by H. Holmwood, Esq., Sessions Judge of Gya, dated the 23rd of November 1896.

unlawful assembly on the part of the accused as well as on the part of the complainants, each party attempting to enforce some right or supposed right in the property, convicted the accused of rioting with the common object of enforcing by criminal force a right to the plot of land, and sentenced them to rigorous imprisonment for one year. From this sentence the accused appealed.

Mr. *P. L. Roy* (with him Babu *Dasarathi Sanyal*) for the Appellants.—The Judge has found that the appellants obtained possession of the property in dispute five or six years ago, and continued in such possession, until the day of the riot. Upon that finding the common object of the unlawful assembly fails, and under these circumstances the accused had unquestionably the right of private defence of person as well as of property. *Queen* v. *Mitto Singh* (3 W. R., Cr., 41), *Birjoo Singh* v. *Khub Lall* (19 W. R., Cr., 66), *Shunkur Singh* v. *Burmah Mahto* (23 W. R., Cr., 25). It may be contended **[688]** by the opposite party that the appellants had no right of private defence on the authority of the case of *Ganouri Lal Das* v. *Queen-Empress* (I. L. R., 16 Cal., 206). That case is not, however, in point. It only decides that there is no right of private defence against a civil trespass. [GHOSE, J.—That case overrules the cases you have cited.] But the decision in question is not a Full Bench case, and therefore it cannot be contended that the cases I have cited are overruled by that decision. The cases I have cited lay down the true principle which should govern all such cases, that is to say, that a person is entitled to maintain his right in possession, and for that purpose he and his neighbours are entitled to use reasonable force to drive out intruders. *Queen-Emprees* v. *Narsang Pathabhai* (I L. R., 14 Bom., 441).

Babu *Raghunandun Prasad* (with him Mr. *Gregory*) for the Crown.—On the authority of *Ganouri Lal Das* v. *Queen-Empress* (I. L. R., 16 Cal., 206) the accused in this case have no right of private defence. They came armed and were prepared to fight under any contingency, and they did fight and killed one of our men. The appeal should be dismissed.

The **judgment** of the Court (**Ghose** and **Gordon, JJ.**) was as follows :—

The appellants before us, Pachkauri and Jodha Singh, have been convicted by the Sessions Judge of Gya of the offences under sections 147, 149 and 325 of the Penal Code, namely, that they were members of an unlawful assembly; that force and violence were used in the prosecution of the common object of that assembly; and that grievous hurt was caused to some one or other of the party of the complainant in furtherance of that common object. And each of them has been sentenced to one year's rigorous imprisonment.

It appears that there was a dispute between two parties, described as the Babhuns and Mahomedans, about certain lands; but it is found by the Sessions Judge that the Mahomedans obtained possession five or six years ago, and continued to be in peaceful possession until, at any rate, October 1895. The case for the prosecution, however, is that in execution of a rent **[689]** decree (*ex parte*) obtained against a third party, the complainant's employer purchased the land, and obtained possession in September 1895; and that on the 4th July last, they (the Babhuns) were engaged in ploughing the fields, when the accused, with a large number of armed men, came and attacked them; the result of such attack being that a man belonging to their party, namely, Dipa Singh, was grievously hurt, and that he died in consequence thereof four days afterwards. This case is distinctly denied by the accused, who say that their party (the Mahomedans), notwithstanding the sale that took place, continued in possession of the property, and they were lawfully engaged in ploughing the lands when the complainant's party came in and attacked them; and, that in the course of the tussle which took place between

the parties, Dipa Singh was hurt, and two men belonging to their side were similarly hurt. We have already said that the learned Sessions Judge has found that the party of the accused (the Mahomedans) obtained possession of the property five or six years ago, and continued in such possession; and we might now state that that officer has disbelieved the evidence adduced for the prosecution which was to the effect that they obtained *de facto* possession of the property in September 1895, that they sowed *nowaj-dhan* a few days before, and were lawfully engaged in ploughing the fields on the date of the occurrence. The learned Sessions Judge, no doubt, in one part of his judgment, throws out certain observations which would seem to indicate that he was inclined to believe that Dipa Singh had ploughed the land, but he says at the same time that there is no evidence thereof. We may therefore take it, upon the findings come to by the Sessions Judge himself in this case, that the complainant's party never obtained actual possession of the land; and we think we may well infer from the fact of the party of the accused being in possession in October 1895, that they continued in such possession until the date of this occurrence.

We observe that the learned Sessions Judge has further disbelieved the evidence for the prosecution, in so far as that evidence sought to prove that the complainant's party, who, on the day of the occurrence went to the land, were only four in number. He seems to hold, if we understand him rightly, that there was an **[690]** unlawful assembly on the part of the complainant, as also on the part of the accused, each party attempting to enforce some right, or supposed right in the property. But we fail to see how that position can be maintained so far as the party of the accused were concerned, if, as we hold, and as we take it, the learned Sessions Judge has in effect held, that the latter had been in possession of the property for five or six years together, and was in lawful possession of it up to the date of the occurrence. We are unable to say that the accused were upon that date endeavouring to enforce a right, or supposed right, within the meaning of section 143 of the Penal Code. It would seem (and that is what we understand the Sessions Judge's view of the evidence to be) that the party of the accused had become aware that the complainant's party wanted to take forcible possession of the land; and that, in order to protect themselves from the aggression of the complainant, they collected a large number of men, some of them being armed, and went through the village to the land in question, and while they were there actually engaged in ploughing the land, the Babhuns came up also armed (some of them) and interfered with the ploughing, and this evidently resulted in a fight between the parties, and the consequence was that Dipa on one side was grievously wounded, while two men on the side of the Mahomedans were hurt. It seems to us that, if the party of the accused were rightfully in possession of the land on the date in question, and if they found it necessary to protect themselves from aggression on the part of the complainant's party, they were justified in taking such precautions as they thought were required, and we think that in doing so they could not rightly be held to be members of an unlawful assembly. The view that we adopt in this case is supported by the cases of *Queen-Empress* v. *Narsang Pathabhai* (I.L.R., 14 Bom., 441), of *Bujoo Singh* v. *Khub Lall* (19 W. R., Cr., 66), and of *Shunkur Singh* v. *Burmah Mahto* (23 W. R., Cr., 25). And we might say that the facts of the case of *Ganouri Lal Das* v. *Queen-Empress* (I.L.R., 16 Cal., 206) are distinguishable from those in the present case.

Turning then to the conduct of the two appellants before us, it appears that, as far as Pachkauri is concerned, there is no evidence **[691]** upon the record to show that he used any force or violence, or made any attack upon the complainant's party; and as regards Jodha Singh all that

the evidence indicates is that he had a *lathi* in his hand, and that he struck Dipa Singh with the *lathi*. But it does not appear that he inflicted the fatal blow. Therefore, so far as the first-mentioned appellant is concerned, we do not see how he could be convicted of any offence in this case; and as to the other appellant, Jodha Singh, if the fact be that the complainant's party were the aggressors, he was entitled in the exercise of his right of private defence of property to use such force or violence as was necessary to prevent the aggression; and it does not appear that he used more violence than was necessary on this occasion.

Upon these grounds we think that the conviction and sentence must be set aside.

C. E. G. *Appeal allowed.*

NOTES.

[This was distinguished, on the facts, in (1898) 21 All., 122; (1901) 24 All., 143; (1908) 35 Cal., 443; (1908) 35 Cal., 368, (1907) 35 Cal., 103; (1899) 26 Cal, 574; and it was followed in (1905) 33 Cal., 295.]

[24 Cal 691]

APPELLATE CIVIL.

The 23rd March, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE

Bahabal Shah............Plaintiff

versus

Tarak Nath Chowdhry.... . .....Defendant.*

Damages, Suit for—Opium Act (I of 1878), section 9—Act XIII of 1857—Wrongful entrance and illegal search—Code of Criminal Procedure (Act X of 1882), sections 155, 156 and 165—Non-cognizable offence.

An offence under section 9 of the opium Act (I of 1878), and not coming under section 14 of that Act, is a non-cognizable offence, and is therefore one for which by section 4 of the Criminal Procedure Code a police officer cannot arrest without warrant; and he has therefore

* Appeal under section 15 of the Letters Patent No 3 of 1895, against the decree of the Hon'ble ROBERT FULTON RAMPINI, one of the Judges of this Court, dated the 7th of December 1894, in appeal from Appellate Decree No. 677 of 1894, against the decree of D. Cameron, Esq., Officiating District Judge of Dinagepore, dated the 19th of March 1894, reversing the decree of Babu Ashini Koomar Gooha, Munsif of that district, dated 30th of December 1893.

under section 155 * of the Code no authority to investigate such an offence without the order of a Magistrate ; nor under section 165 can he make a search in respect of it.

[692] The power of arrest without warrant referred to in clause (g) of section 4 of the Criminal Procedure Code is an unqualified power, and not a conditional power, as in section 24 of Act XIII of 1857, which only gives the right to a police officer to arrest without warrant in case the accused does not furnish the security required by that section.

Where a police officer, therefore, in respect of an offence under section 9 of the Opium Act not coming under section 14 of that Act, made a search in the house of the accused without an order of a Magistrate : *Held*, that his action could not be justified, either under section 24 of Act XIII of 1857, or under the Code of Criminal Procedure, and that he was liable in an action for damages for the illegal search.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgments of the High Court.

Babu *Girija Sunker Mozoomdar* for the Appellant.

Babu *Srinath Das* and Babu *Mohiny Mohun Chuckerbutty* for the Respondent.

The **judgments** of the High Court (MACLEAN, C.J. and BANERJEE, J.) were as follow :—

Maclean, C. J.—In this case the plaintiff sued the defendant, who is a sub-inspector of police, for damages for having, as he alleged, wrongfully and illegally entered and searched his house

The question which we have to decide is whether the police officer, under the circumstances in this case, had any right to enter the plaintiff's house and to make a search.

The Munsif before whom the suit was originally brought found in favour of the plaintiff, and he gave the plaintiff Rs. 10 for damages, the plaintiff stated that he desired nothing in the nature of large damages, and that the only object of his action was to clear himself against the imputation which lay upon him by reason of the proceedings which were taken by the police officer.

The case then came before the District Judge in appeal. He reversed the decision of the Munsif and dismissed the plaintiff's suit. The District Judge in his judgment has not gone into the question of law which was raised before Mr. Justice RAMPINI, and which has been discussed before us.

The plaintiff appealed from the decision of the District Judge [693] to this Court, and Mr. Justice RAMPINI affirmed that decision. Hence the present appeal.

The appellant bases his appeal upon the ground that the sub-inspector had no authority to search the plaintiff's house under the circumstances in the case. I need not go into the facts in detail because the only question which we have to decide and which we can decide now is a question of law. But shortly the facts are these : The police sub-inspector received an information

* [Sec. 155 :—When information is given to an officer in charge of a Police station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information and refer the informant to the Magistrate.

Information in non-cognizable cases.

Investigation into non-cognizable cases.

No Police-officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

Any Police-officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a Police-station may exercise in a cognizable case.]

to the effect that the plaintiff was illegally cultivating poppy plants in his field, and in consequence of that information he went to the spot where it was alleged that they had been cultivated. He there found only one poppy plant, but in consequence of some indication which he said he saw there he was led to suspect that there had been other poppy plants growing in the same field, and that they had been previously removed. Drawing an inference from that, that they had been carried to the plaintiff's house, the police officer went to the plaintiff's house and made search for those plants; but in the result he found none. Criminal proceedings were then taken against the plaintiff, which ultimately resulted in his discharge. Hence the present action. These are all the facts that I need advert to for the purpose of the present case. The real question resolves into one of law, namely, whether the police officer had any authority to make the search which he did.

As I said before, the District Judge has not gone into the question of law which was raised before Mr. Justice RAMPINI, and which has been raised before us. Mr. Justice RAMPINI considered that under the Opium Act (I of 1878) the police officer had no authority to make the search he did.

That was practically admitted by the learned Vakil who appears for the respondent, though at the conclusion of his argument he made a somewhat faint suggestion that the search was authorized under section 14 of that Act. Looking at the language of that section, I think that this case does not come within that section, and I agree with Mr. Justice RAMPINI on this point.

Then it is said that, assuming that the search was not authorized by Act I of 1878, the police officer had power to make a **[694]** search under the provisions of section 165 of the Code of Criminal Procedure. Now to arrive at a conclusion as to whether that argument be sound or not we must look at that section and also at some other sections of the Code. Section 165 says that "whenever an officer in charge of a police station, or a police officer making an investigation, considers that the production of any document or other thing is necessary to the conduct of an investigation into any offence which he is authorized to investigate, he may make a search." I pass over the consideration as to whether or not there was in this case any evidence to show that the police officer had any "reason to believe" as required by the section, and before he can make the search, that the appellant would not have produced the poppy plants if he had been summoned or ordered under section 94 of the Code to do so. In my mind this case hinges upon the question whether this was a case which the police officer was authorized to investigate; for, if he were not, it must be admitted, as indeed it has been admitted by the respondent's Vakil, that section 165 has no application to this case.

To ascertain then the cases which police officers are authorized to investigate, one must look at sections 155 and 156 of the Code of Criminal Procedure. Section 155 says this:

"When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information and refer the informant to the Magistrate.

"No police officer shall investigate a *non-cognizable* case without the order of a Magistrate of the first or second class having power to try such case or to commit the same for trial or of a Presidency Magistrate."

If this case were a non-cognizable case, it is admitted that there was no order of any Magistrate. Then section 156 provides: "Any officer in charge of a police station may, without the order of a Magistrate, investigate any *cognizable case* which a Court having jurisdiction over the local area within the limits of

such station would have power to inquire into and try under the provisions of chapter XV relating to the place of inquiry or trial.

[695] What then we have to ascertain is whether this case was a non-cognizable case within the meaning of section 155 of the Code, or a 'cognizable case' within the meaning of section 156. Cognizable and non-cognizable cases are defined in sub-section (*q*), section 4 of the Code. "Cognizable offence' means an offence for, and 'cognizable case' means a case in, which a police officer, within or without the Presidency towns, may in accordance with the second schedule or under any law for the time being in force arrest without warrant."

It is, I think, clear that the police officer could not in this case have arrested without warrant in accordance with the second schedule to the Code. Whether he could have done so "under any law for the time being in force," I will deal with in a moment. "'Non-cognizable offence' means an offence for, and 'non-cognizable case' means a case in, which a police officer within or without the Presidency towns may not arrest without warrant."

The contention of the respondents is that this was a cognizable case within the meaning of the definition of such case in the Code of Criminal Procedure, the police officer having power to arrest without warrant by virtue of the provisions of section 24 of Act XIII of 1857; and that, being a cognizable case, the police officer was authorized to investigate the case without the order of a Magistrate according to the provisions of section 156 of the Code.

The question then is now reduced to whether the police officer could lawfully arrest without warrant. It is conceded that the only law in force which could give him the power is section 24 of Act XIII of 1857. That section says: "Whenever a police officer or Abkari daroga or Opium gomastah shall receive intelligence of any land within his jurisdiction to have been illegally cultivated with poppy he shall immediately proceed to the spot; and if the information be correct shall attach the crop so illegally cultivated and report the same without delay to the authority to which he may be subordinate. He shall at the same time take security from the cultivator of the said land for his appearance before the Magistrate; and in the event of such cultivator not giving the required security, he shall send him in custody to the Magistrate." Can this be said to **[696]** give the police officer a power to arrest without warrant within the meaning of sub-section (*q*) of section 4 of the Code of Criminal Procedure? I think not. It is not an absolute power of arrest; it is conditional only upon the accused not giving the required security. It may be described as a right to take him into custody if he cannot give bail. That is what it amounts to. The police officer is bound to take security for the appearance of the accused before the Magistrate, consequently the police officer has no power to arrest under that section, unless and until the accused person refuses or is unable to furnish the security which is referred to in that section. In my opinion such a qualified power of arrest—a power of arrest not in respect of the offence alleged against him, but only of arrest in default of his giving security for his appearance before a Magistrate—is not such a power to arrest without warrant as is pointed out in the definition of "cognizable offence" in the definition clause of the Code of Criminal Procedure. The power to arrest without warrant in that definition must, I think, be referable to a power of arrest in respect of and on account of the offence alleged. But the power to arrest under section 24 of Act XIII of 1857 is not in respect of the offence alleged, but because the accused cannot or will not give bail. That is quite a different thing. The case then not being a cognizable case within the meaning of the definition in the Code, is a non-cognizable one, and under section 155

the police officer was not authorized to investigate it without an order of the Magistrate.

That being so, and inasmuch as his power to search under section 165 of the Code is incidental to the conduct of the investigation into any offence which he is authorized to investigate, I think that the police officer not having been authorized to investigate into the alleged offence had no right to make the search he made under section 165. I am, therefore, of opinion that the police officer acted illegally in entering and searching the plaintiff's house, and in consequence an action for damages by the plaintiff will lie against him. It was conceded that if the officer had no authority to search the plaintiff's house the action would lie.

At the same time I desire to add, and I think that it is my **[697]** duty to add, that I have seen nothing in this case to indicate, as regards the conduct of the police officer, that he acted otherwise than *bonâ fide* and in the belief that he was authorized to make the search, and that he was only doing his duty.

The result, therefore, is that the decrees of the District Judge and Mr. Justice RAMPINI will be set aside, and that of the Munsif restored. The appellant will get his costs in all the Courts.

Banerjee, J.—I am of the same opinion. The question is, whether the defendant, who is a sub-inspector of police, has made himself liable in this action for damages for having searched the house of the plaintiff under the circumstances found by the learned District Judge. It has been found that in searching the house of the plaintiff he acted, not maliciously, but in good faith, under an honest belief that he was only doing his duty. That is a finding which this Court is bound to accept, and I may add that I see no reason to dissent from that finding. I think that having regard to the circumstances disclosed in the evidence that is the only finding that a Court of Justice should arrive at. But, then, there still remains the question whether that should exempt the defendant from liability to an action like this, if the search of the plaintiff's house made by him was altogether unauthorized by law. To that question the answer must be in the negative. It therefore becomes necessary to consider whether the search made by the defendant of the plaintiff's house was, or was not, authorized by law. It was but faintly urged before us that the search was authorized by section 14 of the Opium Act (I of 1878). I quite agree with Mr. Justice RAMPINI in thinking that that section does not apply to this case, because there is nothing to show that the police officer had either personal knowledge or information in writing to the effect that the house he searched contained opium or poppy heads, which would come under the definition of opium in the Opium Act. That being so, the question is reduced to this, namely, whether the search he made was authorized by section 165 of the Code of Criminal Procedure as Mr. Justice RAMPINI has held.

In order that a search may be authorized by that section, it is necessary that the police officer should consider that the produc-**[698]**tion of some particular thing "is necessary to the conduct of an investigation into any offence which he is authorized to investigate." The offence here was that of illicit cultivation of poppy, which is made punishable by section 9 of the Opium Act,—and the question reduces itself to this, namely, whether that is an offence which a police officer is authorized to investigate without any order of a Magistrate.

Section 155 of the Code of Criminal Procedure enacts that "no police officer shall investigate a non-cognizable case without the order of a Magistrate." If the offence here was a non-cognizable offence, the police officer had no power to investigate it, and the case would not come under section 165 of the Code. Referring to the definition of "non-cognizable case" and "non-cognizable offence" as given in clause (*q*) of section 4 of the Code of Criminal

Procedure, I find that a "non-cognizable offence means an offence for, and a non-cognizable case means a case in, which a Police officer, within or without the Presidency towns, may not arrest without warrant." Schedule II of the Code of Criminal Procedure under the head of "Offences against other Laws," shows for what offences not coming under the Indian Penal Code a Police officer may arrest without a warrant; and they are offences punishable with imprisonment for three years and upwards. The offence in this case is punishable under section 9 of the Opium Act with imprisonment not exceeding one year; so that the case is not one for which a Police officer may arrest without warrant under the provisions of the Code of Criminal Procedure.

But then it was contended, and that contention has been accepted by Mr. Justice RAMPINI, that under section 24 of Act XIII of 1857, the Police officer here was authorised to arrest the plaintiff without a warrant. Section 21, however, as has been clearly pointed out in the judgment of the learned Chief Justice, does not authorise a Police officer, unconditionally, to arrest a person against whom the information mentioned in that section has been received. It only authorises a Police officer to take security from the person informed against, and the power to take such person into custody arises only upon his default in giving the security that may be demanded of him. The liability **[699]** to arrest is a concomitant, not of the offence of which the person is suspected, but of his inability to give security for the furnishing of which alone he is liable. That being so, the case does not come under the definition of a cognizable case, and the Police officer was prohibited by section 165 of the Code to investigate it, and, accordingly, section 165 had no application. The view taken of the case by Mr. Justice RAMPINI and the learned District Judge must therefore be held to be incorrect, and the judgment and decree of both the learned Judges must be set aside and the decree of the Munsif restored with costs.

S. C. G. *Appeal allowed*

[24 Cal. 699]

FULL BENCH.

The 3rd February and 12th March, 1897.

PRESENT:

SIR FRANCIS MACLEAN, KNIGHT, CHIEF JUSTICE, MR. JUSTICE O'KINEALY, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN AND MR. JUSTICE BANERJEE.

Moti Singh and another............Defendants
versus
Ramohari Singh and another............Plaintiffs.*

Interest--Transfer of Property Act (IV of 1882), section 86—Mortgage by conditional sale - Interest after due date—Interest Act (XXXII of 1839)—Limitation Act (XV of 1877), Schedule II, Articles 116, 132.

Held, by a majority of the Full Bench (MACLEAN, C.J., O'KINEALY, J., and MACPHERSON, J.) that when a mortgage bond contains no stipulation for the payment of interest after the due date, interest is payable by virtue of the Interest Act (XXXII of 1839). Article 116† of schedule II to the Limitation Act prescribes the period of limitation in such a case; and therefore only six years' interest after the due date at 6 per cent. per annum is recoverable. The mortgagor cannot redeem until he has repaid the principal sum with such interest and costs.

Gudri Koer v. *Bhubaneswari Coomar Singh* (I. L. R., 19 Cal., 19), approved.

Mathura Das v. *Narindar Bahadur Pal* (I. L. R., 19 All., 39 : L. R., 23 I. A., 138), *Cook* v. *Fowler* (L. R., 7 H. L., 27) and *Bikramjit Tewarji* v. *Durga Dyal Tewari* (I.L.R., 21 Cal., 274), referred to.

[700] *Held* (by TREVELYAN and BANERJEE, JJ.) that the interest after due date should be regarded as interest due on the mortgage within the meaning of section 86 of the Transfer of Property Act (IV of 1882); and that being so, that it becomes a charge on the mortgaged property, and the period of limitation applicable to the claim for such interest is twelve years, under article 132‡ of schedule II to the Limitation Act (XV of 1877).

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* Full Bench Reference in Appeal from Appellate Decree No. 534 of 1895 against the decree of G. G. Dey, Esq., District Judge of Shahabad, dated the 15th December 1894, modifying the decree of Babu Kalidhan Mookerjee, Munsif of Arrah, dated the 1st May 1894.

† [Art. 116 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For compensation for the breach of a contract in writing registered.	Six years ...	When the period of limitation would begin to run against a suit brought on a similar contract not registered.]

‡ [Art. 132 :—

To enforce payment of money charged upon immoveable property. *Explanation.*—The allowance and fees respectively called *malikkana* and *haqqs* shall, for the purpose of this clause, be deemed to be money charged upon immoveable property.	Twelve years...	When the money sued for becomes due.]

THIS was a reference made by TREVELYAN and BANERJEE, JJ., to the Full Bench, in the following terms:—

"The question in this case is what articles of the Limitation Act should be applied to a claim for interest on a mortgage after the due date, when the bond makes no provision for such interest, having special regard to the provisions of the Interest Act (XXXII of 1839).

"If the decision of a Division Bench in *Bikramjit Tewari* v. *Durga Dyal Tewari* (I. L. R., 21 Cal., 274) be correct, article 132 would apparently apply; but in *Gudri Koer* v. *Bhubaneswari Coomar Singh* (I. L. R., 19 Cal., 19), article 116 has been held to apply.

"The case of *Bikramjit Tewari* v. *Durga Dyal Tewari* (I. L. R., 21 Cal., 274) is supported by the following authorities:—*Rama Reddi* v. *Appaji Reddi* (I.L.R., 18 Mad., 248), *Kristna Reddi* v. *Varada Rajulu Reddi* (I.L.R., 18 Mad., 338*n*), and to some extent by the decision of the Privy Council in the case of *Chhajmal Das* v. *Brijbhukan Lal* (I. L. R., 17 All., 511: L. R., 22 I. A. 199), though the point now in question was not argued On the other hand, the case of *Gudri Koer* v. *Bhubaneswari Coomar Singh* (I. L. R., 19 Cal., 19) is in conformity with the following reported decisions:—*Golam Abas* v. *Mahomed Jaffer* (I. L. R., 19 Cal., 23*n*), *Badi Bibi Sahibal* v. *Sami Pillai* (I. L. R., 18 Mad., 257), *Thayar Ammal* v. *Lakshmi Ammal* (I. L. R., 18 Mad., 331), *Mansab Ali* v. *Gulab Chand* (I. L. R., 10 All., 85), and *Bhagwant Singh* v. *Daryao Singh* (I. L. R., 11 All., 416). We refer this appeal to the decision of a Full Bench."

The material part of the mortgage deed provided that "if the consideration-money with interest at 1½ per cent. per mensem be paid back by the 30th Bhadro 1290, the propetry sold by [701] conditional sale shall be reconveyed to the mortgagors; but if the consideration be not repaid by that time, the mortgagor's right to redeem shall be gone."

Babu *Makhan Lal* for the Appellants.—Under the Interest Act interest is allowed only as compensation for breach of contract, and not as part of a debt due under a mortgage bond. The plaintiffs are not entitled to any interest after due date; such a claim is barred by article 116 of the Limitation Act. Limitation runs from the breach of the contract, that is, from the time when the money became due. Interest is only to be given as damages for breach of contract, not as interest under the bond,—*Cook* v. *Fowler* (L. R., 7 H. L., 27), *Bishen Dayal* v. *Udit Narain* (I. L. R., 8 All., 486). [MACLEAN, C.J., referred to *Mathura Das* v. *Narindar Bahadur Pal* (I. L. R., 19 All, 39: L. R., 23 I. A., 138).] That case shows that article 116 applies. [TREVELYAN, J.—It shows that the defendants must pay six years' interest at least. BANERJEE, J.—If the suit was for foreclosure,—and the plaint shows that it was,—the question as to the amount of money due must be determined with reference to section 86 of the Transfer of Property Act]. Under the bond, the mortgagors are not bound to do anything after due date, not even to give possession. If the money was not paid, the sale was to be confirmed, and the mortgagees might have brought a suit for possession. But there being nothing to be done by the defendants the plaintiffs were not entitled to any damages. Should the Court, however, take a contrary view, I contend that article 116 applies, but that the defendants ought not in any event to be ordered to pay interest for the period during which the plaintiffs delayed bringing the suit.

Babu *Tarak Nath Palit* for the Respondents.—Sections 86-88 of the Transfer of Property Act apply to this case. Section 86 contemplates an account, not only during the period from the mortgage to the filing of the suit, but up to the latest period the law will allow, that is, up to the time allowed to the

mortgagor to pay the money; *Surya Narain Singh* v. *Jogendra Narain Roy Chowdhury* (I. L. R., 20 Cal., 360). [MACLEAN, C.J.—The question is, to how many [702] years' interest are the plaintiffs entitled?] The decision in the case of *Mathura Das* v. *Narindar Bahadur Pal* shows that they are entitled to six years interest at least, at the agreed rate. This is not a claim for interest by way of damages but for interest under the bond. [MACLEAN, C.J.—The document seems to draw a distinction between "the consideration money" and "the consideration money with interest." The "consideration money with interest" has to be paid within one year; and then the stipulation is that if the "consideration money" is not paid within a year the mortgagor shall be foreclosed]. The two expressions must mean the same thing, namely, the payment of what will entitle the mortgagors to a re-conveyance. The second clause is merely a corollary to the first. [MACLEAN, C.J., referred to *Chhajmal Dass* v. *Brijbhukan Lal* (I. L. R., 17 All., 511: L. R, 22 I. A., 199).] Even if there is no condition for payment of interest after due date in the mortgage bond, *post diem* interest at a reasonable rate may be given,— *Rama Reddi* v. *Appaji Reddi* (I. L. R., 18 Mad., 248), *Thayar Ammal* v. *Lakshmi Ammal* (I. L. R., 18 Mad., 331) It would be a grave injustice to the plaintiffs not to allow them to recover interest for the full period at the agreed rate—*Futtehma Begum* v. *Mohamed Ausur* [I. L. R., 9 Cal., 309 (314).] The Court has power to allow interest, such interest to be recoverable in the same way as the mortgage money and the costs of the suit—*Bikramjit Tewari* v. *Durga Dyal Tewari* (I. L R., 21 Cal., 274), *Chaturbhai Karsan* v. *Harbhamji Harisanoji* (I. L. R., 20 Bom., 744). [The cases of *Baldeo Panday* v. *Gokal Rai* (I. L. R., 1 All., 603), *Balgobind Das* v. *Narain Lal* (I. L. R. 15 All., 339), *Deen Doyal Lall* v. *Het Narain Singh* (I. L. R., 2 Cal., 41), and *Nanchand Hansraj* v. *Bapusaheb Rustambhai* (I. L. R., 3 Bom., 131), were also referred to.]

Babu *Makhan Lal* in reply. A. C. V.

The following **judgments** were delivered by the Full Bench :—

Maclean, C J.—The answer to the question submitted by this reference appears to me to depend upon the question how the interest arises. If it arise and be held to be payable by virtue of [703] Act XXXII of 1839, it appears to me that article 116 of schedule II to the Limitaton Act (XV of 1877) applies. In that respect I agree with the decision in the case of *Gudri Koer* v. *Bhubaneswari Coomar Singh* (I. L. R., 19 Cal., 19), which, upon this point, is consistent with the recent decision in the Privy Council of *Mathura Das* v. *Narindar Bahadur Pal* (I. L. R., 19 All., 39: L. R., 23 I. A., 138). In view of the latter case, however, the former is erroneous in holding that no interest was recoverable. It is clear, having regard to the Privy Council case, that six years' interest is recoverable. This was not contested in the present case, nor could it have been, in the face of the latter decision. Under section 88 of the Transfer of Property Act, the mortgagor cannot redeem unless and until this interest, if and when found due, be paid. If again, *post diem* interest be provided for by the contract, it is just as much a charge on the property as the principal; and the mortgagor cannot redeem until he pays it. In such a case article 132 of the Limitation Act would apply.

In each individual case one has to ascertain how the interest arises, whether under the Act or under the contract. The language of the contract in this case is very different from that in the contract in the Privy Council case, to which I have referred, and, upon its construction, I am unable to discover any intention to provide for *post diem* interest. The plaintiff, therefore, can only recover six years' interest under the Statute I have referred to. *plus*, of course, the one year's interest stipulated for by the deed; and the defendant

cannot redeem until all principal, with such interest and costs, is paid. There is nothing in this view which conflicts with the judgment in the case of *Bikramjit Tewari* v. *Durga Dyal Tewari* (I.L.R., 21 Cal., 274). I see nothing to quarrel with in that judgment. No question of limitation was raised in that suit.

One other point was urged by the respondent. He said, and properly, that he could support the judgment of the Court below upon reasons other than those given by the Judge, and he said that if he were held to be entitled to six years' interest only, he could ask for that at the rate of 18 rupees per cent., the rate stipulated for by the deed, as long as he did not get more than the **[704]** Court below had given him. I do not think this argument can prevail. In the first place, the Judge below has exercised his discretion as to the question of interest; and, secondly, I doubt if he, as an Appellate Court, can assess the amount. If the matter were open the Privy Council case of *Chhajmal Das* v. *Brij Bhukan Lal* (I. L. R., 17 All., 511 : L. R., 22 I. A., 199) would assist the plaintiff's contention.

The judgment of the Court below must therefore be modified by allowing only six years' interest at 6 per cent. plus the interest for the first year at the stipulated rate, and as both parties have partially succeeded, there will be no costs of this appeal.

O'Kinealy, J.—I concur in the judgment which has just been delivered by the Chief Justice.

Macpherson, J.—I also concur.

Trevelyan, J.—I have had the advantage of reading the judgment of Mr. Justice BANERJEE which he is about to deliver. I agree in the conclusion arrived at by him for the reasons given in that judgment.

Banerjee, J.—The suit which has given rise to this reference was brought by the plaintiffs, respondents, on the 28th of April 1893 for foreclosure of a mortgage by conditional sale, dated the 19th September 1882, stipulating that the principal and interest at 1½ per cent. per mensem should be repaid in September 1883. The defence, so far as it is necessary to be considered for the purposes of this appeal, was that no interest was recoverable under the terms of the mortgage deed for any period after the due date, and that the claim for interest after that date was barred by limitation.

The first Court gave effect to the defence and made a decree ordering payment of the principal and interest up to due date with costs within two months, and foreclosure in default.

On appeal by the plaintiffs, the Lower Appellate Court has modified that decree by allowing interest after due date at 6 per cent. per annum.

In second appeal it is contended for the defendants, appellants, that no interest was recoverable under the mortgage-deed for any **[705]** period after the due date, and that if any interest was recoverable, the claim for it is barred by limitation.

The decree in this case was made under section 86 of the Transfer of Property Act, which provides that "the Court shall make a decree ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage and for his costs of the suit," &c. And the question is, what was due to the plaintiff for "principal and interest on the mortgage." The answer to it must depend upon the construction of the mortgage deed. That document provides that "if the consideration money with interest at 1½ per cent. per mensem be paid back by the 30th Bhadro 1290, the property

sold by conditional sale shall be reconveyed to the mortgagors, but if the consideration be not repaid by that time, the mortgagor's right to redeem shall be gone." The omission of the words "with interest" in the second clause quoted above does not go for much, when interest up to due date is so clearly stipulated for. The deed, no doubt, contains no express stipulation for payment of any interest after due date. But the mortgage being one by conditional sale, such a stipulation would not ordinarily find a place in it; and at any rate the mere absence of any such express stipulation would not imply an intention not to claim any interest after due date. On the contrary, it would be unreasonable to suppose that the parties intended that the mortgagor who remained in possession of the mortgaged property and continued to enjoy its profits should be entitled to redeem it at any time after the due date upon payment merely of the principal and interest up to the due date without paying any interest for the period after that date. The observations of their Lordships of the Privy Council in *Mathura Das* v *Narindar Bahadur Pal* (I. L R., 19 All., 39: L. R., 23 I. A., 138) support the view I take. The case of *Cook* v. *Fowler* (L. R., 7 H. L., 27) was referred to as being opposed to that view. But all that case decides is "that upon a contract for the payment of money borrowed for a fixed period on a day certain, with interest at a certain rate down to that day, a further contract for the continuance of the same rate of interest after that day until actual payment," cannot be implied. There is no question here as to the rate of interest. The Court below has, under Act XXXII of 1839 allowed, in [706] its discretion, interest at 6 per cent. per annum, and the plaintiffs are satisfied with that rate. The question now is whether any interest after due date is recoverable on the mortgage. I am of opinion that this question should be answered in favour of the mortgagees The law (Act XXXII of 1839) allows them to recover interest after due date. The Court of Appeal below in the exercise of its discretion has awarded interest at a certain rate after that date. And there is nothing in the mortgage deed to disentitle them to such interest, or to entitle the mortgagors to redeem without payment of the same. The interest after due date that has been allowed in this case should, in my opinion, be regarded as interest due on the mortgage within the meaning of section 86 of the Transfer of Property Act. And if that is so, it becomes a charge on the mortgaged property, and the period of limitation applicable to this part of the claim is twelve years under article 132 of the second schedule of the Limitation Act.

The view I take is supported by the case of *Rama Reddi* v. *Appaji Reddi* (I.L.R., 18 Mad., 248), and also by *Chajjmal Das* v. *Brij Bhukan Lal* (I.L.R., 17 All., 511), and *Bikramjit Tewari* v. *Durga Dyal Tewari* (I.L.R., 21 Cal., 274). The decisions of the Allahabad High Court in *Narendra Bahadur Pal* v. *Khadim Husain* (I.L R., 17 All., 581), *Mansab* v. *Golab Chand* (I.L.R., 10 All., 85), and *Bhagwant Singh* v. *Daryao Singh* (I.L.R., 11 All., 416) and of this Court in *Golam Abas* v. *Mahomed Jaffer* (I. L. R, 19 Cal., 23) which support the opposite view, have in effect been overruled by the decision of the Privy Council in *Mathura Das* v. *Narindar Bahadur Pal* (I. L. R., 19 All., 39: L.R., 23 I.A., 138).

For the foregoing reasons, I would respectfully dissent from the decision in *Gudri Koer* v. *Bhubaneswari Koomar Singh* (I. L. R., 19 Cal., 19), and hold that the decree appealed against is correct. The second appeal should therefore in my opinion be dismissed with costs.

Maclean, C.J.—As the majority of the Court are in favour of the view I have expressed, the decree of the Court below will be modified to the extent I have indicated in my judgment, but as I have said there will be no costs of the appeal.

NOTES.

[See *per* Dr. Rash Behari Ghose in his Mortgages, IV Edn., (1911) pp. 508, *et seq.*

See also (1899) 23 Mad., 534; (1897) 12 C.P.L.R., 18; (1902) P.R., 95; (1913) 35 All. 534; (1911) 17 C.L.J., 87; 13 I.C., 148; (1911) 15 C.L.J., 684 as regards the power of the Court to award interest by way of damages.]

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[707] APPELLATE CIVIL.

The 26th April, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Chand Monee Dasya and others............Judgment-Debtors

versus

Santo Monee Dasya (Auction-Purchaser) and others...........Decree-holders.*

Limitation Act (XV of 1877), Schedule II, Article 178—Application to set aside a sale by a person interested in the sale—Bengal Tenancy Act (VIII of 1885), section 173 - Limitation Act, Art. 166—Code of Civil Procedure (Act XIV of 1882), sections 311 and 244—Second appeal.

An application to set aside a sale under section 173 of the Bengal Tenancy Act, is governed by Article 178,† schedule II of the Limitation Act, and should be made within three years from the date when the right to apply accrues.

Where the auction-purchaser is a *benamidar* for the judgment-debtor, in an application to set aside a sale under sections 173 of the Bengal Tenancy Act and 311 of the Code o Civil Procedure, a second appeal lies to the High Court from the order made on the application, as the application is one under section 244 of the Code.

THIS appeal arose out of an application made in February 1893 by one of the judgment-debtors and the heirs of another deceased judgment-debtor, to set aside a sale of a tenure, which was sold in September 1892 in execution of a decree for its own arrears, under section 173 of the Bengal Tenancy Act and section 311 of the Code of Civil Procedure, on the allegation that the sale was

* Appeal from order No. 334 of 1896, against the order of Babu Brajo Behary Shome, Subordinate Judge of Jessore, dated the 30th of June 1896, reversing the order of Babu Koilash Chandra Sen, Munsif of Jessore, dated the 29th of October 1895.

† [Art. 178:—

Description of application.	Period of limitation.	Time from which period begins to run.
Applications for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, Section 230	Three years ...	When the right to apply accrues.]

brought about by the fraud of the decree-holder in collusion with one of the judgment-debtors, and that the said judgment-debtor purchased the property sold in the name of his wife. The defence of the auction-purchaser was that the application was barred by limitation under article 166, schedule II of the Limitation Act; that she was not the *benamdar* for one of the judgment-debtors, and that the applicants had no *locus standi*. The Munsif, holding that the auction-purchaser was a mere *benamdar* for one of the judgment-debtors, that the application was not barred by limitation, as it was made within thirty days from the date when the [708] applicants first came to know of the fraud, and that the applicants had a right to make the application, set aside the sale. On appeal, the Subordinate Judge reversed the decision of the Munsif, holding that as no fraud was proved the application was barred by limitation, as it was not made within thirty days from the date of the sale.

From this decision the judgment-debtors appealed to the High Court.

Babu *Sarat Chandra Roy Choudhry* for the Appellants.

Mr. *N. Chatterjee* and Baboo *Nalini Nath Sen* for the Respondents.

Mr. *Chatterjee* for the respondents took a preliminary objection to the hearing of the appeal, on the ground that no second appeal lay in this case.

Babu *Sarat Chandra Roy Choudhry* for the appellants.—The parties to the suit, being parties in the application, and the question being one which comes under section 244 of the Code of Civil Procedure, a second appeal lies: see *Prosuno Kumar Sanyal* v. *Kali Das Sanyal* (I. L. R., 19 Cal., 683).

The Bengal Tenancy Act does not provide any special limitation for an application under section 173 of the Act; therefore, under section 185, clause (2), the general law of limitation should govern the case. There being no other provision in the Limitation Act specially applicable to an application like this, article 178 of the second schedule should apply. If that article applies, the present application is quite within time.

Mr. *Chatterjee*.—The question does not come under section 244 of the Code of Civil Procedure, and more especially when one of the parties to the application, *i e*, the auction-purchaser, is an outsider, and therefore no second appeal lies. Article 178, schedule II of the Limitation Act, does not apply; article 166 applies, which provides for applications of a similar nature. Even admitting that the application is not barred by limitation, the sale ought to stand. It is only voidable and not void; see *Gopal Chunder Mittra* v. *Ram Lal Goshain* (I. L. R., 21 Cal., 554).

[709] The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.):—

Maclean, C.J.—I think that this case must go back upon the question whether the case is one which comes within the purview of section 173 of the Bengal Tenancy Act. That point, as I understand, was not argued before the learned Judge in the Court below, and has not been heard and tried out by him, by reason of the fact that he held that the Statute of Limitation was fatal to the applicant's application under that section. The appellant says that th view is wrong. He contends that the only portion of the Limitation Act th applies to an application under section 173 of the Bengal Tenancy Act is artic 178 of the second schedule of the Limitation Act, which allows a period of three years within which to take proceedings such as the present. The appellant is clearly within that period of time. I see no answer to that contention. I can find no other article of the Limitation Act which applies to the case, nor can I find any provision in the third schedule of the Bengal Tenancy Act, under which an application under this particular section is dealt with.

That being so, I am of opinion that the application comes within article 178 of the second schedule to the Limitation Act. It is doubtless an anomaly that in the case of applications under section 173 of the Bengal Tenancy Act, a period of three years should be allowed, within which the application may be made to set aside a sale, whilst in the case of other similar applications, as, for instance, for setting aside a sale on the ground of irregularity in publishing or conducting the sale, or on the ground that the decree-holder has purchased without the permission of the Court, thirty days only is given under article 166 of the second schedule of that Act. However, whether or not the result of our judgment lead to the anomaly I have indicated, we have heard no argument from the respondents to show why article 178 of the Limitation Act does not apply to the present case. We think it does, and that the learned Judge in the Court below was wrong in holding that the application, in so far as it was an application under section 173 of the Bengal Tenancy Act, was barred by limitation.

Another point which was taken on behalf of the respondent **[710]** was, that no second appeal would lie to this Court. Having regard to the decision of the Privy Council in the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (I. L. R., 19 Cal., 683: L. R., 19 I. A., 166), I think it clear that this is an application cognizable under section 244 of the Code of Civil Procedure, and therefore we think a second appeal lies to this Court.

As to the question of costs, we think that the proper course is, that the costs of this appeal abide the ultimate result of the trial of the issue under section 173 of the Bengal Tenancy Act.

Banerjee, J. I am of the same opinion. I only wish to add one word with reference to the contention advanced by the learned Counsel for the respondent, that the case should be held to come under article 166 of the second schedule of the Limitation Act. It was argued that the ground upon which the sale is now sought to be impugned, namely, that the judgment-debtor has purchased the property in contravention of the provisions of section 173 of the Bengal Tenancy Act, is one of irregularity in conducting the sale within the meaning of article 166. But I find great difficulty in giving effect to that argument. If a purchase by a judgment-debtor in contravention of the law laid down in section 173 of the Bengal Tenancy Act could be treated as an irregularity in the conduct of the sale within the meaning of the article to which I have referred, for the same reason would a purchase by a decree-holder without the permission of the Court in contravention of section 294 of the Code of Civil Procedure, be but an irregularity in the conduct of the sale, but the Legislature has thought it fit in article 166 to insert in a separate clause the case of an application for setting aside a sale on the ground that the decree-holder has purchased without the permission of the Court. That shows that the Legislature in enacting article 166 did not consider a case like this to be covered by the words, "on the ground of irregularity in conducting the sale."

S. C. G. *Appeal allowed. Case remanded.*

[711] *The 3rd March, 1897.*

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE AND MR. JUSTICE BANERJEE.

Kailash Mondul............Defendant

versus

Baroda Sundari Dasi.. ... .Plaintiff.*

Res judicata—*Code of Civil Procedure (Act XIV of 1882), section 13, explanation II—Suit for rent—Whether the question that the plaintiff was a mere benamidar could be raised in a subsequent suit for rent, it not having been raised in a suit previously brought by the same plaintiff against the same defendant.*

In a previous suit brought by the plaintiff for rent the defendant denied the relationship of landlord and tenant, but he did not plead that the plaintiff was a mere *benamidar*. The plaintiff obtained a decree In a subsequent suit by the same plaintiff against the same defendant, for rent for subsequent years the defendant *inter alia* contended that the plaintiff was a mere *benamidar* The plaintiff objected that the previous decree was a bar to defendant's contention.

Held that even if the matter in issue might and ought to have been made a defence in the former suit, yet as it was not finally heard and decided by the Court, within the meaning of section 13 of the Code of Civil Procedure, the defendant was not precluded in this suit from raising the objection that the plaintiff was a mere *benamidar*

THE facts of the case, and the arguments for the purposes of this report appear sufficiently from the judgments of the High Court.

Dr. *Rash Behari Ghose* and Babu *Kali Kissen Sen* for the Appellant.

Babu *Sarada Charan Mitter* and Babu *Surendra Chunder Sen* for the Respondent

The **judgments** of the High Court (MACLEAN, C J , and BANERJEE, J.) were as follows —

Maclean, C J—I think this appeal must succeed In 1878, or possibly a little anterior to that date, as the judgment to which I refer is dated the 28th February 1878, the present plaintiff brought an action against the present defendant for the recovery of rent. In that suit the defendant pleaded abatement, but did not [712] adduce any evidence to make out his plea On the 28th February 1878, the Courts decreed the suit in favour of the then plaintiff with costs and interest, that is to say, the Court decreed at that time that the plaintiff was entitled to the particular amount of rent which the plaintiff then claimed. On the 13th April 1894, sixteen years afterwards, the same plaintiff brings another rent suit against the same defendant asking for payment from the defendant of rent accruing due in respect of subsequent years. The defendant puts in a defence raising, as he considers, various defences to that plaint. The case comes before the Munsif and the Subordinate Judge, and they both hold that the decree in the previous suit amounted to *res judicata* as regards the claim in the present suit, and that the defendant consequently was debarred by

* Appeal from Appellate Decree No 594 of 1895, against the decree of Babu Bulloram Mullick, Subordinate Judge of Khulna, dated the 31st of December 1894, affirming the decree of Babu Sarat Chunder Pal, Munsif of Khulna, dated the 12th of September 1894.

reason of the decree in the previous suit from putting in certain defences which he regarded, rightly or wrongly, as sufficient and good defences to the present suit. The decree in the former suit is in my opinion no bar to his doing so. A decree in a former suit by a landlord against his tenant for rent then due does not constitute *res judicata* in a subsequent suit for rent subsequently accrued by the same plaintiff against the same defendant. The defendant in the latter suit is entitled to show that the rent is not due; the decree in the former suit in no sense debars him from so doing.

The respondent relies mainly upon the explanation II to section 13 of the Code of Civil Procedure. But looking first at section 13 itself, can we say that the question of whether any rent is now due was directly and substantially in issue in the former suit, or that it has been heard and finally decided by the Court in the previous suit? The rent for which the plaintiff is now suing had not accrued when the previous suit was brought.

All that the Court previously decided was that a particular amount of rent he claimed was due from the defendant to the plaintiff. Can it be said to follow from that that the rent now claimed is of necessity, by reason of that decision in 1878, equally due from the defendant, or that the defendant is to be debarred from setting up any defences he may have to the present action? In my opinion the present claim was not directly and substantially in issue, and it has not been heard or finally decided. In respect of explanation II, the language of which, to [713] my mind, is not very clear, it says that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

We have no materials before us to enable us to say that the matter which the defendant now desires to set up might or ought to have been made ground of defence in the particular action in respect of that particular rent. The matters he now desires to set up may not have been within the knowledge of the defendant in 1878. Can we say then that he is debarred from going into those matters now? I think not. It may be that on looking further into the matter, some particular issue, precisely similar to some particular issue now raised, was then decided. If so, the principle of *res judicata* may apply, possibly, to that particular issue.

I see there is a decision in the case of *Konerrav* v. *Gurrav* [I. L. R, 5 Bom., 589 (594)] upon this explanation which certainly has some bearing upon the present case. The head note there is this "In a previous suit between the plaintiff and the defendant the plaintiff alleged that there had been a partition of the family property into two parcels, and, under a deed of partition drawn up at the time, claimed one of these parcels. The deed being held invalid the suit was rejected, with liberty to plaintiff to sue for a general partition. In the second suit the plaintiff prayed for a general partition as a member of an undivided Hindu family. *Held*, that the second suit was not *res judicata*, for although the plaintiff *might* in the first suit have made an alternative case and prayed for a general partition in case he failed to establish the previous partition which he ~~alleged~~, yet it could not be said that he ought to have done so."

That case has some bearing upon the present, so far as explanation II to section 13 is concerned.

The appeal in my opinion must succeed, and the case must be remanded to the Court of First Instance for retrial. Costs will be dealt with by the Court retrying the case.

Banerjee, J. - I am of the same opinion. The plea of *res judicata* in this case is based upon the terms of explanation II to **[714]** section 13 of the Code of Civil Procedure. It is contended that as the defendant could have urged in defence to the former action the defence now raised by him, namely, that the plaintiff is a mere *benamidar*, that is a sufficient reason why he should be precluded from raising that defence now. No doubt explanation II is very comprehensive in its terms; but the question is, whether it would include a case like the present. Granting that the matter now in issue might and ought to have been made a ground of defence in the former suit, the question still remains whether it "has been heard and finally decided" by the Court within the meaning of section 13. All that explanation II says is that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit," but it does not go on to say, "and it shall be deemed to have been heard and finally decided," notwithstanding that the question was never considered by the Court, and notwithstanding that the subject-matter of the subsequent suit is different from that of the former suit. It is only where the subject-matter of the two suits is the same that the matter can be said to have been heard and finally decided within the meaning of section 13 of the Code, even though the matter was never raised in issue: but it is very difficult to hold that a matter which was never raised in issue actually in the former suit, and which is raised in defence in a subsequent suit in which the subject-matter is different from that of the former suit, shall, nevertheless, by virtue of explanation II of section 13, be deemed to have been, not only matter directly and substantially in issue, but matter which has been heard and finally decided. That being so, I think that the second explanation does not help the respondent. The view I take is fully supported by a recent decision of this Court in the case of *Saikum Abu Torab Abdul Waheb* v. *Rahaman Buksh* (I. L. R., 24 Cal., 83). I think I may add that to a case like the present may be fully applied the well-known observations of Vice-Chancellor KNIGHT BRUCE in *Barrs* v. *Jackson* [2 Sm., L. C (10th ed.), 757], which, notwithstanding the reversal of the judgment, have been ever since recognized and acted upon. See *The Queen* v. *Hutchings* (L. R, 6 Q. B. D., 300) and *Tekait Doorga Persad Singh* v. *Tekaitni* **[715]** *Doorga Kounwari* [I. R., 5 I. A., 149 (158): I. L. R., 4 Cal., 190 (200)]. The observations to which I refer are these: "It is, I think, to be collected **[sic]**, that the rule against re agitating matter adjudicated is subject generally to this restriction, that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object."

For these reasons I think the case ought to go back for retrial.

S. C. G. *Appeal allowed. Case remanded.*

NOTES.

[The judgment of SUNDARA AYYAR, J., in *Bommidi Bayyan Naidu* v. *Bommidi Suryanarayana* **(1912) 37 Mad., 70 F.B.** : **23 M L J., 543,** overruling 21 M.L J., 344, is exhaustive and critical. At pp. 88, 89 he observes, "The explanation IV would be objectless if a decision also is not to be implied and made the ground of estoppel with respect to what is impliedly to be regarded as having been directly and substantially in issue. At any rate the logical result of the respondent's position must be to make an explicit decision equally necessary with respect to a ground of attack or defence not having been urged with regard to a matter involved

in the decree itself in the previous suit. The learned Judge's (SANKARAN NAIR'S) position is no doubt supported by several decisions in the Calcutta High Court, (1897) 24 Cal., 711 and (1901) 28 Cal., 17; but in my opinion these decisions are absolutely unsupportable and quite inconsistent with the decision of the Privy Council in (1872) 12 B.L.R., 391; (1912) 39 Cal., 527, even if the decision of the same tribunal in (1902) 24 All., 429 on appeal from (1897) 20 All., 110 could be distinguished as stated by SANKARAN NAIR, J., on the ground that the implication of a decision on an issue which ought to have been raised in the previous suit was justifiable in that case as the decree passed in the earlier suit would itself be affected otherwise. The Calcutta High Court however did not consider (1902) 24 All., 429 distinguishable on that ground. GURUDAS BANERJEE, J., who was a party to the decision in 24 Cal., 711 observed in (1906) 1 C.L.J., 248 that the position adopted by him in the previous case would require to be reconsidered in consequence of the decision in (1902) 24 All., 429. The same view was taken by the Calcutta High Court in (1906) 4 C.L.J., 211; (1908) 35 Cal., 979; (1909) 13 C.W.N., 513, although 35 Cal., 979 might be explicable if the distinction adopted by SANKARAN NAIR, J., be correct. This Court also has held that a ground of attack or defence which a party omitted to bring forward in an earlier suit might be taken to have been decided in the suit. See (1898) 21 Mad., 91; (1908) 31 Mad., 385."

"Assuming by the term 'subject-matter' is meant the relief claimed by the plaintiff, * * * we feel constrained to dissent from the decision of BANERJEE, J., in 24 Cal., 711 and from the later ruling, 28 Cal., 17, which approved of that decision. Section 11 bars the trial not only of suits but of issues, and no issue can be tried in which the matter in issue has been in issue in a former suit between the same parties and heard and decided. * * *. The only logical result is to hold that the decision in the former suit must be regarded as an adjudication either expressly or by implication of all matters directly and substantially in issue in that suit"—(1914) 24 I.C., 931 (Punjab).

In (1913) 20 I.C., 890 (Punj.) the only difference between the two suits was that the one was for declaration, the other for possession, and this was held to be immaterial.

See also (1901) 29 Cal., 252; 1 C.L.J., 337.]

[24 Cal. 715]

The 16th March, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE AND MR. JUSTICE BANERJEE

Hari Mohan Shaha............Plaintiff

versus

Baburali...........Defendant.*

Limitation Act (XV of 1877), Schedule II, Article 144 Suit for possession of land by an auction-purchaser, who obtained symbolical possession—Code of Civil Procedure (Act XIV of 1882), sections 318 and 319—Limitation Act, Article 138.

In a suit for possession of land by an auction-purchaser who had obtained symbolical possession, the defendant objected that the suit was barred by limitation, it not having been brought within twelve years from the date of the auction-purchase.

Held, that article 144, schedule II of the Limitation Act (XV of 1877) applied to the case, and that as the suit was brought within twelve years from the date when the auction-purchaser obtained symbolical possession it was not barred by limitation.

THIS appeal arose out of an action for declaration of title to, and for possession of, a piece of land. The plaintiff's allegation [716] was that he had purchased the property in dispute at an execution sale, and having obtained symbolical possession had gone to take actual possession when he was obstructed by the defendant, and hence the suit. The defendant mainly contended that the suit was barred by limitation, inasmuch as it was not brought within twelve years from the date of the auction purchase. The Munsif dismissed the suit, holding that it was barred by limitation under article 138,

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* Appeal from Appellate Decree No. 773 of 1895, against the decree of Baboo Gopal Chandra Chaki, Subordinate Judge of Dacca, dated the 23rd of January 1895, affirming the decree of Babu Romesh Chundra Bose, Munsif of Dacca, dated the 23rd of April 1894.

schedule II of the Limitation Act. On appeal, the learned Subordinate Judge affirmed the decision of the lower Court.

Against this judgment the plaintiff appealed to the High Court.

Babu *Saroda Churn Mitter* for the Appellant.

Moulvie *Mustafa Khan* for the Respondent.

Babu *Saroda Churn Mitter.*—The Lower Appellate Court relies upon the case of *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (I. L. R, 10 Cal., 402), which has been overruled by the Full Bench case of *Joggobundhu Mitter* v. *Purnanund Gossami* (I. L. R., 16 Cal., 530), which follows the Full Bench case of *Juggobundhu Mookerjee* v. *Ram Chunder Bysack* (I. L. R., 5 Cal., 584). Symbolical possession gives the plaintiff in this case a fresh start for limitation, see *Lokessur Koer* v. *Purgun Roy* (I. L. R., 7 Cal., 418), *Shama Charan Chatterjee* v. *Madhub Chandra Mookerji* (I. L. R., 11 Cal., 93) and *Sevu* v. *Muttusami* (I. L. R., 10 Mad., 53).

Moulvie *Mustafa Khan* for the respondent —The present case is distinguishable from the cases of *Joggobundhu Mitter* v. *Purnanund Gossami* (I. L R. 16 Cal., 530), and *Joggobundhu Mukerjee* v. *Ram Chunder Bysack* (I L. R. 5 Cal., 584), and the distinction has been authoritatively recognized in the case of *Lakshman* v. *Moru* [I. L R., 16 Bom., 722 (728)]. Both the Full Bench cases of the Calcutta High Court are cases in which only symbolical possession could have been given, and do not cover a case of this kind where the property in dispute is a house occupied by the judgment-debtor. The *ratio decidendi* of the Full Bench case of *Joggobundhu Mitter* v. *Purnanund Gossami* (I. L. R. 16 Cal., 530) is that [717] the only mode in which the Court can give the purchaser possession as against the judgment-debtor is symbolical possession, and it is effective for all purposes. In that case the property in dispute was not in actual possession of the judgment-debtor, and therefore the possession obtained by the auction-purchaser under section 319 of the Code of Civil Procedure was considered sufficient to save limitation. In the present case the judgment-debtor, being in actual possession of the property, the symbolical possession obtained by the auction-purchaser under section 319 of the Code of Civil Procedure was no possession according to law. That being so, the suit is barred by limitation.

The following **judgments** were delivered by the High Court (MACLEAN C. J., and BANERJEE, J.):—

Maclean, C. J. —I think the Subordinate Judge in this case is in error. He decided the case upon the authority of the case of *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (I. L. R., 10 Cal., 402,) but that case has been reversed by the decision in the case of *Joggobundhu Mitter* v. *Purnanund Gossami* (I L. R., 16 Cal., 530), and the latter case is certainly consistent with the principle of the cases of *Joggobundhu Mukerjee* v. *Ram Chunder Bysack* (I. L. R., 5 Cal., 584), *Lokessur Koer* v. *Purgun Roy* (I. L. R., 7 Cal., 418), *Sevu* v. *Muttusami* (I. L. R, 10 Mad., 53), and *Shama Charan Chatterji* v. *Madhab Chandra Mookerji* (I. L. R., 11 Cal., 93).

It is urged by the respondent's Vakil that this case is distinguishable from those to which I have referred by reason of the fact that in some of those cases the tenants were in possession, in which case section 319 of the Code of Civil Procedure was the proper one under which to take or to give symbolical possession. He says that those cases are distinguishable from the present by reason of the fact that in this case the judgment-debtor was in possession, and therefore actual possession ought to have been given under section 318 of the Code, and not symbolical possession under section 319. But be that as it may, we have the fact which cannot be got over, that possession, call it symbolical possession if you will, was given by a Civil Court in this case [718]

to the plaintiff, and in the case of *Lokessur Koer* v. *Purgun Roy* (I. L. R., 7 Cal., 418) it was laid down that the formal possession given by a Civil Court under an execution operates in point of law and of fact, as between the parties, as a complete transfer of possession from one party to the other. In this case, it seems clear that symbolical possession which in law is possession, was given on the 8th November 1881. It may be that it was wrongly given by reason of the fact that actual possession ought to have been given under section 318 of the Code, but still possession was given to the plaintiff by a Civil Court; and, under the circumstances, it seems to me that the period of limitation must begin to run from the date of that possession being given, which was the 8th November 1881, in which case the plaintiff is within time. I think the appeal must be allowed, and the case remanded to be tried on its merits. The costs will abide the result.

Banerjee, J.—I am of the same opinion. The learned Vakil for the respondent seeks to distinguish the present case from the case of *Joggobundhu Mitter* v. *Purnanund Gossami* (I. L. R., 16 Cal., 530), in this way, that whereas, in that case the property in dispute was in the possession of tenants, and could be taken possession of by the purchaser at the execution sale only under section 319 of the Code of Civil Procedure, the property in dispute in the present case was in the actual possession of the judgment-debtor himself, and so possession of it should have been taken by the execution-purchaser, not under section 319 but under section 318 of the Code; and as the plaintiff, the execution-purchaser, did not proceed to take possession under the last mentioned section as he ought to have done, formal or symbolical possession given to him under section 319 must be treated as a nullity and as having no effect in giving him a fresh cause of action by reason of the judgment-debtor continuing in possession, so far as the law of limitation was concerned. But on referring to the case of *Joggobundhu Mitter* v. *Purnanand Gossami* (I. L. R., 16 Cal., 530) I find that neither the learned Judges, who referred the cases to a Full Bench doubting the correctness of the decision in the case of *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (I L. R., 10 Cal., 402), nor the learned Judges [719] who composed the Full Bench, laid any stress, in their decisions, upon the distinction on which reliance is placed by the learned Vakil for the respondent. The correctness of the decision in the case of *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (I.L.R., 10 Cal., 402) was doubted in the referring order, and the decision of the Full Bench accepts the view of the referring Judges as may be gathered from the following passage: "The case noticed by the Division Bench, which referred this question to the Full Bench, *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (I. L. R., 10 Cal., 402) was decided without reference to the earlier Full Bench case, which was apparently not brought to the notice of the Judges." Moreover, in the cases of *Lokessur Koer* v. *Purgun Roy* (I. L. R., 7 Cal., 418) and *Shama Charan Chatterji* v. *Madhab Chandra Mookerji* (I. L. R., 11 Cal., 93), which were both cases in which symbolical possession had been taken by the decree-holder of property of which the judgment-debtor was actually in possession, and of which, therefore, actual possession could have been taken by the decree-holder, it was held, notwithstanding that fact, that the formal possession given to the decree-holder was sufficient possession as against the judgment-debtor. As for the case of *Lakshman* v. *Moru* (I. L. R., 16 Bom., 722), relied upon for the respondent, it is enough to say that it does not decide the present question. Mr. Justice TELANG points out at the conclusion of his judgment that for several reasons it was not necessary to determine the question now raised. I think the weight of authority is clearly in favour of the view contended for by the learned Vakil for the appellant. And reason also appears to me to be in favour

of the same view. For though actual possession might have been taken by the execution-purchaser in this case, still as he obtained possession in some form, through an officer of the Court, and by process of law, and as the judgment-debtor was, and must be taken to have been, a party to the proceeding relating to the taking of possession, it is not open to the judgment-debtor to say that the whole proceeding should be taken as a nullity, and that the execution-purchaser should still be treated as one who has never obtained any possession at all. If, after the date on which symbolical possession was given to the auction-purchaser, the [720] judgment-debtor continued in possession, his possession became that of a trespasser from that date, and gave the execution-purchaser a fresh cause of action, a suit upon which should be governed by article 144 of schedule II of the Limitation Act. And reckoning the period of limitation from the date of delivery of symbolical possession, this suit is quite in time.

Appeal allowed. Case remanded.

S. C. G.

NOTES.

[Symbolical possession, when given, gives rise to a fresh cause of action :—(1907) 17 M.L.J., 598 ; (1906) 28 All., 722 : 3 A.L.J., 504 ; (1907) 6 C.L.J., 472 ; (1900) 25 Bom., 275; (1901) 25 Bom., 358 ; (1910) 33 All., 224 ; (1912) 17 I.C., 518 (All.) ; (1913) 24 I.C., 850 (Nagpur) dissenting from 36 Bom., 373.]

[24 Cal. 720]

The 2nd April, 1897.

PRESENT :

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE AND MR. JUSTICE BANERJEE.

Kishori Mohun Roy Chowdhry and others............Plaintiffs

versus

Nund Kumar Ghosal and others...........Defendants.*

Landlord and tenant—Notice to quit—Suit for ejectment—Tenancy reserving an annual rent—What notice a raiyat holding an annual tenancy is entitled to.

In a tenancy created by a *kabuliat* with an annual rent reserved, the tenant is entitled to six months' notice expiring at the end of a year of the tenancy before he can be ejected.

THIS appeal arose out of an action brought by the plaintiffs to obtain *khas* possession of land by pulling down a *pucca poshta* and a *ghat* built by the defendants without the plaintiffs' consent and permission. The allegation of the plaintiffs was that the predecessor in title of the defendants took a settlement of the land by giving a registered *kabuliat* on the 14th Pous 1294 B. S., and since his death the defendants have been in possession of the said land as *karsa raiyats* or tenants-at-will ; that the defendants without the knowledge and consent of the plaintiffs built *pucca* structures on the land, and having thus altered its condition, made themselves liable to be ejected ; that a notice was served in the month of Joist last directing the defendants to demolish the *poshta* and the *ghat*, and to give up the land in the month of Assar last, and they having failed to do so, the present suit was brought. The defendants *inter alia* pleaded that there was no relationship of landlord and tenant, that there was no sufficient notice, that the *poshta* and the *ghat* were built openly and with the knowledge of the plaintiff, and therefore the suit

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* Appeal from Appellate Decree No. 998 of 1895, against the decree of S. J. Douglas, Esq., District Judge of Dacca, dated the 7th of March 1895, reversing the decree of P. N. Banerjee, Esq., Subordinate Judge of that district, dated the 31st of July 1893.

ought to fail. [721] The Court of First Instance gave the plaintiffs a decree. On appeal, the learned District Judge dismissed the suit, holding that the notice to quit was not sufficient, and that the plaintiffs allowed the defendants to erect *pucca* buildings on the land without any objection. From this decision the plaintiffs appealed to the High Court.

Mr. *C. P. Hill*, Babu *Bussunt Coomar Bose* and Babu *Jogendra Chunder Ghose* for the Appellants.

Mr. *Woodroffe* and Babu *Hari Mohun Chuckerbutty* for the Respondents.

Mr. *Hill*.—There is no provision for notice, except what is provided for in section 106 of the Transfer of Property Act. Where there is no contract, there is no provision for notice. This case does not come under section 106 of the Transfer of Property Act. Notice must be a reasonable one—see *Radha Gobind Koer* v. *Rakhal Das Mukherji* (I.L.R., 12 Cal., 82 (89)). The question is whether for the purpose of a shop-keeper's business two months' notice is a reasonable one. I submit it is. The defendants having denied the landlord's title no question of sufficiency of notice arises in this case. It is not a question of forfeiture, but the question is whether proof of notice is dispensed with, which otherwise it would have been incumbent upon the plaintiffs to prove. In such cases it is not necessary for the plaintiff to prove service of notice -see *Baba* v. *Vishvanath Joshi* (I. L. R., 8 Bom., 228), *Gopalrao Ganesh* v. *Kishor Kalidas* (I. L. R., 9 Bom., 527).

Mr. *Woodroffe* for the respondent.—The case does not come under section 106 of the Transfer of Property Act. The respondents are entitled to six months' notice terminable at the end of the year--see the case of *Rajendro Nath Mookhopadhya* v. *Bassider Rahman* (I. L. R., 2 Cal., 146 : 25 W. R., 329).

Mr. *C. P. Hill* in reply.

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

Maclean, C.J.—There have been two or three points argued [722] in this appeal, but the principal one is whether the plaintiffs are entitled to eject the defendants from certain land held by the latter under the *kabuliyat* set out at pages 25 and 26 of the paper-book. That question depends again upon whether adequate notice to quit was given by the plaintiffs to the defendants. All we have to decide, and all we intend to decide, is whether the notice was a good and sufficient notice so as to entitle the plaintiffs to recover possession of the property in question from the defendants. I do not propose to repeat the history and the facts of the case which are set out very fully in the judgment of the Court below, nor is it necessary, for the point is a very short one. It appears from the lease that the defendants became lessees of this property, for which they were to pay an annual rent of Rs. 5 by four instalments and take annual *dakhilas* for the same.

The first question is, what was the nature of the tenancy created by that document. In my opinion it was a tenancy reserving an annual rent. We do not decide whether the tenancy was or was not a permanent one. I say that because it has been suggested there may hereafter be a question as to that, and possible litigation in respect of it. Taking it then to be a tenancy with an annual rent reserved, in other words an annual tenancy (but not using that term so as to prejudice any question hereafter as to whether or not it is a permanent tenure), the question is whether the notice to quit was good and sufficient.

The defendants contend that they were entitled to six months' notice. Six months' notice admittedly was not given in this case.

In considering this question both Mr. *Hill* and Mr. *Woodroffe* agree that section 106 of the Transfer of Property Act has no application to the case. That being so, what in a tenancy of this nature is a reasonable notice to which the tenant is entitled before he can be ejected? It is conceded by Mr. *Hill* that according to English law in the case of a similar tenancy there must be six months' notice expiring at the end of the year of the tenancy. Apparently there is no direct authority upon the point in the Indian Courts, though Mr. *Woodroffe* relied upon the case of **[723]** *Rajendronath Mookhopadhya* v. *Bassider Ruhman* (I. L. R., 2 Cal., 146). But, as pointed out by Mr. *Hill*, that case really does not cover the present case. It only lays down this: "That a *raiyat* whose tenancy can only be determined by a reasonable notice to quit, expiring at the end of the year, can claim to have a suit for ejectment brought against him by his landlord dismissed on the ground that he has received no such notice." There being no authority to the contrary in this country we see no reason, nor has any reason been suggested, why the rule of English law should not be applicable to such a tenancy as the present in this country, and we think that six months' notice, terminating at the end of the year of the tenancy is the notice to which a tenant, under such a tenancy as that in this case is entitled. Though the case does not come within section 106 of the Transfer of Property Act, our view is consistent with the principle of that section in regard to tenancies in which a yearly rent is reserved.

In this case six months' notice not having been given the suit fails.

As we have intimated in the course of the argument, we do not think that we ought to allow the appellant to go into the question not raised in either of the Courts below, viz., whether the defendants having denied the plaintiffs' title, if in their written statement they did in fact deny it, which Mr. *Woodroffe* does not admit, the plaintiffs were bound to prove any notice to quit. That question is not now before us.

One other point—a subsidiary point—remains, and it is this: It is contended on behalf of the appellants that the plaintiffs are entitled to re-enter now, by reason of the fact that the defendants without their lessor's consent, have erected certain structures upon the land of a permanent nature, and he calls in aid sub-section "B" of section 108 of the Transfer of Property Act, but as pointed out by Mr. *Woodroffe* that section only applies in the absence of a contract to the contrary. But even if that were not so, on the face of the finding of the Lower Appellate Court, that the plaintiffs acquiesced in the erection of these structures, I do not think that that contention can successfully be raised. It was but faintly argued before us. Upon this point it may be **[724]** mentioned that there is no condition of re-entry in the lease for breach of any covenant in it.

On these grounds I am of opinion that the appeal fails, and must be dismissed with costs.

Banerjee, J. -I also am of opinion that this appeal and plaintiffs' suit should be dismissed, and dismissed upon the sole ground that there has not been any notice to quit such as, upon any view of the case, was necessary. The tenancy was created by a *kabuliyat*, that is by an express contract, and it was admitted on both sides that the case was outside the scope of section 106 of the Transfer of Property Act. Proceeding upon that assumption, and without determining, as it is unnecessary to determine, what the exact nature of the tenancy is, I think it must be at least held that the tenancy was one reserving a yearly rent, and the year of the tenancy commenced on the 14th day of Pous 1294.

Assuming that the tenancy is at all terminable by a notice to quit, the question is what ought the nature of the notice to be; and I think that the

notice in such a case ought at least to be a six months' notice expiring with the year of the tenancy. Although section 106 may not apply to the case, it shows that the Legislature in this country has not thought fit to depart from the rule of English law that a yearly tenancy can only be terminated by a six months' notice. Moreover, the rule that requires that a terminable tenancy from year to year should have as a condition for its determination a notice expiring with the year of the tenancy, is a rule that is founded upon a very good reason. It prevents dispute as to the apportionment of the rent.

For these reasons I think that the notice, if the tenancy is at all terminable by a notice to quit, ought to be a six months' notice expiring with the end of a year of the tenancy.

As the notice here does not satisfy this condition, the suit, I think, has been rightly dismissed.

S. C. G. *Appeal dismissed.*

NOTES.

[This was followed in (1901) 29 Cal., 208. 6 C W.N., 69; (1901) 5 C.W.N., 801; (1904) 8 C.W.N., 774.

See also (1899) 26 Cal., 761 where six months' notice was not held to be a hard and fast rule.

An inappreciable interval between the year of tenancy and the expiry of notice was held insufficient:—(1900) 27 Cal., 570; (1909) 36 Cal., 927: 13 C.W.N., 949.]

[725] FULL BENCH.

The 1st, 2nd, and 3rd February, and 12th March, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, MR. JUSTICE O'KINEALY, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN AND MR. JUSTICE BANERJEE.

Jogodishury Debea.. ....Defendant No. 1

versus

Kailash Chandra Lahiry and others...........Plaintiffs.*

Partition—Estates Partition Act (Bengal Act VIII of 1876)—Partition of revenue-paying estate—Jurisdiction of Civil Court—Code of Civil Procedure (Act XIV of 1882), sections 265, 396—Order appointing a Commission to effect partition after preliminary decree—Appeal—Interlocutory order—Effect of not appealing from order—Civil Procedure Code, section 244.

Section 265 of the Code of Civil Procedure does not apply to a suit for partition of a revenue-paying estate when no separate allotment of revenue is asked for. A Civil Court, therefore, has jurisdiction to decree partition in such a case; and a suit for possession, after partition, of a share in part of an undivided estate, in which part alone the plaintiff has a share, is maintainable in a Civil Court if no division of revenue is sought.

* Full Bench Reference in appeal from Appellate Decree No. 244 of 1895, against the decree of J. F. Bradbury, Esq., District Judge of Pubna and Bograh, dated the 21st of September 1894, modifying the decree of Babu Krishna Chunder Dass, Subordinate Judge of that District, dated the 30th of January 1894.

Debi Singh v. *Sheo Lall Singh* (I. L. R., 16 Cal., 203), approved and followed; *Meherban Rawoot* v. *Behari Lal Barik* (I. L. R., 23 Cal., 679), overruled.

Held, also (per O'KINEALY, MACPHERSON, TREVELYAN and BANERJEE, JJ.) that an order passed in a suit for partition, subsequently to the preliminary decree appointing a commission to make the partition, is not an order in execution, and, therefore, is not appealable under section 244 of the Civil Procedure Code. It is an interlocutory order pending the suit which has not been finally decided; and the appellant may take objection to it in an appeal against the final decree.

THIS case was referred to a Full Bench by MACPHERSON and HILL, JJ., in the following terms:—

"This suit, which has been going on since May 1888, has been on several occasions before the District Court on appeal. The parties to it are some of the proprietors of a revenue-paying estate, the *mouzahs* of which have been divided among the [726] different proprietors, but are still jointly charged with the whole revenue. The suit is for the partition of the land of the eight *mouzahs* in which the plaintiff and the defendants are jointly interested to the extent of the shares specified in the schedule to the plaint. The proprietors of the other *mouzahs*, not being interested in these eight *mouzahs*, are not made parties to the suit. The object of the suit is not to have the parent estate divided into several separate estates, or to effect any division of the revenue, but to have the land of the eight *mouzahs* divided among the persons jointly interested in them proportionately to their respective shares.

"All the defendants, except the first and tenth, whom we will call the opposing defendants, acquiesced in the partition. The second defendant, who is the husband of the first, is also said to have been in the opposition, but it is found that he had no interest in the property, and his name does not appear among the appellants in the different stages of the case.

"The opposing defendants objected in the first instance that the Civil Court had no power to make the partition asked for, and that the plaintiff did not ask for the partition of a certain *julkur* in the *mouzahs*. On the 8th December 1888 the Subordinate Judge overruled these objections and made a decree directing the partition prayed for. The opposing defendants appealed, but the decree was confirmed by the District Court on the 5th June 1889. An Amin of the Court then made the partition under the Court's order. Among the objections taken to his report was one that certain land had been included in the partition which was not in the possession of the other share holders. This was overruled in November 1891, and on the 10th May 1892 the Subordinate Judge made a decree confirming the partition.

"The opposing defendants appealed; and one of their objections apparently related to the objection taken to the Amin's report, although the particulars do not precisely tally. It was, that certain land within the survey limits of Pinderhati, one of the *mouzahs* under partition, had been improperly included in the partition, as it had for a long time been in the exclusive possession of the first defendant and the other owners of the adjoining *mouzah* which was not under partition. The Judge, finding that [727] there was no evidence on which he could say whether this objection was or was not well founded, directed that this disputed land, after its boundaries and extent had been ascertained, should be separated from the rest of Pinderhati, and that a section of it should be assigned to each co-owner of Pinderhati corresponding with his interest in that *mouzah*. This he did to obviate any injury to those share-holders to whom the greater part of the land had been allotted, in the event of its being afterwards found to be part of Tahat. He at the same time directed that the expense of the inquiry should be borne

by the first defendant Jogodishury. A revision of the partition in some other respects, which it is not necessary to notice, was also ordered. This was on the 2nd August 1893.

"On the 30th January 1894 the Subordinate Judge, after revising the partition, made a final decree. He says that, as Jogodishury had not deposited the costs of the inquiry directed, he was unable to comply with the part of the remand order above referred to, and that he overruled her objection that the land of Tahat had been included in the partition, as she had adduced no evidence in support of it. This matter, therefore, stood as it was before.

"The opposing defendants again appealed to the District Court, with the result that the partition was slightly altered. They now appeal against the decree of the Appellate Court, but there is no reference in the Appellate Court's last judgment to any of the questions raised.

"Those questions are three in number. *First*, that, having regard to the provisions of section 265, read with section 396 of the Civil Procedure Code, the Court had no power to make a partition of the land of a revenue-paying estate, and that the partition should have been made by the Collector. *Second*, that the partition is incomplete, as the *julkur*, which was the subject of objection before the preliminary decree for partition was made, has been left undivided: it is argued that if it could not have been divided, it should have been given in entirety to one or other of the shareholders, the others being compensated in some other way. *Third*, that the partition is bad, as a partition can only be made of land which is in the actual or constructive possession [728] of the parties, and the disputed land of Tahat should not have been included. The respondents say they were quite justified in not paying the cost of the inquiry directed, as they objected to the whole order of the Judge with reference to the land claimed as part of Tahat land.

"On the first question there are conflicting decisions of this Court which in our opinion render a reference to a Full Bench necessary. In *Debi Singh* v. *Sheo Lall Singh* (I. L. R., 16 Cal., 203), PETHERAM, C.J., and BANERJEE, J., held that the Civil Court could partition the land of a revenue-paying estate, but could not partition the revenue. In other words, it could not partition the entire estate into several revenue-paying estates, but it could partition the land of the estate, provided that there was no allotment of the revenue, and that the entire land comprised in the estate continued liable as before for the entire revenue. This was the construction put upon section 265 of the Civil Procedure Code which was held to apply only to cases in which a complete partition of land and revenue was sought.

"In *Meherban Rawoot* v. *Behari Lal Barik* (I. L. R., 23 Cal., 679), TREVELYAN and BEVERLEY, JJ., held that under section 265 of the Code, the Civil Court could not partition the land of a revenue-paying estate, even if no partition of the revenue was asked for. That we think was the undoubted effect of their judgment. It is clear that no division of the revenue was asked for in that case, and in so far as it concerned the application of section 265, it was treated as immaterial whether it was or was not asked for, as in either case it was considered the Civil Court could not make the partition. It is true that the learned Judges distinguish and do not dissent from the decision in *Debi Singh* v. *Sheo Lall Singh* (I. L. R., 16 Cal., 203); but, with due deference, we are unable to see the distinction in the principle of the decision, although there may be some distinction in the facts of the case. It is clear that the case of *Debi Singh* v. *Sheo Lall Singh* (I. L. R., 16 Cal., 203) was decided on the construction of the section as to the power of a Civil Court to

make a partition of the land of a revenue-paying estate, when no separate allotment of the land was asked for. The circumstance that part of [729] the land sought to be partitioned was held as a *mokurari* tenure is not remotely alluded to, and if it had been, it would not, we think, have made the partition of the revenue-paying land any the more admissible if section 265 applied. In our opinion the two cases conflict in the construction of section 265.

"It was argued that, as the appellants did not appeal against the preliminary decree for partition, when it was held that the Civil Court could make the partition, they cannot appeal on that ground against the final decree. A decree for partition and a decree for an account are, we think, on the same footing in the sense that both are decrees from which an appeal will lie. It is difficult, therefore, to reconcile the decisions in *Boloram Dey* v. *Ram Chundra Dey* (I. L. R., 23 Cal., 279) and *Biswa Nath Chaki* v. *Bani Kanta Dutta* (I. L. R., 23 Cal., 406).

"The present objection goes, however, to the jurisdiction of the Court to make, and therefore to confirm, a partition. The preliminary decree, moreover, merely directed a partition, and not that it should be made.

"The question which we refer is whether, having regard to the provisions of section 265 of the Civil Procedure Code, the Civil Court can make a partition of land of a revenue-paying estate when no separate allotment of the Government revenue is asked for."

Dr. *Rash Behari Ghose* (with him Babu *Baikanta Nath Dass* and Babu *Kishori Lall Sircar*) for the Appellant.

Mr. *Woodroffe* (with him Babu *Srinath Das*, Babu *Saroda Churn Mitter*, and Babu *Mohini Mohon Chuckerbutty*) for the Respondents.

Mr. *Woodroffe* raised a preliminary objection that the case had not been properly referred; but the Court informed him that that difficulty had been foreseen, and that the learned Judges had made an order referring the appeal. He also submitted that the question referred did not arise; and that the Court that heard the appeal ought to have held that the appeal was barred by limitation. Their Lordships, however, called on the appellant's pleaders to open the case.

[730] Dr. *Rash Behari Ghose*.—The Civil Court had no power to issue the commission for partition; because, whether the action was for complete partition of the estate or not within section 265 of the Code, it certainly was an action for the partition of immoveable property paying revenue to the Government. The fact that this suit was for partition of an undivided share of the estate is immaterial. For the purposes of section 265 of the Code, the word "estate" is not to be limited to the sense in which it is used in the Partition Act, but is to be construed in its ordinary signification: *Secretary of State for India* v. *Nundun Lall* (I. L. R., 10 Cal., 435).

But even if the case does not come under section 265 of the Code, the jurisdiction of the Civil Court is limited by section 396; and if it does not fall within section 396, the issue of a commission would have been an incompetent proceeding.

The current of authorities, with the exception of *Debi Singh* v. *Sheo Lall Singh* (I. L. R., 16 Cal., 203), has been in favour of the proposition that no partition can be effected through the Civil Court: *Badri Roy* v. *Bhugwat Narain Dobey* (I. L. R., 8 Cal., 649). [O'KINEALY, J.—That was a decision under Act X of 1877, in which the words were quite different. They were the same as in Act VIII of 1859, but were changed in Act XIV of 1882.] In that action the parties sued only for partition of the land; they did not ask for allotment

of the revenue. And the power of the Court is not enlarged by the Civil Procedure Code because it is still limited by section 11 of the Partition Act which restricts the right of a person to claim partition of a revenue-paying estate. A suit for partition of portion only of a revenue-paying estate is not maintainable; *Ramjoy Ghose* v. *Ram Runjun Chuckerbutty* (8 C. L. R., 367). The Civil Court can only declare the rights of the parties, the law leaves it to the Collector to give due effect to any order passed by a decree of the Civil Court; *Zahrun* v. *Gowri Sunkar* (I. L. R., 15 Cal., 198). That decision is no authority for the proposition laid down in *Debi Singh* v. *Sheo Lall Singh* (I. L. R., 16 Cal., 203) that the Collector makes a decree for partition only where the parties seek both a partition of the lands and a division of the revenue; on the contrary, it is an authority in my favour.

[731] The Bombay High Court has consistently refused to recognise any power in the Civil Court to partition revenue-paying lands *Dattatraya Vithal* v. *Mahadaji Parashram* (I. L. R., 16 Bom., 528), *Shrinivas Hanmant* v. *Gurunath Shrinivas* (I. L. R., 15 Bom., 527), *Deb Gopil Savant* v. *Vasudev Vithal Savant* (I. L. R., 12 Bom., 371), and the Madras High Court acts upon the same principle: *Ramanuja Ayyangar* v. *Virappa Tevan* (I L. R, 6 Mad., 90) and *Mutturayyangar* v. *Kudalalagayyangar* (I. L. R., 6 Mad., 97). [*Meherban Rawoot* v. *Behari Lal Barik* (I. L. R., 23 Cal., 679), was also relied on.]

Mr. *Woodroffe* for the Respondents.—All the cases cited on behalf of the appellant, so far as they bear on the question, are cases decided under Act VIII of 1859. Under that Act no order was appealable, but was open to question in the final appeal; whereas, under the present law, most orders are appealable, and cannot be questioned separately in the appeal against the final decree. The decision in the present case is a decree within section 2 of the Civil Procedure Code, it is an adjudication on the question of the right to a partition. If it is severable, then it was an order carrying out a decree, and therefore it was appealable under section 244 and therefore cannot be questioned under section 591 in final appeal. The case of *Gyan Chunder Sen* v. *Durga Churn Sen* (I. L. R., 7 Cal., 318) shows that an order such as this is an order under section 396, and is therefore not appealable. Where an Appeal Court directs a commission to issue to an Amin to make a partition and allot the shares to the parties to the suit, such order amounts to a decree: *Bepin Behari Moduck* v. *Lal Mohun Chattopadhya* (I. L. R., 12 Cal., 209), *Bhola Nath Dass* v. *Sonamoni Dasi* (I. L. R, 12 Cal., 273), though the case immediately following in the same volume differs, *Bhoobun Moyi Dabea* v. *Shurut Sundery Dabea* (I. L. R., 12 Cal., 275), and in the case of *Dulhin Golab Koer* v. *Radha Dulari Koer* (I. L. R., 19 Cal., 463), the Full Bench decide that an order declaring the rights of the parties and directing partition is a decree within section 2 of the Code, and is therefore appealable as a decree.

Next, the words "estate paying revenue to the Government," [732] must be taken in their meaning as shown by the statutory use of the expression. They mean what is defined or expressed in the Partition Act. The Civil Courts have the power to partition "estates"; but the Collectors never had the power to do anything but effect a complete partition, that is, to allot the shares on the lands, and to apportion the revenue as well.

Section 265 of the Civil Procedure Code does not apply to a part of an estate. It is admitted that the property sought to be partitioned here is part of an estate, and that no apportionment of the revenue is asked for. Under these circumstances the Civil Court can clearly entertain the suit; *Shama Soonduree Debia* v. *Puresh Narain Roy* (20 W. R., 182), *Chunder Nath Nundi* v. *Hur*

Narain Deb (I. L. R., 7 Cal., 153); and see the cases collected in Broughton's Commentary on the Civil Procedure Code, in the notes to section 11.

Dr. *Rash Behari Ghose* in reply.

C. A. V.

The following **judgments** were delivered by the Full Bench:—

Maclean, C. J.—The question for our decision is: " Whether, having regard to the provisions of section 265 of the Civil Procedure Code, the Civil Court can make a partition of land of a revenue-paying estate when no separate allotment of the Government revenue is asked for."

A preliminary objection has been raised that no appeal lies in this case. It becomes necessary, therefore, to ascertain what the proceedings in the suit have been. The appealing defendant raised the objection in his written statement that the suit ought to have been brought in the Collectorate and not in the Civil Court. This point was decided against him both by the Subordinate Judge and by the District Judge. On the 8th December 1888 the Subordinate Judge made an interlocutory decree for partition, which was affirmed by the District Judge on the 6th June 1889. This decree, in my opinion, was a decree within the meaning of section 2 of the Code of Civil Procedure, and was appealable.

This decree apparently did not indicate by whom the partition was to be effected, whether by the Collector or by an Amin.

[733] It was assumed on the hearing of the appeal that the Civil Court Amin was appointed by an order of the Munsif, dated the 30th November 1889, and the argument on both sides proceeded on that footing. I, however, have sent for the file of the proceedings, and find as a fact that the Amin was not appointed by that order, and that it is not very clear upon the proceedings when or by whom he was appointed. The partition, however, was effected by the Amin, and he made his final report on the 15th February 1892. The defendant never objected until this appeal to such appointment. On the contrary, he treated the appointment as good, and from time to time challenged the conclusions and findings of the Amin. There has been much litigation over the Amin's report, but on the 30th January 1894 the Subordinate Judge made a final decree, which was substantially affirmed by the District Judge on the 22nd September 1894. For five or six years, therefore, the partition proceedings have been going on by the Amin, much time has been expended and much expense incurred. It is now urged for the first time on this appeal, which was filed on the 2nd February 1895, that all those proceedings are irregular, and that the Collector and not a Civil Court Amin ought to have made the partition. Inasmuch as it is not clear, when or by whom the Amin was appointed, or by whose order, I am not disposed to say finally whether any such order is or is not appealable; nor is it of any moment that I should do so, having regard to the view I take of the merits of the case; nor is it necessary to decide whether or not it is too late now for the defendant to raise the point. I may point out, however, that there is nothing to show that he ever objected to the appointment of the Amin; on the contrary, he appears to have completely acquiesced in the proceedings, and if it were necessary to decide the point, it might be difficult to distinguish the present from the case of *Gyan Chunder Sen* v. *Durga Churn Sen* (I. L R., 7 Cal., 318), a case which appears to me to be based upon a sound equitable principle and to be consonant with common sense. I need scarcely point out the grave inconvenience and probable injustice which would result from any other conclusion. It would mean that partition proceedings under an interlocutory decree might go on without any

objection for years [734] by an Amin, and then when concluded, after much time and money has been expended, the whole of the proceedings might be set aside as irregular, on the ground that the partition ought to have been made by the Collector and not by an Amin, although the appointment of the latter had never been objected to. I think a Court of Justice should struggle against so impotent a conclusion. To obviate in future the possibility of so unfortunate a result, I think the Judges making interlocutory decrees in partition suits should indicate clearly upon the face of them whether the partition is to be made by the Collector or by a Civil Court Amin. From the case I have already cited this apparently is what they should do. But as I have said before, in my view of the construction of section 265 of the Civil Procedure Code, the above considerations, *quoad* the present case, become quite academical.

Upon the merits of the appeal, in my opinion, the present suit is not "for the partition or for the separate possession of a share of an undivided estate paying revenue to Government" within the meaning of section 265 of the Code; in other words, it is not for what is called a "perfect" partition. The suit is one for the partition, not of the parent, or whole estate, but of a part only of the estate, and it does not seek to affect or question any division or payment of the revenue. In my opinion, the words of the section do not apply, and were not intended to apply, to such a case as the present, and I approve of and follow the decision in the case of *Debi Singh* v. *Sheo Lal Singh* (I. L. R., 16 Cal., 203). I do not think that section intended to make it compulsory that the Collector should make the partition, save in cases where as the result of partition the revenue would or might be affected.

The partition in the present case cannot affect the question of revenue. I answer the question submitted by the reference in the affirmative. The appeal must be dismissed with costs.

Trevelyan, J.—The two questions which we have to decide in this case are: First, whether an appeal lies; and, second, whether the provisions of section 265 of the Civil Procedure Code apply. I am satisfied that an appeal lies in this case. The [735] matter of complaint is the appointment of a Civil Court Amin to partition the property. This appointment was not made in the decree which ordered partition, but was made by a subsequent order. That order was, in my opinion, an interlocutory order pending the suit which had not been finally decided. It was not an order in execution, and therefore not appealable as being an order under section 244. I am unable to see how there can be any execution except of a final order or decree which is capable of being enforced against the person or property of a party bound by it. The subsequent proceedings, after an interlocutory decree, are the natural consequence of that decree, but are not, as far as I can see, within the ordinary acceptation of the term, in execution of it. I think there is a clear distinction between acts done in pursuance or in consequence of a decree or order, and acts done in execution of it.

With regard to the second question I am of opinion that section 265 has no application to the present case. That section applies only to a case where the decree comprehends the partition of the whole of an estate paying revenue to Government. A decree for possession of a share of a portion of an undivided estate is not a decree for "possession of a share of an undivided estate" in any sense; and, having special regard to the ordinary meaning of an "estate paying revenue to Government" as including only an estate with a separate *towji* number in the Collector's register, I think that there is the more reason for supposing that the section only applies to a decree for possession of a whole estate. It has been argued that the section only applies in a case where

the plaintiff asks, and the decree provides, for the partition of the revenue. It is in my opinion unnecessary to decide that point upon this reference, as this suit only refers to a share of an estate, but were it necessary to decide it, I would say that there is nothing in the section which so limits its operation. A suitor cannot ask a Civil Court to divide the revenue, and the Civil Court has no power in any way to order or deal with the division of revenue. (See section 29 of Bengal Act VIII of 1876.)

I cannot suppose that the section should have been intended to apply only to a case where a suitor has asked a Civil Court to give him what the Court cannot give him, *i.e.*, a division of the **[736]** revenue and where the Court has complied with that request. It is for the Collector, when an order has been made under section 265, to partition the revenue, not in pursuance of the Civil Court's decree, but in pursuance of the powers given to him by the revenue law.

O'Kinealy, J.--I concur in the judgment delivered by Mr. Justice TREVELYAN.

Macpherson, J.—I am disposed to think that in this case the appellant can, on the appeal against the final decree, raise the question that the partition should have been made by the Collector and not by the Civil Court. He can do so without questioning the legality or propriety of the preliminary decree for partition, as that decree did not direct how the partition was to be made.

Assuming that an appeal lies, the objection that the partition should have been made by the Collector in my opinion fails.

The decree referred to in section 265 of the Civil Procedure Code is, I think, a decree either for the partition of an undivided revenue-paying estate into several separate revenue-paying estates, or for separate possession of a share of an undivided revenue-paying estate to be held as a separate estate—a decree, that is to say, which directs a distribution of the revenue as well as a division of the land wholly or in part. If the words "the separate possession of a share" stood alone, there might be some doubt as to their meaning, but taken with the context they clearly, I think, bear the meaning which I have put upon them.

When no distribution of the revenue is asked for, I am unable to see any distinction between the case in which the plaintiff, being a fractional co-sharer of the whole estate, wants a partition of the land of the whole estate, and a case in which, his interest being limited to some particular portion of the estate, he wants a partition of the land of that portion only. If the section prohibits the Civil Court from making the partition in the one case, it does so, I consider, equally in the other. So long as the revenue remains undistributed there is no partition of the estate, and a person owns a share of an undivided revenue-paying estate, whether his share consists of a fractional part of the whole **[737]** estate or of a fractional part of the land in some specific part of the estate. If the Civil Court is prohibited from making a partition of the land of the entire estate, although the estate itself is not partitioned, the prohibition must be referable to the words "the separate possession of a share of an undivided estate;" but these words would apply as much to a division of the land of a specific part of the estate as to the land of the whole estate.

I am unable, therefore, to see the force of the distinction drawn in the case of *Meherban Rawoot* v. *Behari Lall Barik* (I. L. R., 23 Cal., 679), between that case and the case of *Debi Singh* v. *Sheo Lall Singh* (I. L. R., 16 Cal., 203). The two cases seem to me to conflict on principle, and the latter case was, I think, rightly decided.

Unless it is contained in section 265, there is no law in force in the Lower Provinces of Bengal which prevents the Civil Court from making a partition in whole or in part of the land of an undivided revenue-paying estate so long as there is no distribution of the revenue, and the land of the entire estate remains liable as before for the revenue payable on account of the entire estate. Section 265, in my opinion, contains no such prohibition.

Banerjee, J.—The suit, out of which this reference has arisen, was brought by the plaintiff-respondent for the partition of certain *mouzahs* held jointly by him and the defendants and forming a portion of an estate paying revenue to Government, the plaint distinctly stating that all that is asked for is a division of the land without any division of the revenue. The defendants urged that the suit was not cognizable by the Civil Court, and raised various other objections; but the first Court found for the plaintiff upon all the issues raised, and made what it called an interlocutory decree in his favour on the 8th of December 1888, directing that the property in suit be partitioned between the plaintiff and the defendants, according to the shares mentioned in the plaint. The decree contains no direction as to whether the partition is to be made by the Collector or the Civil Court Amin; but there was an order passed on the same day directing that the partition should be made by an Amin. Some of the [738] defendants preferred an appeal against that decree; but the appeal was dismissed by the District Judge on the 6th of June 1889.

A Commissioner was then appointed to make the partition. The Commissioner made certain allotments of the land. And a decree was made by the first Court on the basis thereof on the 10th of May 1892. This decree was set aside on appeal, and the case remanded to the first Court, and the decree made by that Court after the remand was affirmed with some modification by the decree of the District Judge, dated the 21st of September 1894.

Against this decree the defendant No. 1 has preferred the second appeal now before us, and the only ground urged on her behalf is that the land in suit, being part of an estate paying revenne to Government, the decree for partition could be carried into effect only by the Collector as provided by section 265 of the Code of Civil Procedure, and the partition effected by the Commissioner appointed by the Civil Court must be set aside as illegal.

A preliminary objection is raised on behalf of the plaintiff-respondent that it is not open to the appellant to urge the above ground, firstly, because she did not prefer any appeal against the order of the first Court directing a Commissioner to make the partition, though that order was appealable, and, secondly, because, even if the order was not appealable, she acquiesced in that order, and without taking any exception to it allowed the partition to be made by an Amin.

I am of opinion that the first branch of the preliminary objection must fail. The order of the first Court directing a Commissioner to make the partition was not an appealable order, no appeal being given against any such order by section 588 of the Code of Civil Procedure; and if it was not an appealable order, the mere fact of the defendant No. 1 not having appealed against it cannot stand in the way of her urging the ground now raised.

It was argued by the learned Counsel for the respondents that the order in question being one relating to the execution of a decree for partition, was an order under section 244, and was therefore a decree as defined in section 2; and that consequently it was appealable.

[739] To this argument there are two answers. In the first place, in the view I take of section 265 of the Code, as will be presently stated, I think that

the decree for partition made on the 8th of December 1888, though it determined certain rights of the parties and was appealable as a decree [see *Dulhin Golab Koer* v *Radha Dulari Koer* (I. L. R., 19 Cal., 463)] was not a decree made under that section, nor the final decree in the suit, but was, as the Court that made it properly describes it, an interlocutory decree, and that the order made in the proceedings subsequently taken to effect the partition before the final decree was passed should be treated as an order made in further proceedings in the suit, and not as an order made in execution of decree within the meaning of section 244. [See *Dwarka Nath Misser* v. *Barinda Nath Misser* (I. L. R., 22 Cal., 425).] In the second place, even if the order directing the partition to be made by a Civil Court Amin or Commissioner can be properly viewed as an order made in the execution of a decree, still it cannot, in my opinion, be regarded as an order coming within the scope of section 244, and therefore within the meaning of the term "decree." It is not every order made in execution of a decree that comes within section 244. If that were so, every interlocutory order in an execution proceeding, such as an order granting or refusing process for the examination of witnesses, would be appealable; and far greater latitude would be given of appealing against orders in such proceedings than is allowed as against orders made in suits before decree —a thing which could hardly have been intended. [See *Sree Nath Roy* v. *Radha Nath Mookerjee* (I.L.R., 9 Cal., 773) and *Behari Lal Pundit* v. *Kader Nath Mullick* (I. L. R., 18 Cal., 469).] An order in execution proceedings can come under section 244 only when it determines some question relating to the rights and liabilities of parties with reference to the relief granted by the decree; not when, as in this case, it determines merely an incidental question as to whether the proceedings are to be conducted in a certain way. I may add that the language of section 244 which enacts that certain "questions shall be determined by an order of the Court executing the decree and not by separate suit," clearly indicates that the questions contemplated by the section must be of a nature such that it is possible **[740]** to suppose that but for the section they could have formed the subject of determination by a separate suit. But a question of an incidental character can never come under that description, and an order determining such a question cannot, therefore, be a decree as defined in section 2.

The order under consideration not being in my opinion appealable, it becomes unnecessary to determine the further question raised as to the effect of a party not appealing within time against a decree or an order which is appealable—a question regarding which there is some conflict of authority. See the cases of *Boloram Dey* v. *Ram Chandra Dey* (I. L. R., 23 Cal., 279) and *Biswa Nath Chaki* v. *Bani Kanto Dutta* (I.L.R., 23 Cal., 406), which relate to the effect of not appealing from an order which is a decree within the meaning of section 2 of the Code, and the cases of *Cheda Lal* v. *Badulla* (I. L. R., 11 All., 35), *Savitri* v. *Ramji* (I. L. R., 14 Bom., 232) and *Kanta Pershad Hazari* v. *Jagat Chandra Dutta* (I. L. R., 23 Cal., 335) which relate to the effect of not appealing from appealable orders.

It remains now to consider the question raised in the second branch of the preliminary objection (which, strictly speaking, is not in the nature of a preliminary objection) namely, whether the defendant No. 1, by having acquiesced in the order directing the partition to be made by an Amin, and having allowed the partition to be so made without protest, has precluded herself from urging the point now pressed before us. If the point raised for the appellant that the partition ought to have been made by the Collector and not by an Amin is one of procedure only and not of jurisdiction, then the appellant, having acquiesced in the procedure adopted by the Court of First Instance, cannot

now take exception to it. The case of *Gyan Chunder Sen* v. *Durga Churn Sen* (I. L. R., 7 Cal., 318) is clear authority on the point. The appellant's contention would also be met by section 578 of the Code of Civil Procedure. But it is argued for the appellant that if the case comes under section 265, the question raised on her behalf would be one of jurisdiction and not of procedure merely. As this last-mentioned point is not altogether free from doubt, and as, in the [741] view I take of section 265, the appeal fails on the merits, I do not think it necessary to consider whether the objection raised on behalf of the appellant is one of jurisdiction or of procedure only.

Turning now to the question raised on behalf of the appellant, namely, whether, having regard to the provisions of section 265 of the Civil Procedure Code, the Civil Court can make a partition of land of a revenue-paying estate when no separate allotment of the Government revenue is asked for, I am of opinion that the question should be answered in the affirmative.

Section 265 runs as follows: "If the decree be for the partition, or for the separate possession of a share, of an undivided estate paying revenue to Government, the partition of the estate or the separation of the share shall be made by the Collector according to the law, if any, for the time being in force for the partition or the separate possession of shares of such estates."

In construing this section, bearing in mind the observations of their Lordships of the Privy Council in *Norendra Nath Sircar* v. *Kamal Basini Dasi* (I. L. R., 23 Cal., 563: L. R., 23 I. A., 18), we must in the first instance examine the language of the enactment. The section evidently contemplates two classes of cases, namely, one for the partition of an undivided estate paying revenue to Government, and the other for the separate possession of a share of such an estate, and the question is, what is meant by "the partition of an undivided estate paying revenue to Government" and what by "the separate possession of a share" of such an estate? As I understand these expressions, which are not explained in the Code, the former means the division of an undivided estate paying revenue to Government into a number of smaller estates corresponding to the shares or interests of the several joint proprietors, each being liable only for a portion of the revenue assessed on the original or parent estate; and the latter, the separate possession of his share by a co-proprietor of the undivided estate, the separate share forming a distinct estate liable only for its legitimate portion of the revenue, the remainder of the parent estate continuing joint and being burdened with the remainder [742] of the revenue. I may add that the words "separate possession of a share," which occur also in section 225 of Act VIII of 1859, the former law on the subject, appear to have been taken from section 4, clause 2, of Regulation XIX of 1814, the law relating to partition of estates in force when the Code of 1859 was passed. The words "partition" and "separate possession of a share," in the absence of any conflicting context, must imply complete partition and complete separation, and the presence of the phrase "paying revenue to Government" in the context as qualifying the term "undivided estate" evidently suggests that the partition or separation must involve, not only a division or separation of the land of the estate, but also a division or separation of the revenue payable to Government in respect thereof. But where, as in this case, the suit is for the partition, not of an undivided estate paying revenue to Government, but of the lands of a portion of such an estate, the revenue payable to Government still remaining undivided, the case does not in my opinion come within the scope of section 265, and the partition should be made, not by the Collector, but by the Civil Court.

This is the conclusion I deduce from the grammatical construction of the section ; and an examination of the law in force for the partition or the separate possession of shares of an estate paying revenue to Government, which is referred to in the section itself, will confirm that conclusion, and show the reason why a decree for complete partition or separation of a share of such an estate, that is, one for the division of the land and the revenue, is required to be made by the Collector, while a partition or separation of the land alone without any division of the revenue is left to be effected by the Civil Court. That law, so far as the district from which this case comes is concerned, is to be found in Bengal Act VIII of 1876. Section 5 of the Act provides that "all partition of estates which shall be ordered to be made after the commencement of this Act shall be made under the provisions of this Act, and no such partition made otherwise than under this Act shall relieve any lands from liability to Government for the total demand of the land revenue assessed upon the estate of which they form a part." Section 6 lays down the principle on which the revenue assessed on the parent estate is to be distributed over the [743] separate estates. Section 29 says : "Subject to the provisions of section 11 a Civil Court may at any time direct the Collector to assign to any person lands representing a specified interest in any estate or in any specified village or tract of land in an estate, to be held by such person as a separate estate, or to divide off from any estate any specified village or lands and to assign them to any person to be held as a separate estate, provided that an application for such partition and separation shall be presented by such person as required by sections 17, 18 and 19; but no Civil Court shall in any case sepecify the amount of revenue for which any separate estate, which it may direct to be formed under the provisions of this section, shall be liable" And section 30 enacts that "the Collector shall assess the land revenue on every such separate estate in accordance with the provisions of this Act, and no Civil Court shall direct the Collector to carry out a partition otherwise than in accordance with the provisions of this Act."

The first of the abovementioned sections (section 5) shows that a partition, in order that it may result, not only in the division of the land, but also in the division of liability for Government revenue, must be made according to the provisions of the Act, and that a partition not so made will leave the liability to Government for the total revenue untouched, and the last two sections (29 and 30) show that, though it is competent to the Civil Court (subject to the provisions of section 11) to direct the Collector to assign to any person, either lands representing any specified interest or any specific lands, to be held by him as a separate estate no one except the Collecter can determine the amount of revenue to be assessed upon such separated estate and divide the joint liability for revenue.

The object of this provision is evidently to ensure the safety of the Government revenue by leaving it to a responsible revenue officer alone to distribute the revenue in cases of partition, so that there may be no risk of the separated estates being through error or collusion burdened with disproportionate liabilities.

Where, as in the case before us, the parties do not require a division of the revenue, or where, as in cases coming under sections 11, 13 and 14 of Bengal Act VIII of 1876, they cannot, unless they comply with certain conditions, ask for a division [744] of the revenue, and all that they ask for is a division of the lands, the liability for revenue continuing joint, there is no reason why the Collector should be asked to effect the partition. In fact, the

Civil Court cannot direct the Collector to make any partition in the last-mentioned class of cases, it being prohibited to do so by the latter part of section 30 quoted above.

It has been said that section 265 of the Code of Civil Procedure applies to all cases where partition or separate possession of an entire estate is asked for, irrespective of the consideration whether division of the revenue is asked for or not, because no division of the revenue can be asked for in such a suit in the Civil Court, the Civil Court having no jurisdiction to make any such division. I am unable to accept this reasoning as correct. It is true that section 29 of Bengal Act VIII of 1876 shows that the Civil Court has no power to specify the amount of revenue for which any separate estate shall be liable, but that same section shows that the Civil Court may direct the Collector to assign lands to any person *to be held by him as a separate estate*, that is, having regard to the definition of the terms "estate" and "separate estate" in section 4, clauses viii and xvi, as a distinct quantity of land liable for a separate amount of revenue. So that, though the Civil Court cannot *divide the revenue*, it may *declare that the revenue should be divided.*

Section 396 of the Code of Civil Procedure was referred to as lending support to the appellant's contention. It was argued that, besides section 265, this is the only other provision in the Code for the partition of immoveable property; and as the property in suit cannot be said to be property not paying revenue to Government, this section cannot apply to it, and if section 265 is also inapplicable, there is no provision in the Code with reference to the present case.

The language of section 396, no doubt, does create a little difficulty. It is very likely that this section was intended to cover all cases other than those provided for by section 265, but the Legislature has not said so clearly, and in section 396 it has departed from the phraseology adopted in section 265 to an extent which would make it difficult to say that it had any such intention.

[746] If section 396 was inapplicable to this case, still the Court could issue a commission for local investigation and preparation of a map of the lands in suit under section 392 with a view to make a decree for partition.

It remains now to consider the cases cited in the argument on this point. Some of these, such as the cases of *Shama Soonduree Debia* v. *Puresh Narain Roy* (20 W. R., 182), *Chunder Nath Nundi* v. *Hur Narain Deb* (I. L. R., 7 Cal., 153), *Ramjoy Ghose* v. *Ram Runjun Chuckerbutty* (8 C. L. R., 367) and *Badri Roy* v. *Bhugwat Narain Dobey* (I. L. R., 8 Cal., 649) are not decisions in point, but only contain *dicta* of the learned Judges which might be construed in favour of the appellant. In two of the cases, *Damoodur Misser* v. *Senabutty Misrain* (I. L. R., 8 Cal., 537) and *The Secretary of State* v. *Nundun Lall* (I. L. R., 10 Cal., 435), it appears that division of revenue was either asked for or involved in the plaintiff's prayer, so that nothing that was said by the learned Judges there can be in conflict with the view I take. As against the *dicta* relied upon for the appellant there are the *dicta* of the learned Judges in the case of *Zahrun* v. *Gowri Sunkar* (I.L.R., 15 Cal., 198), which favour the opposite view. The two cases which are really in point and are in conflict with one another are those of *Debi Singh* v. *Sheo Lall Singh* (I L.R., 16 Cal., 203) and *Meherban Rawoot* v. *Behari Lal Barik* (I.L.R, 23 Cal., 679). For the reasons stated above I consider the decision in the former case correct, and I would respectfully dissent from that in the latter.

In the result I would answer the question stated in this reference in the affirmative, and dismiss this appeal with costs.

H. W.

NOTES.

[I. Sec. 54 C.P.C, 1908 has those, among other, charges, "*Where* the decree *is* for the partition of an undivided estate *assessed to the payment* of revenue to the Government or for the separate possession of a share of *such* an estate, the partition of the estate or separation of the share shall be made by the Collector or any gazetted subordinate of the Collector," etc.

II A partition suit for portion of a joint estate is maintainable:—(1904) 1 C.L.J., 40; (1905) 2 C.L.J., 351 (in this there was separate possession and the question of *extent* of interest was held to be one which could be gone into).

III. Every interlocutory order is not appealable —(1897) 24 Cal., 725; (1912) 34 All., 530: 15 I.C, 50 (All) order disallowing objection that there should be a fresh attachment, (1901) 8 C.W N., 257 (valuation in sale proclamation being incorrect, appealable); (1902) 25 Mad., 244.

IV. An order determining finally the liability of the judgment-debtors to have execution issued against them on the basis of the decree is final within sec. 47 C.P.C., 1908:- (1914) 19 C.L.J., 581, (1914) 20 C L.J., 512 See also (1903) 31 Cal., 179.]

[746] APPELLATE CIVIL.

The 23rd March, 1897.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BEVERLEY.

Beni Prosad Sinha............Defendant No. 9

versus

Rewat Lall (Plaintiff) and others. ....Defendants.

Sale for arrears of rent —Incumbrance—Bengal Tenancy Act (VIII of 1885), sections 161, 167 —Notice —Mortgage—Transfer of Property Act (IV of 1882), section 73.

A sale purporting to be under section 161 and the following sections of the Bengal Tenancy Act (VIII of 1885) does not, *ipso facto*, cancel incumbrances. Notice *must* be given under section 167 according to the procedure laid down in that section.

Section 73 † of the Transfer of Property Act only gives a right to the mortgagee over the residue of the sale proceeds, and refers to cases where the law otherwise provided that the effect of the sale is to nullify a mortgage, it is not intended in any way to enlarge the interest of the purchaser at a sale for arrears of revenue or rent.

Prem Chand Pal v. *Purnima Dasi* (I. L. R., 15 Cal., 546), referred to.

THIS appeal and appeal No. 230 of 1894 arose out of the same suit, and were tried together. The facts material to this report are given in the judgment of the High Court. The principal point argued was on behalf of defendant No. 9, Beni Prosad Sinha, appellant in appeal No. 195, who purchased a *dar-mokurari* interest in a *12d. 5c.* share in mehal Bhadakhra at a sale for arrears of rent due from the *dar-mokuraridars*, the defendants Nos. 1 to 5. The plaintiff

* Appeal from Original Decree No. 195 of 1894 against the decree of Babu Brij Mohun Pershad, Subordinate Judge of Gya, dated the 23rd of February 1894.

† [Sec. 73.—Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage unless the sale has been occasioned by default made on his part.]

Charge on proceeds of revenue-sale.

held a mortgage bond from the same defendants, which was found by the Court to have covered the *dar-mokurari* interest in addition to other properties. The plaintiff urged that the purchase by defendant No. 9 was subject to plaintiff's mortgage lien, and in case the Court held otherwise, that the plaintiff was entitled to a declaration in respect of the surplus sale proceeds.

The Subordinate Judge held that the purchase was not free from incumbrances, as it was not a purchase at a sale under the **[747]** Bengal Tenancy Act, the sale having been, not only for the arrears due on account of this *dar-mokurari*, but on account of another mouza also. He then went on as follows :—

"Again, the sale did not take place in conformity with the provisions of the Bengal Tenancy Act. No notification seems to have been fixed up in the mal kutchery and police thana. It is also worthy of note that defendant No. 9 did not follow the provisions of section 167 of the above Act He ought to have applied to the Collector of the District to annul the sale"

The defendant No. 9 appealed to the High Court.

Mr. *W. C. Bonnerjee* and Babu *Karuna Sindhu Mukerjee* for the Appellant.

Mr. *J. T. Woodroffe*, Babu *Umakali Mukerjee*, Babu *Amarendra Nath Chatterjee*, and Moulvie *Mahomed Habibulla*, for the Respondents.

Mr. *Bonnerjee*.—The plaintiff cannot now enforce his lien against the tenure; his remedy is to proceed against the surplus sale proceeds. The attachment and sale proclamation were under the Bengal Tenancy Act, and the sale was free from incumbrances The sale proceeds represent the property, and the mortgagee can now look only to those proceeds. The conduct of the plaintiff subsequent to sale, in not having recourse to the provisions of section 167, does not affect the nature or validity of the sale. The sale proceeds represent the property free from the mortgage. The lower Court was in error in holding that the plaintiff could not proceed against those proceeds Section 73 of the Transfer of Property Act provides for a case like this. The mortgagee's right has now in reality been transferred to the residue of the sale proceeds after paying the amount for which the property was sold.

Counsel for respondents was not called upon.

The **judgment** of the High Court (**Trevelyan** and **Beverley, JJ**) was as follows :—

As these two appeals arise from the same judgment it will be convenient for us to deal with them in one judgment, although the questions which have to be determined in them are different. The suit was somewhat a complicated one, but as the argument **[748]** before us has been confined to matters in which the appellants in these appeals are concerned, the facts necessary to be mentioned are not many. The suit was brought to enforce a mortgage of certain properties, and all the persons interested in those properties were made parties.

The appeal No. 195, which was argued first, was preferred by the 9th defendant, Beni Prosad. Shortly the position of Beni Prosad was that he had purchased a *dar-mokurari* tenure in mehal Bhadakhra at a sale held for arrears of rent of that tenure. That tenure had belonged to the mortgagor, and in the fourth of the mortgages sued upon there were included the mortgagor's *milkiat* and *mokurari* rights in 3 annas 8 dhurs of this mehal. This mortgage was executed on the 17th February 1886, and the sale at which the appellant bought was on the 8th August 1891.

The first contention that was raised on the appellants' behalf was that the *dar-mokurari* interest of the mortgagors did not pass under the mortgage to the plaintiff. We think it clear that the description of the *mokurari* in that mortgage was intended to include any *dar-mokurari* right, and

the learned Subordinate Judge has shown in his judgment how the *dar-mokurari* interests were treated as if they had been actually *mokurari* interests. The *dar-mokurari*, although it is a sub-lease, is a lease, and we think it clear that the mortgagors intended in their mortgage to the plaintiff to dispose of all their interest in the property.

The next question was contended with greater force. First of all we would point out that, assuming that this tenure was sold in accordance with section 161 and the following sections of the Bengal Tenancy Act—a matter which we need not determine now—it is admitted that no notice was given under section 167 of that Act. The property purported to be sold in accordance with the Bengal Tenancy Act, and the sale proclamation provides that "the sale will be by public auction, and the right of holding the said *kasth* (which evidently means the tenure) will be sold with the power of cancelling all the incumbrances." It is clear that *that* provision did not *ipso facto*, cancel the incumbrances. It is not contended before us that it did. It would, therefore, follow that under section 167 notice must be given according to the procedure laid down in that section.

[749] Mr. *Bonnerjee* on behalf of the appellant contended that under section 73 of the Transfer of Property Act the rights of the mortgagor in that property were by virtue of the sale transferred to the residue of the sale proceeds after paying the amount for which the property was sold. We are unable to give the force contended for to that section. The object of section 73, in our opinion, is to relieve the mortgagee of the effects of the injury which he would suffer by the property which was a security for his money being sold, and to give him a right over the residue of the sale proceeds. It is not intended in any way to enlarge the interests of persons purchasing at a sale for arrears of revenue or rent. If that had been the intention any subsequent provision of law providing that a sale for arrears of revenue or rent could get rid of an incumbrance would be unnecessary. It is, in our opinion, intended to refer to cases where the law has otherwise provided that the effect of a sale for arrears of revenue or rent should nullify a mortgage. There is authority for this view, namely, the decision of NORRIS AND BEVERLEY, JJ., in *Prem Chand Pal* v. *Purnima Dasi* (I. L. R., 15 Cal., 546), which has been referred to by the Subordinate Judge in his judgment. This mortgage was attached to the property and was not by any process of law destroyed. It therefore follows that the plaintiff's rights in regard to it have not been touched by the sale of the tenure which was not followed up by any avoidance of the incumbrances in the way provided by law.

We are also asked to hold that the Subordinate Judge ought to have directed that the property, Dowlutpore Khaira, which was mortgaged to the plaintiff and was not subject to any of the other mortgages, should be first sold. This contention was put forward as an extension of the doctrine of marshalling. This is not a case which comes under section 81 of the Transfer of Property Act. It is not a case between mortgagees, and as the effect of the appellant's purchase without avoiding incumbrances would be the same as if he had purchased subject to incumbrances, it might be an injustice to the mortgagors if any such right should be allowed, and we know of no authority which would give him such right against the mortgagees. The case of *Lala Dilawar Sahai* v. *Dewan Bolakiram* (I.L R., 11 Cal., 253) cited from the Indian Law Reports **[750]** is an authority against the right contended for. This disposes of appeal No. 195, which must be dismissed with one set of costs to each of the two sets of respondents.

As regards the appeal No. 230, the appellant is the defendant No. 8, who was a purchaser at a sale for arrears of Government revenue of the whole

of the separated share of seven annas odd of mehal Bhadakhra. This is not a separate estate, but the Government revenue was paid separately.

The first argument which was addressed to us was a curious one. It seems that the plaintiff happened to be a *mukhtar* by profession. A decree had been obtained by the defendants Nos. 25 to 29 against the mortgagors on mortgage bonds of certain property, which it is not necessary to detail here. The plaintiff in that suit, through the present plaintiff as their *mukhtar*, before the sale of the property which was ordered to be sold in their suit, obtained possession of the residue of the proceeds of mehal Bhadakhra after the sale for arrears of Government revenue, and with the consent of the mortgagors appropriated that money towards payment of the debt due to them. There was nothing wrong in that. The debt was due. The debtors permitted particular creditors to take this money and it was money payable to them. It may be that if the plaintiff had asserted his rights as mortgagee he might have been able to prevent such payment. But how the present appellant who paid the money for what he bought could reasonably object to what has been done it is difficult to see. He was buying subject to the mortgage of the plaintiff. He is not entitled to have a portion of what he paid for the equity of redemption applied for the purpose of paying off any portion of the mortgage. It is difficult to see how the action of the plaintiff could in any way have given rise to any equity against him.

Then it was suggested that compound interest ought not to be charged. The contract was for compound interest, and we are unaware that the account has been made up otherwise than correctly.

This appeal therefore also fails, and must be dismissed with costs.

S. C. C. *Appeal dismissed.*

NOTES.

[See the explanation of this case in (1904) 9 C.W N. 117. The decision in 24 Cal., 746 was followed in (1911) 9 I C., 248 (Cal.) See also (1908) 18 M.L.J., 229.]

[751] *The 5th May 1897.*

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE AMEER ALI.

Sarat Chandra Purkayestha... ....Plaintiff No. 1

versus

Prokash Chundra Das Chowdhury and others............Defendants.

Assam Land and Revenue Regulation (I of 1886), sections 154, clause (e) 96, 97—Suit for partition—Jurisdiction of Civil Court—"Perfect" and "imperfect" partition—Entire estate.

An estate does not cease to be an entire estate within the meaning of the Assam Land and Revenue Regulation (I of 1886) because a few plots of land are common to it and some other estate, or because they are *brahmutter* or *debutter*, or because they are held in some undefined way jointly with other persons.

Where a suit was brought for the partition of an estate, excluding certain portions as being *brahmutter* or *debutter* or as being held jointly by third persons, how or in what capacity not being stated: *Held*, the jurisdiction of the Civil Court was barred by section 154 of the Regulation.

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* Appeal from Original Decree No. 279 of 1894 against the decree of Babu Joy Gopal Sinha, Subordinate Judge of Sylhet, dated the 30th of June 1894.

THIS was one of three analogous suits instituted by the plaintiffs in the Court of the Subordinate Judge of Sylhet for partition of lands situated in different mouzas appertaining to one or other of six revenue-paying estates in pergunnah Chhattak. In these suits certain specified plots were excluded from the partition as being either *debutter* or *brahmutter* or as being held *ijmali* with certain other persons, but how or in what right those persons held, or how the lands were joint, was not stated in the plaint. The division of the Government revenue of the lands in suit was not prayed for, nor was there any allegation by the plaintiffs that their application for "perfect partition" had been refused by the revenue authorities.

The defendants alleged, *inter alia*, that the suits were not maintainable under the provisions of the Assam Land and Revenue Regulation, 1886.

The Subordinate Judge held that in these cases "imperfect partition" was claimed, and as there was no allegation that the plaintiff's application for "perfect partition" had been refused by the Collector, the Civil Court had no jurisdiction to entertain these suits under section 154, clause (e) of the Assam Land and Revenue Regulation (I of 1886), and he dismissed this suit on [752] that ground, and also because certain *ijmali* lands and *jalkars* had been excluded from the partition sought for.

The plaintiff No. 1 appealed to the High Court.

Babu *Baikunta Nath Das* for the Appellant.

Babu *Nilmadhub Bose* for the Respondents.

The **judgment** of the High Court (**Macpherson** and **Ameer Ali, JJ.**) was as follows:—

The suits which have given rise to this and the two analogous appeals Nos. 108 and 186 of 1895, have been dismissed on the statements contained in the plaints, and without going into any evidence, on the ground that under section 154, clause (e) of the Assam Land and Revenue Regulation (I of 1886) the Civil Court had no jurisdiction to entertain them, and also because certain *ijmali* lands and *jalkars* had been excluded. It is sufficient to deal with appeal No. 279 (suit No. 280 of 1892), which has alone been argued, as it is admitted that the decision in this will govern the decision in the other cases.

In suit No. 280 the plaintiffs ask for the partition of about 170 plots of land situated in one or other of the eleven mouzahs mentioned in the first 11 schedules to the plaint and appertaining to one or other of six revenue-paying estates, which may be described as No. 1, 7, 11, 22, 23 and 26. The plaintiffs and the three defendants are the owners, and, so far as appears, the sole owners, of these estates, the plaintiff's share being 6 annas and that of the defendants 10 annas; of the 170 plots, 57 appertain to taluk No. 1, 42 to taluk No 7, 23 to taluk No. 11, 13 to taluk No. 22, 14 to taluk No. 23 and 11 to taluk No. 26. Schedules 12, 13, 14 refer to certain specified plots appertaining to some of the taluks which are excluded from the partition as being either *debutter* or *brahmutter*, or as being held *ijmali* with certain other persons not parties to the suit, but how or in what capacity is not stated. In order to understand clearly the position we may refer shortly to the plaints in the two other suits, Nos. 131 and 132. The land is situated in the same mouzas, and the parties are the same as in suit No. 280, with the addition of certain defendants interested in other taluks, some of the land of which it is sought to partition. In both suits certain specified plots are also excluded from the partition asked for.

[753] Suit No. 131 is for the partition of about 59 plots appertaining to one or other of taluks Nos. 8, 11, and 1; of these 56 appertain to taluk No. 8

in which all the defendants, including the parties to suit No. 280, have a share, and three are common to that taluk and taluks Nos. 11 or 1, some of the lands in which it is sought to partition in suit No. 280, and which belong to the parties to that suit. Suit No. 132 is for the partition of about 50 plots of lands appertaining to one or other of 10 taluks. About 35 of these appertain to taluk No 2 owned by all the parties to the suit. The rest are common to some of the taluks, amongst which are taluks Nos. 1, 7, 22, 23 and 26 belonging to the parties in suit No. 280, and some of the lands on which it is sought to partition in that suit, and taluks Nos. 6, 9, 12 and 28, which are said to belong to two only of the defendants in suit No. 132.

It will thus be seen that some plots of taluks Nos. 1, 7, 11, 22, 23, and 26 appertaining jointly to those and other taluks are excluded from suit No. 280 and brought into the other suits. Section 154 of the Assam Regulation debars the Civil Court from exercising jurisdiction in any of the following matters: (*d*) claims of persons to perfect partition; (*e*) claims of persons to imperfect partition (with a certain exception which does not apply here); (*f*) the distribution of the land or allotment of the revenue on partition. By section 96 partition is described as either perfect or imperfect; 'perfect partition' meaning the division of a revenue-paying estate into two or more such estates, each separately liable for the revenue assessed thereon; 'imperfect partition' meaning the division of a revenue-paying estate into two or more portions jointly liable for the revenue assessed on the entire estate. Section 97 provides that no person shall be entitled to apply for imperfect partition of an estate, unless with the consent of recorded co-sharers holding in the aggregate more than one-half of the estate, or for a perfect partition if the result of the partition would be to form a separate estate liable for an annual amount of revenue less than five rupees. If, however, a partition is refused on the latter ground the Civil Court can, under clause (*e*) of section 154, entertain a claim for imperfect partition. That event has not happened.

This is not a case of perfect partition, as no division of the [754] revenue is asked for, and it is contended for the appellants, the plaintiffs in the suits, that the jurisdiction of the Civil Court is not taken away by section 154, because the imperfect partition contemplated and provided for by the Regulation is the division of the entire estate into two or more portions, whereas what the appellants want is a division of a portion only of the estate, or more accurately speaking of portions of several estates.

This possibly may be under certain circumstances a correct contention. If the appellants and the defendants were the owners, and in possession of a specific portion of an entire estate, having no interest in the remaining portion beyond the general liability for the whole Government revenue, it may be that the Court could, notwithstanding the Regulation, make a partition of the particular portion which belonged to them. That, however, is not the case here, and we express no opinion on the point So far as appears from the plaint the appellants and the defendants are the sole owners of the whole of the six taluks and not of any particular portions of them, and they want to get the lands of those taluks divided in the way most convenient to them. They exclude certain plots as appertaining jointly to those and other taluks. They also exclude some plots of *brahmutter* or *debutter*, and other plots as joint with lands of other persons, but how or in what right those persons hold, or how the lands are joint, is not stated.

It is quite clear that the appellants by lumping together the lands of a number of taluks cannot give the Court a jurisdiction which it could not exercise in respect of any one of them, nor can they give it jurisdiction by excluding

plots of land which properly appertain to them. Putting the narrowest construction on the Regulation, the Civil Courts are debarred from entertaining any claim for the division of an entire revenue-paying estate into two or more portions or from making any distribution of the land of such an estate. An estate does not cease to be an entire estate because a few plots of land are common to it and some other estate, or because they are *brahmutter* or *debutter*, or because they are held in some undefined way *ijmali* with other persons. The plaint must show that the Court has jurisdiction to deal with the subject-matter of the suit. The plaints in these [755] suits so far from showing this indicate the contrary, and the suits have, we think, been rightly dismissed.

Obviously also there might be considerable difficulty in making the partitions, and considerable complication in future if they were made, for the lands, however divided, would continue to be attached to the taluks to which they are now attached. It is unnecessary, however, to enlarge on this. We dismiss the appeals with costs.

B. D. B. *Appeals dismissed.*

[24 Cal. 755]

CRIMINAL REVISION.

The 5th May, 1897.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE WILKINS.

Mata Dayal............Petitioner

versus

Queen-Empress............Opposite Party.*

Registration Act (III of 1877), section 74 and section 82—Sub-Registrar holding inquiry under order of the Registrar—Liability of Witness giving evidence in such inquiry to prosecution.

An inquiry under s. 74 † of the Registration Act should be made by the Registrar himself. He cannot delegate his power to any one else. A Sub-Registrar holding such an inquiry under an order of the Registrar cannot be said to be acting in execution of the Registration

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* Criminal Revision No. 282 of 1897, against the order passed by H. Savage, Esq., District Registrar of Gya, dated the 22nd of February 1897, confirming the order passed by Moulvie Fiazuloollah, Special Sub-Registrar of that district, dated the 17th of February 1897.

† [Sec. 74:—In such case, and also where such denial as aforesaid is made before a Registrar in respect of a document presented for registration to him, he shall as soon as conveniently may be inquire—

Procedure of Registrar on such application.

(a) whether the document has been executed;
(b) whether the requirements of the law for the time being in force have been complied with on the part of the applicant or person presenting the document for registration as the case may be, so as to entitle the document to registration.]

Act in any proceeding or inquiry under that Act. An order for the prosecution, under section 82 of the Registration Act, of a witness who gives evidence before the Sub-Registrar in such an inquiry, is wrong in law.

TWO persons, Bishen Dayal and Ganga Prasad, applied to the Special Sub-Registrar of Gya to have a document registered, which they alleged had been executed by one Toolsee Koer. The Sub-Registrar refused to register the document, because Toolsee Koer denied the execution of the document by herself. Thereupon Bishen Dayal and Ganga Prasad applied, under section 73 of the Registration Act, to the District Registrar, who, instead of inquiring into the matter himself, sent the case for inquiry and report to the Sub-Registrar. In the course of the inquiry the petitioner was examined as a witness by the Sub-Registrar who disbelieved him. The District Registrar, acting [756] upon the report of the Sub-Registrar, dismissed the application of Bishen Dayal and Ganga Prasad, and ordered the prosecution of the petitioner under section 82 of the Registration Act. The petitioner moved the High Court to set aside the order of the District Registrar.

Babu *Lakshmi Narain Sinha* appeared for the Petitioner.

The **judgment** of the High Court (**Ghose** and **Wilkins, JJ.**) was as follows:—

We think that this rule must be made absolute. The District Registrar has made an order directing the prosecution of the petitioner in respect of certain statements made by him before the Sub-Registrar with reference to a certain document presented for registration. It appears that the Sub-Registrar had refused to register the document, and under section 73 of the Registration Act an application was made to the District Registrar for the purpose of obtaining registration. The District Registrar, without inquiring into the matter himself, as enjoined by section 74 of the Act, delegated his functions to the same Sub-Registrar, who took the evidence of the petitioner, Mata Dayal, on oath, and made a report to the District Registrar that the document was not true. The District Registrar, relying upon that report, ordered the prosecution of the petitioner under section 82 of the Registration Act.

It seems to us that the District Registrar was not competent to delegate his functions, as prescribed by section 74 of the Act, to the Sub-Registrar, nor was the Sub-Registrar competent to receive the statements of the petitioner in the matter of the registration of the document in question.

Section 82 of the Act says: "Whoever commits any of the following offences shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both: (*a*) "intentionally makes any false statement, whether on oath or not, and whether it has been recorded or not, before any officer acting in execution of this Act, in any proceeding or inquiry under this Act," and so on.

Now the question is, whether the Sub-Registrar, in this instance, was "acting in execution of this Act in any proceeding or inquiry under this Act," within the meaning of the section. No [757] doubt he was authorized by the local Government to perform certain functions under the Act; but the functions prescribed by section 74 were entirely in the Registrar himself; and if he could not delegate his functions to any body, it could not be said that the Sub-Registrar was acting within the meaning of section 82 of the Act.

In this view of the matter we think that the sanction to prosecute the petitioner, granted by the District Registrar, was wrong in law, and, therefore, should be set aside.

S. C. B. *Rule made absolute.*

[24 Cal. 757]

CRIMINAL REFERENCE.

The 26th June, 1897.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE WILKINS.

Queen-Empress

versus

Tomijuddi and others (1st party) and others (2nd party).*

Criminal Procedure Code (Act X of 1882), section 148—Order for and assessment of costs—Delay—Notice to parties.

An order for, and the assessment of, costs under section 148 of the Criminal Procedure Code should be made at the time of passing the decision under section 145 of the Code in the presence of the parties Such costs should not be ordered and assessed by the Magistrate after a long interval, and without allowing all the parties affected an opportunity to appear and show cause.

THESE two cases were referred to the High Court by the Sessions Judge of Backergunge under section 438 of the Criminal Procedure Code. The facts sufficiently appear from the letter of reference, the material portion of which is as follows:—

"1. The petitioners in both cases are the same, and the two cases being exactly on all fours with each other must necessarily be governed by the same decision.

"2. The petitioners formed the 2nd party in two cases under section 145 of the Criminal Procedure Code before the Deputy Magistrate of Ferozepore, the 1st parties and the lands in dispute being different. Both cases were decided (by separate judgments) on the 10th of October 1896, and in each the 1st party was declared to be in possession. No order for costs under the last paragraph of section 148 of the Criminal Procedure Code was passed at the time, [758] judgment being altogether silent as regards costs. On the 20th of January 1897, the 1st party filed a petition (on unstamped paper) praying for an order for costs against the 2nd party; and on that petition the Deputy Magistrate recorded the following order—' The 2nd party is to pay Rs. 60 as costs to the 1st party.' The order is dated 20th January 1897.

* Criminal Reference Nos. 141 and 142 of 1897, made by B. L. Gupta, Esq., Sessions Judge of Backergunge, dated the 14th June 1897.

"3. This is the order complained of, and its legality is impugned on the ground that it was passed 3 months and 10 days after the decision of the case, and then also in the absence of the 2nd party and without any notice to them. In *Binoda Sundari Chowdhurani* v. *Kali Kristo Paul Chowdhury* (I.L R. 22 Cal., 387) the High Court expressed the opinion 'that the words *the Magistrate passing a decision*' (in section 148 of the Criminal Procedure Code) 'should be construed to mean, not merely the Magistrate who passes the decision, but at the time of passing the decision.' (*Vide* last but one paragraph of judgment, page 391 of the report.) In that case, however, the application for costs was made only 2 days after the decision, and the learned Judges, for reasons stated in the judgment, declined to interfere. In expressing the opinion quoted above the learned Judges followed the decision in an unreported case referred to in page 390 In another case, *Girdhar Chatterji* v. *Ebadulla Naskar* (I. L. R , 22 Cal , 384) the High Court appears to have taken the same view , and it would seem that an order for costs was set aside because 'it had been made in the absence of the 2nd party.'

"4. I think the effect of the decisions cited above must be taken to be that an order for costs under Chapter XII of the Code of Criminal Procedure should be passed at the time of passing the decision, or at least within a reasonable time thereafter, and in presence of or after notice to the opposite party In the present cases the orders for costs were made *ex parte* and more than 3 months after the decision of the cases. I consider the delay on the part of the 1st party in making the application to be unreasonable, and therefore think it right to refer these cases for the consideration and orders of the High Court. "

No one appeared in support of the reference.

The **judgment** of the High Court (**Ghose** and **Wilkins, JJ.**) is as follows :—

We think that in these two cases the Magistrate should not have passed his *ex parte* orders for costs under section 148 of the Criminal Procedure Code, when his original orders under section 145 contained no directions at all as to costs, and no application for costs was made to him until after the expiration of over 3 months from the date of such orders Proceedings under these sections of the Procedure Code are *quasi*-civil in their nature The intention **[759]** of section 148 would seem to be that an order for, and the assessment of, costs should be made at the time in the presence of the parties This being so, such costs should not be ordered and assessed by the Magistrate after a long interval and without allowing all the parties affected an opportunity to appear and show cause.

We set aside the orders of the Magistrate in both cases dated 20th January 1897.

S. C. B

NOTES.

[In (1911) 15 C.W N , 811 11 I C , 144 '*at the time*' was explained to mean 'while the same Magistrate is still sitting and the parties are able to appear before him ' See also 29 Mad., 373.]

[24 Cal. 759]

APPELLATE CIVIL.

The 7th May, 1897.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE AMEER ALI.

Uma Sundari Devi............(Plaintiff) Petitioner

versus

Bindu Bashini Chowdhrani and another (Defendants),...........Opposite Party.*

Decree —Amendment or alteration of Decree—Power of the High Court to amend decree of lower Court improperly drawn—Civil Procedure Code (Act XIV of 1882), sections 206, 551—Effect of dismissal of appeal—Practice.

The order of dismissal of an appeal under section 551 † of the Civil Procedure Code being a final determination of, and an adjudication on the questions raised in the appeal, is a "decree;" and in this respect there is no distinction between an appeal which is dismissed under section 551 of the Civil Procedure Code and an appeal which is dismissed under any other section of the Code after full hearing. *Royal Redai* v. *Linga Reddi* (I. L. R., 3 Mad., 1) referred to.

When an appeal is dismissed under section 551 of the Civil Procedure Code, or in the case of a second appeal when the decree is one of dismissal, the effect practically is to make the decree which is confirmed the final decree to be executed in the suit; and the High Court making such order has power to amend the decree of the lower Court which has been in effect confirmed by it, so as to bring it in conformity with the judgment which is also confirmed.

THE petitioner brought a suit against the defendants in the [760] Munsif's Court for the recovery of possession of two plots of land *ka* and *kha*, and for the removal of a privy which stood on the latter plot. The Munsif decreed the suit as regards the plot *ka* and dismissed it as regards *kha*. From that decree both parties appealed to the District Court with the result that the appeal of the defendants was dismissed, and that of the plaintiff decreed; but the relief to which the plaintiff was entitled was not specified in the decree,—the form of the decree being simply "appeal decreed."

The defendants preferred a second appeal to the High Court against the said decree of the District Judge, which was dismissed under section 551 of the Civil Procedure Code.

The plaintiff then sought to execute the decree as one for possession of the said plots of land and for removal of the privy by the defendants, who objected to the execution of the decree on the main ground that the decree

* Civil Rule No. 7 of 1897 in Appeal from Appellate Decree No. 703 of 1895, against the decree of W. H. Lee, Esq., Officiating District Judge of Mymensingh, dated the 31st of December 1894, modifying the decree of Babu K.K. Chowdhury, Munsif of that district, dated the 19th of February 1894.

†[Sec. 551:—The Appellate Court may, if it thinks fit, after fixing a time for hearing the appellant or his pleader, and hearing him accordingly if he appears at such time, confirm the decision of the Court against whose decree the appeal is made, without sending notice of the appeal to such Court and without serving notice on the respondent or his pleader; but in such case the confirmation shall be notified to the same Court.]

Power to confirm decision of Lower Court without sending it notice.

obtained by the plaintiff was incapable of execution. Both the lower Courts disallowed the defendants' objection and ordered the execution to proceed.

The defendants appealed to the High Court against the order of the District Judge allowing execution of the decree. The High Court held that the decree, as it stood, could not be executed as regards the plot *kha*, it not being in conformity with the law which requires that decrees shall clearly specify the relief granted, and it would be impossible to gather from the decree in its present form what relief the plaintiff was entitled to; and in allowing the appeal as regards the plot *kha*, the High Court remarked that if the decree of the lower Court was not in conformity with its judgment the respondent might apply to the District Judge under section 206 of the Civil Procedure Code to get it brought into conformity. The petitioner then applied to the District Judge who had made the decree in question, to bring it into conformity with the judgment. The District Judge refused the application on the ground that he had no jurisdiction to deal with the decree as it had been the subject of an appeal to the High Court. Thereupon the petitioner applied to the High Court and obtained this rule, calling upon the opposite party to show cause why the District Judge should not be directed to alter the decree to make it clear what relief the petitioner was entitled to, **[761]** and in the alternative also prayed that a decree might be directed to be drawn up in accordance with the decision of the High Court dismissing, under section 551 of the Code, the defendants' second appeal, inserting therein all the reliefs granted to the petitioner by the judgment of the District Judge, which was thereby affirmed. In the course of the hearing of this rule the questions arose—whether an order of the High Court dismissing an appeal under section 551 of the Civil Procedure Code is a decree, and whether the High Court had power to amend the decree of the lower Court confirmed by such order.

Babu *Srinath Das*, Babu *Basanta Kumar Bose*, Babu *Kritanta Kumar Bose*, and Babu *Dwarka Nath Chuckerbutty* for the Petitioner.

Babu *Nilmadhub Bose*, Babu *Jogesh Chundra Roy*, and Babu *Mukunda Nath Roy* for the Opposite Party.

The **judgment** of the High Court (**Macpherson** and **Ameer Ali, JJ.**) was as follows:—

On an appeal from an order allowing execution of a decree, this Court held that the decree-holder was not entitled by the decree to the particular relief claimed, and remarked that if the decree was not in conformity with the judgment, the proper course for him to take was to get it brought into conformity by an application under section 206 of the Code of Civil Procedure. The plaintiff who was the decree-holder then applied to the District Judge who had made the decree in question to bring it into conformity with the judgment. The District Judge held that as the decree of the District Court had been the subject of an appeal to this Court, he had no jurisdiction to deal with it. This rule was then obtained by the petitioner to show cause why the District Judge should not be directed to alter the decree under the provisions of section 206. The Judge was not right in saying that this Court altered the decree of the Lower Appellate Court, as admittedly it did not do so. What happened was that this Court dismissed the appeal of the defendant under section 551 of the Code of Civil Procedure. It is argued that a dismissal under section 551 is not a decree or an adjudication of the rights of the parties, but amounts to nothing more than a refusal to entertain the appeal, and that the Lower Appellate Court is **[762]** consequently not precluded by the order of dismissal from entertaining an application for the amendment of the decree which it had passed. It is true that the Court, acting under section 551, is not in a position to deal fully with the appeal or to make any alteration in the judgment or decree appealed

against. Nevertheless, it is a determination and a final determination of the appeal and it adjudicates on the questions raised by the appellant so far as it is necessary to adjudicate upon them for the purposes of the appeal, and we can see no distinction between an appeal which is dismissed under section 551 and an appeal which is dismissed under any other section of the Code after full hearing. The case of *Royal Reddi* v. *Linga Reddi* (I. L. R., 3 Mad., 1) supports this view. Rightly or wrongly it is not the practice of this Court to draw up decrees in cases dismissed under section 551, or, in the case of a second appeal, when the decree is one of dismissal, to record anything in the decree more than that the appeal is dismissed. But the effect practically is to make the decree which is confirmed, the final decree to be executed in the suit, and there can be no question that this Court has power to amend the decree which has been in effect confirmed by it so as to bring it into conformity with the judgment which is also confirmed. The rule which has been issued in this case called upon the opposite side to show cause why the District Judge should not be directed to make the amendment. But this does not appear to be strictly in conformity with the order which the Court made when the rule was granted. All the parties are, however, now before the Court, and we are in a position fully to deal with the matter on its merits. It is an admitted fact that the decree of the District Judge is not in conformity with his judgment. The decree simply directs that the appeal be decreed without specifying in any way the relief given by it. In the judgment it was distinctly held that the plaintiff had proved her title to and possession of the land (plot *kha*) on which a privy had been built, and that the defendant must remove that privy and vacate the land. We, therefore, direct that the decree of the District Court, setting aside the decree of the first Court, be amended; and that it be declared that the plaintiff's title to the land (plot *kha*) on [763] which a privy has been built is established, and that she is entitled to possession thereof, and that the defendant must remove the privy and vacate the land. The defendant to pay the costs of the appeal and of the suit in the lower Courts with the usual interest. A copy of this order will be sent to the lower Court to be attached to the decree.

B. D. B. *Decree of the lower Court amended.*

NOTES.

[In (1910) 11 C.L J., 159 where this decision was followed, it was pointed out that sec. 152 C.P.C., 1908 did not alter the law in this respect. This was also followed in (1908) 30 All., 290; (1906) P.R., 48, (1906) 4 C L.J , 566; (1898) 22 Mad., 293 (all cases of dismissal under sec. 551 C.P.C., 1882); (1907) 6 C.L.J., 542; although the party applying for amendment did not appeal (1909) 11 C.L.J., 155.]

[24 Cal. 763]

ORIGINAL CIVIL.

The 4th June, 1897.

PRESENT.

MR. JUSTICE AMEER ALI.

Debendra Nath Mullick

versus

Pulin Behary Mullick and another.

Transfer of Property Act (IV of 1882), s. 135, clause (d)—Mortgage—Actionable Claim—Transfer of Property Act, section 84—Transfer of a claim for an amount less than its value--Recovery of amount actually paid with interest and incidental expenses

A debtor claiming the benefit of section 135† of the Transfer of Property Act (IV of 1882) is discharged of his liability if he pays or offers to pay at any time before final judgment the amount actually paid with interest and incidental expenses

Muchiram Barik v. *Ishan Chunder Chuckerbutti* (I L R., 21 Cal, 568) followed.

The amount of interest is governed by section 84 of the Transfer of Property Act.

THE defendant Pulin Behary Mullick executed a mortgage and further charge, dated, respectively, 23rd September and 3rd November 1886, in favour of one Sowdaminy Dossee, who assigned the same to the plaintiff on the 26th January 1891 On hearing of the assignment the mortgagor offered to pay to the assignee, under section 135 of the Transfer of Property Act, the actual price paid by him for the assignment, together with interest and incidental expenses. There was a dispute as to the amount of these items, the price of the assignment, according to the plaintiff, being Rs 6,000, and according to the defendant only Rs 2,750, which latter sum was proved at the hearing to be correct. This offer was refused by [764] the assignee, who instituted a suit (I. L. R, 23 Cal, 713) for the full amount that might be found due on the mortgage and further charge At the hearing an offer was made by the defendant to pay the amount actually paid by the plaintiff with interest and incidental expenses. On the plaintiff refusing to accept anything less than what was claimed in the suit, the case proceeded, and Mr Justice AMEER ALI, delivered judgment on 16th April 1896 (I L R, 23 Cal, 714) and directed an inquiry to be held before the Registrar to ascertain the amount of the expenses incidental to the assignment

Mr. *S. P. Sinha* for the plaintiff —The sum deposited by the defendant on the 10th April 1896 in payment of the costs and expenses incidental to the assignment was insufficient, as he deposited only Rs 750 on that account. The actual expenses are found by the Registrar to be Rs 758-4-0 The

* Original Civil Suit No 319 of 1891.

†[Sec. 135 —Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it

Discharge of person against whom claim is sold.

Nothing in the former part of this section applies—

(a) where the sale is made to the co heir to, or co-proprietor of, the claim sold,

(b) where it is made to a creditor in payment of what is due to him,

(c) where it is made to the possessor of a property subject to the actionable claim;

(d) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment.]

defendant is, therefore, not entitled to the benefit of section 135 of the Transfer of Property Act. The balance ought to have been paid into Court as soon as it was discovered that the amount originally deposited was not sufficient, and the deposit of Rs. 65 after the case was put on the cause list on 22nd May last does not remove the objection. We are also entitled to interest on the whole amount up to the date of final judgment.

Ameer Ali, J.—The facts of this case are sufficiently set out in my preliminary judgment (I. L. R., 23 Cal., 714). It is enough to say that the Registrar has found upon the inquiry directed that the expenses of and incidental to the plaintiff's assignment amounted to Rs. 758-4-0. His report is dated the 19th of December 1896. On the 8th of May last an application was made to fix a day for further hearing and final judgment. The case was fixed for the 22nd of May, but was adjourned by consent to the 29th of May. On the 27th the defendant deposited a further sum of Rs. 65, odd annas. Mr. *Sinha* on behalf of the plaintiff contends that the sum deposited by the defendant on the 10th of April 1896 was insufficient, inasmuch as he had deposited only Rs. 750 over and above the consideration paid by the plaintiff for his assignment, whereas the expenses are now found to have been Rs. 758-4-0, and **[765]** that therefore he (the defendant) is not entitled to the benefit of section 135 of the Transfer of Property Act. He also contends that the balance ought to have been paid into Court as soon as it was discovered that the amount originally deposited was not sufficient, and that the deposit of Rs. 65 made after the case was placed on the cause list on the 22nd of May last does not remove his objection. He also asks for interest up to final judgment.

As regards the first point it was obviously impossible for the defendant to know what the expenses amounted to. The plaintiff did not furnish any information on the subject, and consequently an inquiry was directed to ascertain the amount. Under the circumstances the defendant could only be expected to deposit an approximate amount, and he accordingly paid into Court Rs. 750 over and above the price paid by the plaintiff, thus showing his intention to abide by the offer he had repeatedly made to the plaintiff. On the 19th of December 1896 it was found that the expenses amounted to Rs. 758, odd annas. The case of *Muchiram Barik* v. *Ishan Chunder Chuckerbutti* (I. L. R., 21 Cal., 568) shows that a debtor claiming the benefit of section 135 of the Transfer of Property Act is discharged of his liability, if he pays or offers to pay at any time before final judgment the consideration plus the expenses and interest. The defendant in this case has, from the outset, claimed the benefit of the section ; he tendered the amount to the plaintiff shortly after the assignment, and appears to have been always willing to pay whatever else the plaintiff might be found entitled to for incidental expenses and interest. In order to show that he was acting *bonâ fide* he deposited in Court Rs. 3,500 on the 10th of April 1896. It seems to me that he is entitled to the benefit of section 135 of the Transfer of Property Act.

I am also of opinion that under section 84 of the Transfer of Property Act the plaintiff ought to have interest on the sum of Rs. 2,750 only up to the 6th of March 1891. I understand that the amount paid into Court fully covers what the plaintiff is entitled to under section 135. I accordingly order that the sums of money paid into Court by the defendant be paid to the plaintiff, and that the plaintiff do reconvey or retransfer to the defendant the property **[766]** comprised in the mortgage and further charge, free from all incumbrances done by him or any person or persons claiming by, from or under him, and do deliver up all documents in his custody or power relating thereto, such

reconveyance to be settled by the Registrar of the Court, if the parties differ about the same.

Having regard to the conduct of the plaintiff I must direct him to pay to the defendant his costs of the suit to be taxed on Scale 2.

Attorney for the Plaintiff: Mr. *N. C. Bose.*

Attorney for the Defendant, *Pulin Behary Mullick*. Mr. *G. C. Fair*

C. E. G.

[24 Cal 766]

The 13th July, 1897.

PRESENT

MR. JUSTICE JENKINS

Achalabala Bose

versus

Surendra Nath Dey.*

Interest—Mortgage—Interest on mortgage decree—Transfer of Property Act (IV of 1882), sections 86, 87, 88, 90, 94, 97 - Civil Procedure Code (Act XIV of 1882), sections 209, 222, 611, Schedule IV, Forms 109, 128,—Form of Decree--Practice.

The Court has power, under a decree in a mortgage suit under section 86 † of the Transfer of Property Act (IV of 1882), to allow interest subsequent to the date of decree and the date fixed by the decree for payment, until realization.

Amolak Ram v *Lachmi Narain* (I L. R , 19 All , 174) dissented from

THIS was a suit to recover from the defendant the amount of the principal advanced on two Bengali instruments of mortgage, together with interest and costs, and the only question raised was whether, having regard to the decision in *Amolak Ram* v *Lachmi Narain* (I L R , 19 All , 174) the decree should provide for the payment of subsequent interest, for a period beyond the date of payment that has to be fixed within six months from the date of the decree, until actual realization

* Original Civil Suit No. 242 of 1897

† [Sec. 86 —In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree,

Decree in foreclosure-suit.

and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title by those under whom he claims, and shall, if necessary put the defendant into possession of the property, but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.]

Mr. *Dunne* for the Plaintiff.—Is this Court debarred from giving interest on a decree in a mortgage suit under sections 209 and 220 of the Code of Civil Procedure by reason of anything **[767]** contained in the Transfer of Property Act (IV of 1882)? A mortgage decree is one for the payment of money within the meaning of section 209 of the Civil Procedure Code The practice of this Court has for years past always been to give such interest, (See Belchambers' Rules and Orders, Rule 555). The decision in *Amolak Ram* v *Lachmi Narain* (I L R, 19 All., 174), is not binding on this Court and is not correct That decision proceeds on an assumption that the words of section 88, "what is so found due to the plaintiff," have reference to the account to be taken under section 86, and that the balance, if any, over and above that amount, must be paid to the defendant. But more than the amount found due on that account may be paid, for section 94 provides for subsequent costs being allowed against the defendant.

The Act contemplates a final adjustment see section 94. Section 86 provides that the Court can make one of two forms of decree, either one ordering an account to be taken of what will be due for principal, interest, and costs at a subsequent date, or a decree declaring the amount due for principal, interest, and costs on the date of the decree The words "so due" in the second paragraph do not refer to the amount of what will be due on a subsequent date only, but include a possible decree declaring the amount due on the date of the decree On a decree such as the one last mentioned, interest would be allowed Section 87 enables the Court to enlarge the time for payment This could hardly have been intended, if all interest had ceased to run In section 88 the words "so found due to the plaintiff' do not necessarily exclude the ascertainment of the sum due at the date of the payment Section 90 shows that the words "amount due for the time being on the mortgage" cannot mean the amount found due by the decree originally This points to a subsequent adjustment and that is provided for by section 94 Section 97 shows that the plaintiff in the suit would, under the circumstances there provided for, be entitled to payment out of the sale proceeds of all interest due on account of the mortgage This points again to a final adjustment Sections 209 and 222 of the Code of Civil Procedure give full power to the Court to make such an order for subsequent interest on the decree see Form 128 in Appendix **[768]** to the Code of Civil Procedure Those forms are based on the provisions of the Code itself and read together with the sections of the Code on the subject show that the Legislature intended that subsequent interest ought to be allowed on the decree

The defendant did not appear

Jenkins, J—This is an ordinary mortgagee's suit in which the plaintiff seeks to enforce her security, and the only question involved is whether the decree should provide for the payment of subsequent interest The doubt is due to a decision of the Allahabad Court in the case of *Amolak Ram* v. *Lachmi Narain* (I L R, 19 All, 174) the head note of which is as follows:—

"In a suit upon a mortgage for the sale of the property mortgaged the Court has no power to allow in the account under section 86 of the Transfer of Property Act, 1882, or in its declaration under that section, interest for a period beyond the date of payment which has to be fixed within six months from the date of the decree

"Sections 209 and 222 of the Code of Civil Procedure 1882, do not affect the special provisions as to allowance of interest contained in the Transfer of Property Act, 1882

"In construing a decree, the terms of which are ambiguous, such construction must, if possible, be adopted as will make the decree in accordance with law, and not a decree such as the Court making it had no power to pass."

The portion of the judgment which deals with this actual point, is in these terms :—

"Now, it is contended on behalf of the decree-holders that the decree gave them interest on the principal amount beyond the date of the expiration of the six months which the Court fixed as the time when the payment should be made. We must see what would have been a legal decree in this case. A decree for sale can only be made under the Transfer of Property Act, 1882. It is as well to bear that in mind. The decree which can be made in a case like this is that which is specified in section 88 of the Act. A decree for sale, according to section 88, shall be to the effect mentioned in the first and second paragraphs of section 86 of that Act—'and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof, be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.' In order to see what would be a decree to the effect mentioned in section 86, we must [769] look at section 86. We find that by the first paragraph of section 86 'the Court shall make a decree ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree.' It is obvious that the words of section 88—'what is so found due to the plaintiff' must mean the amount referred to in the first paragraph of section 86, that is, either the amount found due by the account directed to be taken in that section, or the amount which the Court at the time of passing its decree declares to be due. It is also obvious that under section 86 no future interest beyond a date within six months of the date of the decree can be entered in the account or declared by the Court, and from section 88 it is obvious that the proceeds of the sale decreed under that section must be applied, after payment of the expenses of the sale, in payment of 'what is so found due to the plaintiff,' and that the balance, if any, must be paid to the defendant or other person entitled to receive the same. The section clearly shows that it is only the amount originally declared at the time of making the decree or found to be due under the account provided for by section 86, which the Court can pay over to the plaintiff out of the proceeds of the sale, and that the Court has no power to allow, in the account under section 86, or in its declaration under that section, interest beyond the date which has to be fixed within six months from the date of the decree. In certain events, in adjusting the amount to be paid to a mortgagee, certain additional costs are to be added under section 94 of the Act to the mortgage money, but there is absolutely no provision that we are aware of for adding additional interest

"Now it appears to us that the granting of interest on the costs decreed was in contravention of section 86 The power exercised by Courts to grant interest up to realization under the Code of Civil Procedure appears, in the case of decrees for sale, to be excluded by sections 86 and 88 of the Transfer of Property Act It would be well if Courts, whether of first instance or of appeal, in cases arising under the Transfer of Property Act, would read and consider the sections of that Act which contain the law on the subject, which the Legislature in India has thought it necessary to enact. We have no power as Judges in India to alter the Statute Law, and we have no power to make decrees which are not in accordance with that Statute Law, when the Statute Law provides for the form of the decree to be made. It is not safe to assume that the law of the Transfer of Property Act is the law which was administered in the Courts of Chancery in England."

On the serious practical inconveniences resulting from this decision it is needless to enlarge, as it is matter of common knowledge that the sale under a decree invariably and of necessity involves some degree of delay, and that it frequently happens that a postponement is as necessary in the interest of the mortgagor as of the mortgagee; still this cannot control the proper construction [770] of the Act, if its language is clear and plain. The sections to which

reference seems to have been made in that case are the 86th, 88th and 89th of the Transfer of Property Act, and the 209th and 222nd of the Code of Civil Procedure; but it appears to me that for the purpose of arriving at the true meaning of the Legislature regard must be had to other parts of both these Codes.

Now section 88 provides:—

"In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section 86, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

"In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms."

To ascertain then the full effect of section 88 recourse must be had to section 86 which provides:—

"In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree, and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free [771] from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall, if necessary, put the defendant into possession of the property."

Then section 89 provides: —

"If in any case under section 88 the defendant pays to the plaintiff or into Court on the day fixed as aforesaid, the amount due under the mortgage, the costs, if any, awarded to him, and such subsequent costs as are mentioned in section 94, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section 88; and thereupon the defendant's right to redeem and the security shall both be extinguished."

It will be seen from the judgment to which I have referred, that, according to the view expressed by the Allahabad High Court, the expression "*what is so found due to the plaintiff*" in section 88 means the amount referred to in the first paragraph of section 86; in other words that the word "so" refers not merely to the different heads of indebtedness mentioned in that paragraph, *i.e.*, principal, interest and costs, but also to the date there indicated. It appears

to me that to attribute this force to the word *so* is opposed to that which is apparent from this first paragraph itself, for it will be noticed that in that paragraph the expression "*so due* at the date of the decree" must refer to a point of time other than that by reference to which the account mentioned in the earlier part of the clause is to be taken. This of itself would seem to justify the conclusion that the expression "*so found due*" in section 88 does not necessarily and obviously mean, *found due* at the date indicated in section 86.

But if one looks at section 90, it is difficult to reconcile its provisions with the view that a mortgagee is not entitled to subsequent interest. That section provides that: "When the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally [772] recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum."

The expression "*the amount due for the time being on the mortgage*" to my mind implies that there is to be an adjustment over and above the account mentioned in section 86; and this view receives confirmation from section 94, which expressly mentions a final adjustment, and also from the application of the proceeds mentioned in section 97.

On the other hand, if the interpretation applied in the Allahabad case is adopted, a mortgagor would not be entitled to credit in respect of any subsequent payment made by him, or even in respect of subsequent rents received by a mortgagee in possession, and it would be almost doubtful whether the proceeds of sale mentioned in section 89 would be applicable in payment of subsequent costs though mentioned in the earlier part of the section, because those proceeds are to be applied as mentioned in section 88, and if the expression "*so found due*" is to have the meaning attributed to it at page 177 of the report of that case it would exclude subsequent costs. With all deference I cannot suppose that such results could have been intended or is required by the words of the Transfer of Property Act.

Then the Code of Civil Procedure is not without its bearing on the point.

The Transfer of Property Act was passed on the 17th of February 1882, and the Civil Procedure Code a month later, *i.e.*, on the 17th of March in the same year.

In the 4th schedule to the Procedure Code are set out the forms of pleadings and decrees, which section 644 of the Code ordains shall be used for the respective purposes mentioned in that schedule, and it is fair to assume that those forms do not exceed that which is permissible. Form 109 contains the plaint to be used in an action for foreclosure and sale, and it is clear from the prayer there stated that in case the proceeds of sale are insufficient to pay the amount due to the plaintiff, the defendant may be made personally liable to pay interest until realization.

Now section 90, under which this part of the decree is made, does not provide for the payment of such interest, so that the [773] power to include it in the decree must apparently be derived from section 209 of the Code of Civil Procedure.

If this be so, then the opinion, expressed at page 180 of the report of *Amolak Ram* v. *Lachmi Narain* to the effect that section 209 of the Code of Civil Procedure cannot affect the special provisions of the Transfer of Property Act, would seem to be erroneous. The inference would rather appear to be that the provisions of the Transfer of Property Act are not exclusive and exhaustive; and, further, that it never was contemplated that a mortgagee in a suit, which, in its origin at any rate, was founded on equitable principles as firmly established in this Court as in the Court of Chancery in England, should be mulcted of his interest, when his mortgagor is in default.

The conclusion then to which I come is that the Transfer of Property Act does not exclude the allowance of subsequent interest, and I see no reason for departing from the long continued practice of this Court, sanctioned as it is by the rules of Court, and I accordingly direct that the decree shall be in the form which has hitherto obtained*

Attorney for the Plaintiff Babu *Horendra Nath Dutt.*

C. E. G.

NOTES.

[The practice referred to in this decision has received the approval of the Privy Council in *Sundar Koer* v *Rai Sham Krishen* (1906) 34 Cal., 150. "The decree is in accordance with the directions contained in Rules of Court made by the Calcutta High Court under the power for that purpose conferred on the Court by section 104 of the Transfer of Property Act, 1882, as well as in rules of an earlier date and with the uniform practice of that Court. This appears from an instructive note by Mr Belchambers, the Registrar of the Court, appended to the report of *Achambala Bose* v *Surendra Nath Dey* (1897) 24 Cal, 766. The same practice has been followed by the Madras High Court in (1897) 21 Mad, 364." (After examining the decisions in (1898) 26 Cal, 39, and (1900) 23 All., 181, their Lordships proceeded) "In the present case their Lordships have no hesitation in expressing their concurrence with the High Court of Calcutta, not only in allowing interest after the fixed day, but also in allowing interest at the Court rate and not at the mortgage rate. They think that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree It will be observed that according to the practice explained by the registrar, which has been followed in this case, the interest is allowed on the aggregate sum, and not merely on the principal money and this is right, if the mortgagee is treated as a decree holder or judgment creditor, but would be wrong if the right to the interest depended on the terms of the mortgage-bond After the decision of this Board last cited (23 All 181) it is immaterial to inquire into the source of the power in the Court to allow such interest" at pp 159 161

These were decisions prior to the decision of the Privy Council quoted above —(1902) 6 C W N, 769, (1897) 21 Mad 364 (1899) 21 All, 361, (1908) 18 A W. N, 164, (1904) 1 N.L. R, 43, (1899) 3 O C, 129, (1898) 2 O C 37, (1898) 12 C.P L R, 78]

* The following note furnished by Mr Belchambers, the Registrar of the Court, Original Side, in connection with this case, shows the practice which has hitherto obtained in the Calcutta Court

"The decision in *Amolak Ram* v *Lachmi Narain* (I L R, 19 All, 174) demands attention as materially affecting the interests of mortgagees The head note is as follows.—(head note set out ante p 768)

"The Transfer of Property Act, while it gives power to enlarge the time for payment of the amount declared to be due under a mortgage, and also requires a personal decree to be made against a mortgagor for any balance that may remain due after exhausting the security, contains no express provision for the allowance of further interest in either case. The power to enlarge the time for payment is seldom invoked *adversely*, but further time for payment is frequently obtained by consent When default is made, and it becomes necessary to proceed to a sale, a considerable time must elapse in taking the necessary steps leading up to the sale, that is, in obtaining a final order for sale, investigating the title to the property comprised in the mortgage, settling the conditions of sale, and causing the sale to be duly advertised

"A sale is usually advertised for a month (see section 290 of the Civil Procedure Code) except when any property comprised in the mortgage is out of Calcutta. It is then advertised for a longer period, and is also proclaimed in the district where the property is situate, the procedure being regulated by rules 392 and 403, Belchambers' Rules and Orders, p. 194.

"A sale may be postponed if the Registrar is unable to attend on the day appointed for the sale, or for want of bidders or sufficient bidding, "or for other sufficient cause, or with the consent of the parties" see rules 407, 408 and 412, Belchambers' Rules and Orders, pages 195 and 196 Instances may be referred to where a sale has been repeatedly postponed, requiring another day to be fixed and the sale to be re-advertised or re-proclaimed under rules 413 and 414, the effect being to defer the day of payment.

[774] APPELLATE CIVIL.

The 4th May, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Mathura Nath Ghose........ ..Auction-Purchaser

versus

Nobin Chandra Kundu Biswas (Petitioner) and another (Decree-holder) and others ....Judgment Debtors.*

Second Appeal—Order refusing to set aside a sale—Appeal from an order remanding a case—Code of Civil Procedure (Act XIV of 1882), section 588, clauses 16 and 28, and section 562

Though orders under section 562 of the Code of Civil Procedure are appealable under clause 28 of section 588, yet the provisions of the latter section are subject to its last paragraph which says that "orders passed under this section shall be final", and, therefore, no second appeal lies from an order passed under section 588 clause 16 notwithstanding that it is an order passed by the Lower Appellate Court remanding the case under section 562, inasmuch as the order was made in a case which was itself an appeal from an order allowed by section 588 of the Code

" It should also be noted that time is always allowed to the purchaser to pay the purchase money [see rule 393 and form of conditions of sale, Belchambers' Rules and Orders, pages 191 and 460], that he may fail to do so in due time and it may be necessary to proceed against him under rule 425 that on the other hand, he may, if not prepared to accept the title, pay the purchase money into Court under rule 424 subject to his right to object to the title, that generally after a sal objection may be taken and the sale set aside, or compensation allowed for error or misstatement in the particulars or description of the property. see rules 420 to 423, pages 197 and 198, and form of conditions of sale p 460

" It will thus be seen that the purchase money can in no case be immediately available for payment to the mortgagee, and may in some cases be withheld for an uncertain period dependent upon the result of proceedings by or against the purchaser

" According to the decision of the Allahabad High Court, a mortgagee cannot, under any circumstances, be allowed interest "beyond the date which has to be fixed within six months from the date of the decree "

" Previous to the Transfer of Property Act decrees for sale were made by the Calcutta High Court in mortgage suits as well as in other suits Its subsidiary rules of procedure passed under clause 37 of the Letters' Patent, 1865, and under section 652 of Act X of 1877 [as amended by Act XII of 1879], are contained in Belchambers' Rules and Orders, and include a body of rules for regulating sales by the Registrar (p 189 *et seq*) to which attention is called and especially to the two following rules which came into effect on the 1st of May 1885

" Rule 555 at p 228 —' Unless otherwise ordered interest shall be computed on a mortgage, at the rate mentioned therein, until the end of six months from the date of the decree or until the end of any further period to which the time may be enlarged Such interest shall be added to the principal, and thereafter interest shall be computed on the aggregate amount at the rate of six per cent per annum '

" Rule 324 at p. 168.—' Unless the Court or a Judge shall otherwise order every decree in a suit for the sale of mortgaged property shall contain a direction that if the money to arise by such sale shall not be sufficient for the payment in full of the amount of principal, interest, and costs payable under the decree, the defendant do pay the amount of the deficiency, with interest at the rate of six per cent per annum ' See the note under this rule.

" In mortgage suits the procedure was regulated by the rules of Court and the Civil Procedure Code, until the Transfer of Property Act came into effect.

* Appeal from Appellate Order No. 427 of 1896, against the order of Babu Syam Chand Roy, Subordinate Judge of Jessore, dated the 30th of September 1896, reversing the order of Babu Bidhu Bhushan Banerjee, Munsif of that District, dated the 16th of May 1896.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

[775] Dr. *Rash Behari Ghose* and Babu *Kishori Lall Sarkar* for the Appellant.

Mr. *N. Chatterjee* and Babu *Nalini Nath Sen* for the Respondents.

The **judgment** of the High Court MACLEAN, C.J., and BANERJEE, J., was delivered by

Banerjee, J. (MACLEAN, C.J., concurring).—This appeal arises out of an application made by the respondent for setting aside the sale of a *ganti* tenure in execution of a decree for arrears of rent, on the allegation that he holds a subordinate tenure under the *ganti* tenure. The application purported to be made under sections 244 and 311 of the Code of Civil Procedure.

[776] The Munsif held, and I think rightly held, that section 244 has no application to a case like the present; and he rejected the application on the ground that the applicant was not entitled to make any such application under section 311.

Against the order of the Munsif the applicant preferred an appeal; and the learned Subordinate Judge in the Court below has set aside the order of the Munsif and directed him to entertain the application and to dispose of the same according to law. Against this order of the Subordinate Judge the auction purchaser has preferred this second appeal.

At the hearing of the appeal, a preliminary objection is taken [777] by the learned Counsel for the respondent, that no second appeal lies in this case. The ground upon which the preliminary objection is based is this, that the order passed by the Court of appeal below was an order passed under section 588, clause 16, in an appeal from an order of the Munsif refusing to set aside a sale of immoveable property, and being an order of that nature is final, as provided by the last paragraph of section 588.

In answer to this objection the learned Vakil for the appellant urges that this appeal is allowed by clause 28 of section 588 of the Code. It is argued that the order appealed from is a remand order by the Lower Appellate Court made under section 562, and is therefore appealable; and the cases of *Kirte Mohaldar* v. *Ramjan Mohaldar* (I. L. R., 10 Cal., 523), *Collector of Bijnor* v. *Jafar Ali Khan* (I. L. R., 3 All., 18), and *Mohadev Narsingh* v. *Ragho Keshav* (I. L. R., 7 Bom., 292) are relied upon as lending support to this contention.

But we are of opinion that the preliminary objection ought to prevail, and that the cases cited for the appellant are distinguishable from the one before us. It is true that orders under section 562 remanding a case are appealable under clause 28 of section 588; but the provisions of the section are subject to the last paragraph of the section, which says that "orders passed in appeals under this section shall be final." The effect of this last paragraph

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"Section 104 of that Act gives the High Court power to make rules as follows: 'The High Court may from time to time make rules consistent with this Act for carrying out in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this chapter.'

"Under that section the Calcutta High Court made rules for the Original Side, a printed copy of which is annexed. The rules regulating sales by the Registrar were then considered, with the result that some were repealed and some amended. Rule 555 which directs the allowance of further interest was amended, but without modifying or in any way affecting that direction.

"It thus appears that the interpretation of the law by the Allahabad High Court is opposed to the interpretation of the law by the Calcutta High Court as evidenced by its rules. And it should be added that the course of practice followed by the Calcutta High Court has been uniformly in conformity with its rules."

of the section is to bar an appeal from an order passed in an appeal allowed under the section; and where a remand order is made in a case which is itself an appeal from an order allowed by this section, the order, even though it be one remanding the case, is, we think, an order that is not appealable. To reconcile clause 28 of section 588 with the last paragraph of the section, we must read clause 28 as referring only to orders made under section 562 in cases which are appeals from decrees.

As for the cases cited, they are all of them cases of remand orders made, not in appeals from orders, but in appeals from original decrees. The objection that was raised in those cases to an appeal from a remand order being entertained was this, that the cases being of the Small Cause Court class, and a second [778] appeal being barred in such cases by section 586, an appeal from a remand order which would be a second appeal, would not lie; and the objection was overruled upon the ground that clause 28, section 588, was not subject to the exceptional provisions of section 586, which was a provision relating to appeals from appellate decrees and not to appeals from orders. Whether that view of the law is right or not is a question which we need not consider in this case. It is enough to say that this case is clearly distinguishable from the cases cited.

That being so, we think effect ought to be given to the preliminary objection, and this appeal must be dismissed with costs.

S. C. G. *Appeal dismissed.*

NOTES.

[This was followed in (1899) 21 All., 291.]

[24 Cal. 778]

The 24th March, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Adhar Chandra Dass............Decree-holder

versus

Lal Mohun Das and others............Judgment-debtors.*

Limitation Act (XV of 1877), Schedule II, Article 179, clause (4)—Step in aid of execution of decree—Application for substitution of the heirs of the deceased judgment-debtor—Application in accordance with law—Code of Civil Procedure (Act XIV of 1882), sections 234, 235, 248 and 273.

An application by the judgment-creditor for substitution of the heirs of the deceased judgment-debtor, though disallowed, is an application in accordance with law to take some step in aid of execution of the decree within the meaning of sub-section 4 of Article 179 of the Limitation Act.

An application by the judgment-creditor for the execution of his decree, which has been attached, as well as an application by him to execute another decree which he had attached in execution of his own decree, though disallowed, are applications in accordance with law.

THE facts of the case and the arguments appear sufficiently from the judgments of the High Court.

Babu *Manmatha Nath Mitter* for the Appellant.

Babu *Baikant Nath Das* for the Respondents.

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* Appeal from Order No. 320 of 1896, against the order of H. E. Ransom, Esq., Officiating Additional Judge of Dacca, dated the 5th of June 1896, reversing the order of Babu Shyam Chunder Roy, Officiating Subordinate Judge of that district, dated the 6th of September 1896.

[779] The following **judgments** were delivered by the Court (MACLEAN, C.J., and BANERJEE, J.):—

Maclean, C.J.—When one is in possession of the facts of this case, the point which one has to decide is reduced to very narrow limits. The question is whether the application of the decree-holder of 5th June 1893 was an application made by him in accordance with law to take some steps in aid of execution within the meaning of sub-section 4 of article 179 of schedule II of the Limitation Act.

The facts are these: The appellant here is the judgment-creditor and the respondent is the judgment-debtor. I need not go through the various steps which the judgment-creditor has taken to try and obtain the fruits of his judgment, but he took several, and has not obtained payment. On the 5th June 1893 he made an application of a double nature: one part of the application was that the heirs of the deceased judgment-debtor might be substituted in the place of the judgment-debtor who had died, so that the proceedings might be carried on against them, and the other part of the application was that steps might be taken to enable him to obtain, by way of execution, the fruits of his judgment. It is said that that is not a step in aid of execution in accordance with law within the meaning of the sub-section to which I have referred.

The ground upon which that view is based is that at the time the judgment-creditor made this application, the decree he had obtained had been attached by a judgment-creditor of his own, and that being so, he had not sufficient interest in the decree which he had obtained to enable him to sustain the application in aid of execution.

I do not think that that is a valid objection. The judgment-creditor still had an interest in the decree which he had obtained, and the attachment order did not prevent him from presenting the decree with a view to its execution. Such a step would not be adverse to the rights of his own judgment-creditor, as it would be for the interests of both, that, if possible, the fruits of the decree should be obtained by execution. He could have paid off his own judgment-creditor, and then his own judgment-decree would have been free from the attachment order. The [780] learned Judge in the Court below has taken no notice of that part of the application, which asked for the substitution of the heirs of the judgment-debtor in place of the judgment-debtor. Without bringing them before the Court the judgment-creditor could not have proceeded with his execution proceedings. His application for that purpose appears to me to be a step in aid of execution in accordance with law.

I ought to have stated that another objection was taken, that it was not an application in accordance with law because it was refused. "In accordance with law" cannot, I think, mean that it must of necessity be a successful application. That is too narrow a construction to put on the article, nor does the language of the sub-section justify such a view. It is conceded that if the application of 5th June 1893 were a step in aid of execution in accordance with law, then the present application for execution is not out of time.

I ought, perhaps, to refer to a suggestion rather than an argument which was thrown out, *viz.*, that a previous application of the 6th June 1890 in aid of execution was not well founded, and consequently that the application of the 5th June 1893 was itself out of time. I am unable to attach any importance to this suggestion, and I am not satisfied that we can properly go into it.

The Judge, who in the first instance decided this point, decided it in favour of the judgment-creditor, but the District Judge has reversed that decision.

I think that the application of the 5th June 1893 was an application in accordance with law to take a step in aid of execution, and the case appears to me to be consistent in principle with the case of *Hafizuddin Chowdhry* v. *Abdool Aziz* (I. L. R., 20 Cal., 755).

I do not think that the language of article 179 of the second schedule of the Limitation Act ought to be strained in favour of a judgment-debtor, who has not paid his just debt; and there are a variety of reported cases to show that applications, some of which, in my opinion, are not so strong as this, have been regarded as steps taken in aid of execution. Upon these grounds, I think, [781] that the District Judge was wrong, and that the order of the first Court must be restored The appeal therefore must be allowed with costs in this Court and in the Lower Appellate Court.

Banerjee, J. —I am of the same opinion. The question raised before us is whether the application for execution of the decree in this case, which is dated the 22nd November 1887, was barred by limitation The first application for execution was made on the 18th February 1889, and so that was filed in time. The second application for execution was made on the 8th May 1890, which was within three years of the date of the last application; and that also was therefore in time. Then on the 6th June 1890, an application was made for execution of this decree, by enforcing the execution of another decree, which had been attached in execution of the present one, and that was rejected on the 11th June 1890. The next application that was made with reference to the execution of this decree was an application made on the 5th June 1893 for the execution of the decree after substitution of the legal representatives of the deceased judgment-debtor in his place. That application was dismissed on the 16th June 1893, on the ground that, as the decree sought to be executed had been attached in execution of another decree obtained against the present decree-holder, no execution could issue, the order evidently having been made with reference to the provisions of section 273 of the Code of Civil Procedure. That attachment was subsequently removed, and the present application for execution was made on the 11th December 1894.

The first Court disallowed the objection of the judgment-debtor that the present application was barred, and ordered execution to proceed. On appeal, the Lower Appellate Court has reversed that order, holding that execution was barred by limitation, and the question is whether the decision of the Lower Appellate Court on that point is correct.

If the application of the 5th June 1893 is an application in accordance with law to the proper Court to take some step in aid of execution of the decree within the meaning of clause 4 of article 179 of schedule II of the Limitation Act, the present application, which is well within three years from the date of that application, is not barred, provided, of course, that [782] the application of the 5th June 1893 was itself not barred. The learned Vakil for the respondents contends that the present application is barred, because the application of the 5th June 1893 was not an application according to law within the meaning of clause 4 of article 179, and also because, even if that application be held to be one according to law, that application itself was barred, as it was made more than three years after the second application made on the 8th May 1890, the intermediate application for execution, dated the 11th June 1890, being one not according to law.

The two questions we have to consider, therefore, are, *first*, whether the application of the 5th June 1893 was one according to law; and, *secondly*, whether the application of the 6th June 1890 was one according to law.

As regards the application of 5th June 1893, the main objection to it is that, as under section 273 of the Code of Civil Procedure the Court was bound to stay execution of this decree, by reason of a notice of attachment of the same having been received from another Court, no application for execution could have been made according to law. Granting that that was so, the application of the 5th June 1893 was not merely an application for execution, but contained a further prayer for the substitution of the legal representatives of the deceased judgment-debtor in his place; and although the Court under section 273 of the Code was bound to stay execution until the notice issued at the instance of the party who had attached the decree was withdrawn, I do not think that there was any bar to its making the substitution of the legal representatives of the deceased judgment-debtor in his place as prayed. The object of section 273 of the Code in directing stay of execution is merely to prevent the holder of the attached decree from realizing and taking away the fruits of that decree. But it cannot be held to have been intended to prevent an incidental step like that, which was a necessary step for the execution of the decree being taken. The taking of such a step would, instead of defeating the object for which the decree had been attached, have only furthered it by placing on the record the party against whom, and against whom alone, execution could have been taken at the instance of the [783] attaching decree-holder. That being so, as far as the prayer for substitution was concerned, the present decree-holder, in applying to the Court to make such a substitution, was, in my opinion, making an application in accordance with law to the proper Court to take some step in aid of execution within the meaning of clause 4 of article 179.

It was contended that, as the Court to which the application was made had disallowed the application, and no appeal was preferred against the order disallowing it, we must take it that the application that was made was not made according to law. I do not think that such a view is at all tenable. To affirm the proposition for which the learned Vakil for the respondent contends, would be to hold that none but a successful application can come within the scope of clause 4 of article 179. That certainly could not have been intended—see *Hafizuddin Chowdhry* v. *Abdool Aziz* (I. L. R., 20 Cal., 755).

This brings me to the consideration of the application of the 6th June 1890. The ground upon which it is contended that that application was not one according to law is that it was an application made by the decree-holder to execute another decree, which he had attached in execution of the present decree, and it was rejected by the Court because, under section 273 of the Code, the proper procedure was for the decree-holder to apply to the Court to direct the proceeds of the attached decree to be applied in satisfaction of his own, instead of applying for execution of that decree at his instance. Though that application was rejected by the Court, section 273 of the Code was really no bar to it, and for the present purpose it should be treated as an application made according to law—see *Peary Mohun Chowdhry* v. *Romesh Chunder Nundy* (I. L. R., 15 Cal., 371).

Various cases were referred to by the learned Vakil for the respondents in the course of his argument as to the meaning of the words "applying in accordance with law." None of those cases is in point; and I do not think we should be doing right in straining the law and in holding that an application made *bonâ fide* with the object of obtaining satisfaction of a decree [784] should be held to be not in accordance with law, merely because the Court in which the application was made thought fit, for some reason, not to allow the same. The view I take is in accordance with the opinion of the learned Judges of the Madras High Court in the case of *Kunhi Mannan* v. *Seshagiri Bhakthan* (I. L. R., 5 Mad., 141). The Court had not, when dismissing

the former application, to consider whether, for the purposes of the law of limitation, that application could or could not be treated as one made according to law. The order dismissing the former application cannot, therefore, be regarded as conclusive upon the present question. That being so, I think that there is no force in the contention urged on behalf of the respondents that the two applications referred to above should be treated as being not according to law; and, if that contention fails, the present application is clearly in time.

S. C. G. *Appeal allowed.*

NOTES.

[I. The decree-holder's application to bring the judgment-debtor's representative on the record is a step in aid of execution :—(1907) 30 Mad., 541; (1913) 14 M.L.T, 530.

II Limitation Acts should receive a liberal construction.—(1905) 28 Mad., 557.

III. Attachment does prevent the decree-holder from proceeding to execute the decree—(1911) 21 M.L J., 577 overruling (1909) 5 I.C, 56 (Mad).

See also (1910) 8 I C., 675 (Cal.), (1912) 13 M.L.T., 227 as regards the effect of attachment.]

[24 Cal 784]

TESTAMENTARY JURISDICTION.

The 5th May, 1897.

PRESENT:

MR. JUSTICE SALE.

In the goods of R. Porthouse (deceased).

Will- Imperfect form of Will - Will unexecuted by Testator—Blank spaces in body of Will—Application for Probate.

A testator died leaving as his will a printed form of will imperfectly filled in, and having omitted to insert his name and description at the head of the document, and to append his signature thereto. He had, however, written his name in the attestation clause and completed the disposition clause bequeathing all his property to his wife and appointing her sole executrix.

Held, that this was sufficient and the will should be admitted to probate.

In the goods of Casmore (L.R., 1 P. and D., 653), referred to.

THIS was an application in Chambers, under the following circumstances. Robert Porthouse, an employé of the East Indian Railway Company, died, leaving as his will a printed form of will provided by the Railway Company for the use of their servants, **[785]** which, in this case, was only partially filled up in the following way:—

THIS IS THE LAST WILL AND TESTAMENT OF ME

———OF———

Firstly—I direct that all my just debts funeral and testamentary expenses be paid and satisfied by my executrix hereinafter named as soon as conveniently may be after my decease and

Secondly—I give devise and bequeath all and every my household furniture linen and wearing apparel books plates pictures china horses carts and carriages and also all and every sum and sums of money which may be in my house or be about my person or due to me at the time of my decease and also all other my stocks funds and securities for money, books debts, money on bonds bills notes or other securities and all and every other my estate and effects wheresoever and whatsoever both real and personal whether in possession reversion remainder or expectancy unto my wife Agnes Porthouse to and for her own use

and benefit absolutely, and I nominate constitute and appoint my wife Agnes Porthouse to be executrix of this my will and hereby revoking all former or other wills and testaments by me at any time heretofore made. I declare this to be my last will and testament. In witness whereof I the said *Robert Porthouse* have to this my last will and testament set my hand the eleventh day of October in the year of Our Lord one thousand eight hundred and eighty eight.

Signed by the said testator and acknowledged by him to be his last will and testament in the presence of us present at the same time and subscribed by us as witnesses in the presence of the said testator and of each other.	William Gordon Porthouse. David Heug.

The printed form was a form always used by the employés of the East Indian Railway Company with blanks left in the form for a testator to fill up himself. Most of these the testator had omitted to fill up, but in the body of the will he filled in his wife's name as residuary legatee and executrix, and at foot he added "in witness whereof I the said Robert Porthouse have hereunto set," etc., etc., but he did not sign the document. An application was now made on behalf of the executrix and sole legatee for the admission of this will to probate.

Mr. *Longmuir* (Messrs. *Morgan & Co.*), for the applicant, stated the circumstances and asked that the will might be admitted to **[786]** probate, citing the cases of *Corneby* v. *Gibbons* (1 Rob., 705), *In the goods of Kirby* (1 Rob., 709), *In the goods of Kimpton* (3 Sw. and Tr., 427).

Sale, J.--I will make the order for grant of probate, as I am satisfied on the evidence that the deceased intended by signing his name in the attestation clause to execute the will. See *In the goods of Casmore* (L. R., 1 P. and D, 653).

Attorneys for the applicant: Messrs. *Morgan & Co*

C. E. G.

[24 Cal. 786]

APPEAL FROM ORIGINAL CIVIL.

The 29th January, 1897.

PRESENT

SIR FRANCIS WILLIAM MACLEAN, KT, CHIEF JUSTICE, MR. JUSTICE MACPHERSON, AND MR JUSTICE TREVELYAN.

Choutmull Doogur and others .... Plaintiffs

versus

The Rivers Steam Navigation Company Defendants*

Carriers Act (III of 1865), sections 6, 8—Negligence—Accident, Loss by—Special Contract—Suit for Damages

The plaintiffs delivered to the defendants certain goods for carriage to Calcutta in a flat belonging to the defendants The goods were carried under the terms of a special contract or "forwarding note," signed by the shipper One of the conditions of the forwarding note was as follows —"The Company will not be under any liability for damages or compensation in respect of loss of, or damage to, goods except such liability as they are or may be subject to under the provisions of any law for the time being in force or of any contract other than this for the time being in existence between the Company and the shipper" While on board the defendants' flat, the goods were destroyed by fire At the trial of the case, the defendants gave evidence showing the state of things before the fire occurred the circumstances leading to the discovery of the fire (but not the cause or origin of it) and the measures taken to extinguish the fire

Held that the occurrence of a fire under the circumstances disclosed in the case without any explanation as to the origin of it, was of itself evidence of negligence

[787] *Held*, also reversing the decision of SALE, J that the defendants had not discharged the onus cast upon them by law, of showing that there was no negligence

Central Cachar Tea Company v Rivers Steam Navigation Company† explained

* Appeal from Original Decree No 10 of 1896 from the decision of Mr Justice SALE, dated the 26th February 1896, in Suit No 11 of 1895

† Appeal No 38 of 1895 from Original Civil Suit No 472 of 1893 The Original Suit was heard by Mr Justice HILL, and his decision was affirmed on appeal on the 4th March 1896

The **judgments** of the Appeal Court (PETHERAM, C J and PIGOT and MACPHERSON, JJ.) from which the facts of the case fully appear were as follows -

Petheram, C J—The defendants are common carriers within the meaning of the Carriers Act, 1865, and this action is brought against them to recover the value of 166 chests of tea delivered to them to be carried from Fenchugunge in Sylhet to Calcutta, which were lost on the voyage The plaintiffs are the owners of the tea and the underwriters by whom it was insured The liability of the defendants is regulated by the Carriers Act section 6 of which provides that the carrier may, by special contract signed by or on behalf of the owner of the goods, limit his liability, sections 7 and 8 that his liability for negligence shall not be limited by special contract, and section 9, that in any suit brought against a common carrier for the loss or non-delivery of goods, it shall not be necessary for the plaintiff to prove negligence, in other words that the non delivery of the goods shall be *primâ facie* evidence of negligence

The history of the case is as follows —Before and on the 11th of November 1892, the defendants and the India General Steam Navigation Company employed the same persons as their agents at the river stations, including Fenchugunge These agents did the work of both Companies, and cargo received by them at these stations for transit to Calcutta, addressed to the India General Steam Navigation Company, was often brought down by the defendants, and cargo received by them at such river stations for transit to Calcutta, addressed to the defendants, was often brought down by the India General Steam Navigation Company. On the 4th of October 1892, an agreement was made between the India General

[788] *Held*, on the construction of the above clause (*per* SALE, J., in the Court below, and *per* TREVELYAN, J., in the Court of Appeal) that the words "any law for the time being in force" must be taken to refer, not to the common law, but to the law as laid down in the Carriers Act (III of 1865), and that, unless their liability was enlarged by express contract, the defendant Company were liable only for loss or damage of which under section 6 of that Act they were not allowed to relieve themselves, that is, only for loss occasioned by the negligence or criminal acts of themselves, their servants or agents.

The decision of HILL, J., in *Central Cachar Tea Co.* v. *Rivers Steam Navigation Co.* (Unreported) followed.

Steam Navigation Company and the defendants of the one part, and the plaintiffs, the owners of the tea of the other part, by which the two Companies agreed to carry the plaintiffs' goods at certain rates, and the plaintiffs agreed to send all their goods by the steamers of one or other of the two companies. The last clause of the agreement was as follows: "The conditions contained in the bill of lading to be granted by the Companies for goods carried by them under this agreement or other document (if any) shall, except when the terms thereof expressly conflict with the provisions of this agreement, be binding on the parties." On the 3rd of November 1892, Mr Lees, the manager of the Garden in Sylhet, sent the 166 chests of tea, which are the subject of this suit, to Fenchugunge, to the persons who were the agents of both the Navigation Companies, together with a shipping note signed by himself. This note was written on a printed form of the India General Steam Navigation Company, and by the printed heading appeared to be addressed to that Company. It contained the following clause 7: "The Company will not be liable for any loss or damage, non-delivery or short delivery occasioned by the act of God, dacoity, piracy, destruction or damage by collision, fire or vermin, leakage and breakage, or rust, or deterioration of perishable goods, accidents of and from machinery or ship's tackle boiler's steam risks of separation of the cargo vessels from the steamer, stress of weather, want of water in the rivers, or the difficulties and casualties of navigation or any danger or accident of the rivers or navigation of what nature or kind soever." The goods were received at Fenchugunge by the persons who acted as agents for the two Navigation Companies, and were shipped by them on the Flat *Nowgong*, which belonged to the defendants, in pursuance of the arrangements between the two Companies, and of the agreement between the two Companies and the owners of the tea mentioned above. The bill of lading under which the goods were shipped was signed by these agents. The flat was attached to the port side of the Steamer *Makum*, which also belonged to the defendants and which was commanded by Captain J. C. Allen. The Steamer *Makum* is 230 feet long by 55 feet wide over all, and the Flat *Nowgong* is 30 feet across, so that the whole flotilla occupied a space of about 230 by 85 feet. This flotilla, with the tea in question on board the flat left Fenchugunge on the morning of the 12th of November, and, very soon after 8 o'clock on the morning of the 14th, was at a place in the Kushyara river, which Captain Allen calls Long Cape Reach. At this place there is an almost straight reach of the river, which, I gather from the evidence, is from five to eight hundred feet long. Below it the river turns sharply to the right, forms a narrow loop, and then returns in another straight reach nearly parallel to the one on the other side of the loop. The river at the entrance to the loop is about 250 feet wide from bank to bank, but under the right bank at this spot, and from this spot round the bend, there is a shoal which extends some 70 feet into the stream, and reduces the width of the navigable water to about 170 feet. The left bank of the river at this place is perpendicular, and is composed of soft clay. All the witnesses say that the navigation at the place is difficult, that, if it can be done, the proper way to get round the bend is to keep close to the shoal, and to go round, without touching the left bank at all; but, they add, that it is not always possible to do so, and that sometimes the most experienced commanders must touch that bank in order to get round the bend. On the morning in question the current was setting down the reach at about three miles an hour, and at the entrance to the loop was setting down the stream and across it from the right bank towards the left. Captain Allen was on the bridge in front of the steamer attending to the steering, and Captain Westbrook, the Commander of the flat, was in his cabin on the flat engaged in preparing a manifest. His cabin was on the front part of the deck of the flat, and from it he could see where the flat was and in what direction she was going. When he got to the beginning of the straight reach which leads to the bend, the Captain eased the engines, and the flotilla proceeded for some five hundred feet down the reach at about four knots an hour, one of which was caused by the action of the engines, the remaining three being caused by the force of the current. On arriving at the end of the reach, when the flotilla was opposite the shoal, the Captain stopped, and then reversed the engines, and put the helms hard aport. The flotilla was then carried by the current down and across the stream for about 200 feet, when the port quarter of the flat struck the perpendicular left bank of the river, at a point about that distance lower down than the place opposite which the engines

[789] *Semble*, on appeal (*per* MACPHERSON, J., MACLEAN, C.J., *doubting*) that the above construction of the clause was correct.

THE facts of the case are fully stated in the judgment of SALE, J., dismissing the suit, which was as follows:—

"This is a suit to recover the value of 432 drums of jute delivered by the plaintiffs to the defendant Company for carriage from Serajgunge to Calcutta.

[790] "The plaintiffs are merchants carrying on business at Calcutta and Serajgunge. The name under which they do business in Calcutta is Than Sing Koram Chand, and the name of their business in Serajgunge is Bhood Sing Bal Chand. The defendants are common carriers, and it is admitted that in the ordinary course of business they received the goods in suit for carriage to Calcutta, and the loss of the goods is also admitted. The goods were carried under the terms of an agreement contained in a forwarding note which was signed on behalf of the plaintiffs and constituted a special contract within

had been stopped. After the stern of the flat had struck the bank, the forepart closed in on the bank, and the whole grazed along it for a short distance. Directly after the flat had taken the bank, it was found that the water was pouring into her, and the Captain at once started the engines at full speed ahead, and took the flotilla round the loop into the straight reach on the other side, down this reach to a place where it was wide enough for the flotilla to turn, where he turned it, and then beached the flat on a level shoal or beach under the right bank of the river, at a place several hundred yards down the straight reach. An examination of the flat after she had been beached showed a groove in the iron plates of which she is built, on the port quarter, about six feet long, ending in a hole six or seven inches wide and three feet long, tapering towards the ends. This hole was in the side of the flat at a place which had been about two feet under water when the flat took the bank, and all the experts say that it was caused by some hard substance, which was pressed against the flat by the bank, when the flat struck, but that it could not have been caused by the bank itself, had there been nothing unusual at the place at the time. The inclination of their opinion is, as I understand them, that it was caused by a piece of wood which was sticking in the bank some two feet below the surface of the water, though nothing of the kind was found near the spot when search was made after the accident. For myself, I have no doubt that the injury was caused by the end of a large log of wood or a fragment of a tree, the other end of which was pressed against the bank; but whether the wood was sticking in the bank or floating in the water, there is no evidence to show, and I do not think it at all material to inquire. The 166 chests of tea, which are the subject-matter of this suit, were so injured by the water as to be useless and not worth carriage to Calcutta.

Upon evidence of this state of things the learned Judge in the Court below has found that there was a contract within the meaning of section 6 of the Carriers Act, by which the liability of the carriers was limited to a liability for negligence only, and that the Captain of the steamer was negligent in allowing the flat to touch the bank at all, but has further found that the loss of the tea was not caused by the negligence of the Captain in allowing the flat to strike the bank, but by the presence at the spot of a concealed danger, which he had no reason to suspect, and upon these findings has dismissed the suit.

On appeal before us, it was first contended by Mr. *Pugh* on behalf of the plaintiffs that, as the shipping note was written by the agent of his clients, the owners of the tea, on a form of the India General Steam Navigation Company, there was no contract with the present defendants by which their liability was in any way limited, and that they are liable for the loss of the goods as insurers, whether the loss was caused by negligence or not. I admit that I am unable to understand this argument. It is apparent from the facts which are stated at the beginning of this judgment, that the shipping note, though written on a form issued by one Company, was in fact sent to the agent as the agent of both, and that the defendants carried the goods at the agreed rate upon the terms of it.

The point which has been principally argued before us, and which is, in my opinion, the only point which arises in the case, is whether, upon the evidence upon this record, it appears that the Captain of the steamer was negligent in allowing the flat to touch the bank at all, as, if he was, I cannot doubt that the loss was caused by such negligence, as the hole in the side of the flat was certainly made when the flat struck the bank.

It is no doubt the case that, by section 9 of the Carriers Act, the loss is evidence of negligence as against the carrier; but where, as is the case here, the parties have placed all the evidence on which they rely before the Court, it is for the Court to say upon that evidence whether or not the loss was caused by the negligence of the carriers or their servants,

the meaning of the Carriers Act; [791] and in order rightly to apprehend the various points which arise for determination in the suit, it is necessary to state the following facts which are either admitted or proved. The goods were delivered for carriage on board the flat *Khyber* at Serajgunge early in November 1893, and the flat, which was fully loaded with 29,000 maunds of jute, both baled and in drums, arrived in Calcutta in due course on the 17th November and anchored off Prinsep's Ghat.

"On instructions received from the defendant Company the flat was taken down to the Lower Hooghly Mills and there discharged cargo. She subsequently returned and discharged more cargo at the Sibpore and Howrah Mills On 4th December she was taken out into midstream, and there discharged a further portion of her cargo on board the flat *Hafjan*. Then she was towed above the [792] Howrah bridge and was cast off opposite the Union Press She arrived there on the afternoon of the 5th December but too late to discharge cargo On the 6th she was occupied all day in discharging the cargo intended for the Union Press, and during that day she discharged 1,300 drums of jute, and she also took on board, for delivery elsewhere, a certain quantity of salt and gunnies Work ceased on the 6th at the usual time about 5-30, and according to the evidence which has been adduced by the defendant Company the usual steps were taken to secure the goods on the flat from accident by fire or otherwise

In this case I can find nothing to show that, in acting as he did, Captain Allen was guilty of any negligence or want of skill, and for that reason I think that the plaintiffs cannot succeed in the action The action was from the first entirely speculative, as the plaintiffs had no knowledge when the action was brought how the accident happened, and relied entirely upon the presumption of negligence raised by section 9 of the Act, and the hope that the carriers would not be able to rebut it When the whole of the case, as it appears from the evidence on the record, is examined it appears that the only question is whether Captain Allen was negligent or unskilful in stopping and reversing the engines when the flotilla was opposite the shoal at the entrance to the loop, and whether the flat took the ground in consequence of his negligence, or want of skill in doing so In considering this question, it is necessary to remember that when the flotilla was opposite the shoal the Captain stopped, and then reversed the engines, and that in consequence of this action on his part the flotilla drifted with the current down and across the stream until it struck the left bank, and that the experts say that, if it can be done the most approved mode of getting round this bend is to keep close to the shoal, with the engines going ahead, and the helms hard aport, but that this is not always possible It has been pressed upon us by the Counsel for the plaintiffs that we should assume that when the flotilla was opposite the shoal, it was in a position from which the Captain could and would have gone round the bend, without touching the bank at all if he had kept his engines going ahead and his helms aport, and that he was attempting to get round in this way when the flat took the bank contrary to his expectation It is said that this is indicated by the fact that he ordered the helms to be put hard aport while the flotilla was drifting, and that it was negligent and unskilful on his part to stop and reverse the engines whilst he was carrying out the manoeuvre, as the consequence of his doing so must have been that the flotilla lay like a log on the water without steerage way and entirely at the mercy of the current The plaintiffs rely strongly on a kind of abstract admission obtained from the Captain in cross examination, that it is dangerous and improper to allow a vessel so to lose her way as to become unmanageable I do not think this contention is supported by the facts which have been proved in the case I cannot infer from the evidence on this record, that when the flotilla was opposite the shoal, it was in such a position that it was possible to get round the bend in the manner described, or that the Captain ever contemplated getting round in that way, or ever attempted to do so The experts all say that it would depend on where the flotilla was when it got to the end of the reach whether the manœuvre would be possible or not, and that under some circumstances it would be impossible to get round without touching the left bank, and there is no evidence here that when the flotilla was opposite the shoal it was so situated that the manœuvre was possible It is certain that Captain Allen was on the bridge looking out at the time, and that what he did was done deliberately and with a knowledge of what he was doing; and as it was certain that the effect of stopping the way of the flotilla at that point must have been that it would drift with the current down and across the stream until it came in contact with the left bank, the only conclusion I can come to is, that Captain Allen found himself in such

[793] "The precautions adopted are explained in the evidence of Captain Duncan, the commander of the flat, and of Abdool Koreem the serang and of Tamizuddin the watchman who was on watch at the time the flat took fire. It appears that the flat was constructed on the plan now usually adopted in the case of flats belonging to the Company which are intended for the carriage of jute, that is to say, she had a steel hull and steel deck. She was 270 feet long and 41 in width. She had a roof of corrugated iron which was 30 feet above the deck, and the corrugated iron of the roof was bent down and formed an upper screen going all round the flat, and which came to within 10 feet of the deck. There were corrugated iron bulkheads at each end of the flat which shut off the [794] portion of the flat which was used for storage of the goods

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a position that he could not get round the bend without touching the left bank, that he stopped the engines in order that the flotilla might drift down to that bank, and that he reversed them to lessen the force with which the flat would strike the bank That the place in which he found himself after the flat had touched the bank was appropriate for this purpose, is shown by the fact that from it he was able to take the flotilla round the bend without any check, and that the blow was not a violent one is shown by the fact that the side of the flat was not bulged or injured by the blow of the bank, as all the expert witnesses say would have been the case if the blow had been a violent one It is said that the action of the Captain in putting the helms aport while the flotilla was drifting shows that he intended to get round the bend by keeping close to the shoal I cannot see that this necessarily follows. Captain Allen was not asked why he put the helms aport, and as the head of the flat when the stern struck the bank was away from the left bank, it may be that, as the Captain says was the case, the steamer did answer her helm slightly, and it may be that this had the effect of decreasing the violence of the blow

There can, I think, be no doubt that if the burden had been upon the plaintiffs to prove negligence, they would, upon this evidence, have failed to discharge it, and as all the evidence on which the parties rely is before us, I think that, as nothing appears to have been done which was inconsistent with due care and skill, the presumption of negligence is rebutted, and the defendants are entitled to have the action dismissed

For these reasons I think that the Judge was right in dismissing the action, and that the appeal must be dismissed with costs.

Pigot, J —I am also of opinion that the decree of the original Court should be affirmed, and the appeal dismissed There are one or two points raised in the argument before us, upon which I desire to express an opinion.

I quite agree that the liability of the defendants is to be determined with reference to the conditions on the back of the forwarding note, notwithstanding the fact that the name of the India General Steam Navigation Company, Limited is printed thereon, and not that of the defendant Company I think the effect of the contract of the 4th October 1892, and of the manner in which the two Companies carried on their business, that is, as the learned Judge says, "running in a measure in amalgamation," renders the fact that an India General form was used perfectly immaterial, and makes the name of that Company printed on the forwarding note mere surplusage

The next point as to which I wish to express my opinion is upon the question of remoteness of damage The learned Judge, founding his conclusion upon the protest of Captain Allen, is of opinion that negligence in the navigation of the flotilla is established He says: "I have no alternative but to find that in taking all way off the vessels, in the situation in which they were placed when the accident occurred, and allowing them to drift with the current, Captain Allen did not exercise that degree of skill and care in handling them which the circumstances demanded, or, in other words, that he was guilty of negligence"

The learned Judge found, however, that the damage which actually was done was not the natural and probable consequence of the negligent act of the Captain The question whether he ought, as a reasonable man acquainted with the risks of river navigation, to have anticipated the likelihood of the presence at the place where the flat struck of such an object as that which penetrated her side must, in his opinion, be answered in the negative The substance whatever it was, that caused the injury, was below the surface of the water and invisible There was nothing in the visible natural conditions of the place to suggest the probability of any such substance being there. The bank is perpendicular, with a considerable depth of water beneath it, and the height is swept by a somewhat strong current, so that there would be little likelihood of substances floating down the river depositing themselves upon or attaching themselves to it. It is a clay bank, and without stones and devoid of trees. Then contact with the bank in this bend of the river is shown to be very usual, and generally innocuous. He did not think that Captain Allen could reasonably be expected to have

from the portions which were occupied by the Captain and crew, respectively the Captain occupying the portion which was in the fore-part of the flat, and the crew the portion aft. There were doors in these bulkheads, opening into the portion of the flat reserved for the cargo, and when these doors were shut, connection was entirely shut off from the portions occupied by the Captain and the crew respectively. Attached to the screen I spoke of were canvas purdahs reaching down to the deck. These ran from the fore bulkhead to the aft bulkhead. They were secured above to the iron screen and below to the deck by wires fixed to the deck, and immediately inside these purdahs was a bamboo frame work, and round this [795] framework was a space left which formed a passage enabling a person to go round the cargo stored on the flat. In the intermediate portion, that is the portion inside this passage and bounded by it, the cargo was stored up to the roof.

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anticipated the likelihood of the presence of a foreign substance at the point where he struck, and all that he could be expected to foresee as a consequence of permitting the vessels to drift, was that they would be carried against the bank, and would experience the consequences ordinarily resulting from such a collision, that they would either suffer no injury at all, or an injury proportionate to the force of the collision.

And on the authority of *Sharp* v. *Powell* (L. R., 7 C. P., 293), *Greenland* v. *Chaplain* (5 Exch., 240), and other cases cited in Pollock on Torts, pp. 36 *et seq.*, he held the loss not to be attributable to the negligence of the defendants.

In appeal before us, this finding was challenged, and the cases bearing on it were fully discussed on both sides. The appellants put their case somewhat high, in my opinion. As I understood, one point contended for was that, if by reason of negligence the ship or flotilla was allowed to take a course in the descent of the river other than that which was the best, absolutely the best which could possibly be taken, then, for anything which happened while the flotilla was in that course, the defendants must be responsible, whether it could or could not have been reasonably foreseen. I understood the learned Counsel for the appellants to argue that, "If through negligence he deviated from his course and got on a rock, he would be liable on his contract," that is, his contract as carrier. "He is away from where he ought to be."

This would be in fact to apply the language used in *Davis* v. *Garrett* (6 Bing., 716) to every case such as the present. That case is no doubt often cited in cases not precisely on all fours with it. It was a case of deviation not warranted in the circumstances, not merely an act of negligence in carrying out the contract, but one in actual violation of it, and it is generally, I think, treated as founded on that consideration, as for instance in *Scaramanga* v. *Stamp* (L. R., 5 C.P.D., 295), in *Lilley* v. *Doubleday* (L. R., 7 Q.B.D., 510) and other cases.

I should hesitate to accept so absolute a rule as applicable to cases like the present. But upon the facts of the present case, I am unable to share the opinion which I have quoted from the judgment of my learned colleague in the original Court.

I think it results from the evidence that striking the bank ought to be avoided, that there is danger in striking it, which ought to be avoided, if possible. Obviously it is and must be a danger of an uncertain kind, the degrees of which may depend upon various conditions, the nature and shape of the bank, the depth of the water, and the force of the current. The most common kind of risk, at any rate where the bank is a precipitous bank of earth or mud, is the risk of striking it so violently as to injure the frame of the vessel, and break in the plates by the force of the blow. But the risk of what happened in this case is, I think, another danger of striking the bank, and which could not have happened if the bank had not been struck, so far as one can judge from the evidence. It is not suggested, and there is no reason to suppose that the blow came from a substance projecting from the bottom of the river bed : indeed, the depth of the water, 5 to 7 fathoms, would seem to negative anything of the sort; as would the position and shape of the hole in the flat's side, and the line traced by the substance, whatever it was, in the side of the flat up to the point where the side was broken in. The supposition of a snag standing up in the bottom of the river-bed, and causing the damage, may, therefore, I think, be dismissed. The damage must most probably have been done either by some tree or log protruding from the bank, or by some log lying in the water and caught between the flat and the bank when the flat was at the bank. Mr. *Mackintosh* puts the first of these possibilities very clearly in his evidence. It cannot, I think, be said that the danger of coming on such a fixed or moveable substance by getting to the bank is out of all reasonable anticipation. The banks of rivers such as this are often eaten away by the current in places, the trees growing on them must fall in or slip down too, with their roots perhaps still imbedded in the earth, which falls or slips with them. It is said by some of the witnesses that

"The evidence is that at 5-30 when the work was stopped, in accordance with the usual method, the purdahs were let down and secured to the deck. The bulkhead doors were closed and all fires on the flat, whether for cooking purposes or otherwise, were put out.

[796] "There was a staging which had been erected by the servants of the defendant Company, connecting the flat with the shore, and had been used for the purpose of discharging cargo.

"The flat was 40 or 41 feet from the shore and was moored fore and aft with anchors and with hawsers attached to the bank. The gangway was closed by the purdah being let down along the side of the flat and also by a bamboo framework. It is obvious that when this was done the cargo was completely isolated from the crew and all communication with the outside was cut off. At 12 o'clock the person on watch was Tamizuddin. He and another man were set on watch at 12 o'clock, relieving two others who up to that time had been on watch, the rule being that the watch is relieved every one or two hours according to the season of the year; the longer watch being reserved for the hot season.

[797] "Tamizuddin states that on coming on watch he walked down the starboard side along the covering-board which runs all round and on the outside of the flat, the other watchman being stationed on the port side of the flat. He had walked up and down the flat twice, and then his attention was engaged by some floating wreckage or other substance which had got entangled with the anchor at the bow of the flat. He was occupied with that for 7 or 8 minutes. Then he observed a glare on the water, and on looking up, he observed a fire had broken out about amidships on the flat from the starboard side at a place he had passed some 7 minutes before when everything had appeared all right. He gave the alarm to the Captain, and being unable by reason of the fire to pass along the covering board on the starboard side he went round on the port side and roused up the crew.

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there were no trees, or only one, on the bank at this place. I am not satisfied of the accuracy of that evidence. Abed Ali describes the attempt of the men to tie the vessel to trees on the bank where she struck. I do not see any reason to doubt this.

Then, again, the Captain says that the idea occurred to him that she had struck a snag as soon as ever he saw her careen over two feet. "I knew something must have broken her, and at that particular place boats taking saul timber often get loose in that bight," and being asked what he means by a snag, he says, "An old tree or log of timber." Later on, speaking of what he believes must have caused the injury, he says, "It must have been a saul log with the end sawn off, from the marks on the flat."

I infer that one of the dangers of striking the bank was, and is, the danger that what did happen might happen, because of the vessel striking the bank; and I do not think that it is straining the Captain's evidence to infer from it that he knew facts from which this danger might be anticipated, not, of course, as a probable thing, but as a quite possible, though perhaps unlikely, result of striking, as one of the reasons, of which no doubt there are many, which make it the duty of the Captain to avoid touching the bank, and to use reasonable care and pains to avoid doing so: so that if it was, as a matter of fact, owing to his negligent management of the flotilla that the flat struck the bank, the defendants would be liable for the damage caused by the snag, or whatever the substance was, that broke into the side of the flat.

Upon the question whether there was negligence or not the learned Judge felt bound, by the contents of the Captain's protest, to decide that there was. No doubt that document, if it is to be read literally, and to be treated as a perfectly accurate description of what took place, would at first sight seem rather to represent the Captain as having committed what, according to the experts examined and according to his own admission as a witness, would be an error in the conduct of the flotilla.

He says in the protest that when he arrived in the Long Reach shortly after 8 A.M., he "eased down the engines of the *Makum* and reduced her speed, then stopped the engines, and backed them astern, thus stopping all way on the said vessel;" and he then adds some sentences about the best way of getting round this bend, in which, from the evidence of the

[798] "An effort was made by the crew to extinguish the flames, in the first place by buckets of water, and afterwards by means of the pump which was aft; but being unable to pass through the bulkhead door they had to take the hose outside, and it was found to be too short to reach the flames. Captain Duncan was at this time cut off from the rest of his crew by reason of the fire rapidly extending to the port side and was unable to communicate with them. He says, however, that he did all he could in the time, the first thing being to cut free the flat *Hafjan* which was lashed to the port side of the *Khyber*. The *Hafjan* was drifted out by the tide amidstream and was uninjured.

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experts and from his own, it is quite evident that he is entirely wrong, and in fact writing mere nonsense. It is quite clear that it would be wholly wrong to let the flotilla drift without any steerage way in going round the bend.

The question for us is, however, what he actually did, and the opinion expressed by him in his protest six weeks afterwards, is of no consequence save so far as it may bear upon the probability of his having in fact done what he there appears to say he ought to have done.

He says in his evidence that he did not lose all way on the vessels, no doubt; part of his evidence on this subject I cannot regard as less than uncandid, when he affects to believe that a vessel going in a current, and only by the current's speed, has steerage way. But as to what he did (apart from his opinion), it does seem to me that the protest does not show that he committed any act of negligence conducing to the accident. True, he says, he stopped the engines and backed them, thus stopping all way; and this reads as though he had done so a long way off the point where the flotilla struck. This would certainly have been an act of negligence likely to produce disaster. But in truth this is not said in the protest, from which, save by the word "then," it is not indicated at what point the engines were stopped, or at what point they were reversed.

I take it to be quite certain, on the evidence, that up to point A on Ex. 3 the flotilla was going four miles an hour over the ground, one mile an hour through the water. It is at that point, the Captain says, he reversed the engines. Harvey, the engineer, contradicts him as to that. But I do not rely much on the accuracy of the entries in that engineer's log, having regard to what he says as to the way it was made.

Let it be assumed that the engines were reversed as soon after the flotilla reached A, or rather a point in the stream abreast of A, as the order to reverse could be carried out. Now that point is 200 feet from where the flotilla struck. No question was asked throughout the long examination of the witnesses to ascertain within what time the reversal of the engines could take a mile an hour off the speed. I suppose the answer would not be a very easy one to make with perfect accuracy, but some approach to it might perhaps have been made. We have nothing on the subject, but it has a bearing on the case. Four miles an hour would give less than 40 seconds for the flotilla to reach the bank at B, to which the current ran straight. In the one point of the evidence, at which the matter was nearly touched on, the Captain says: "When the engines are stopped there is way on the vessel for a long time." This, of course, must be so: and to a considerable extent must be true even when the engines were reversed, especially in the case of a mass so heavy as this flotilla must have been.

Now the Captain, even confronted with his protest, persisted in affirming that he still had steerage way, still had control over the vessel. I am quite unable to see any reason to doubt it. Assume the earliest possible moment for the reversing to begin to take effect, in the 35 seconds or so that must have elapsed before the bank was struck, I am unable to say that the Captain speaks erroneously, and that in fact the flotilla became, by reason of the engines being reversed, a mere log on the water within that time, and was thereby, because of being so made helpless, carried up to the bank. But this is the only act of negligence contributing to or causing the disaster which it is sought to establish. In every other respect the Captain's conduct is left unchallenged.

I believe that the flotilla had the necessary steerage way, although, whether from the eddy stated to have existed at that spot or for some other reason, she did not answer her helm when ported, and that the accident was not caused by the reversing of the engines, even if that took place 200 feet off point B. It is proper to add, that it is at least doubtful if the reversing of the engines took place until the flotilla was just at the bank.

For these reasons I agree that no negligence causing or contributing to the disaster is shown, and that therefore the appeal should be dismissed with costs.

Macpherson, J.--I also think, for the reasons given in the judgment just delivered, that the appeal must fail. I have nothing to add to the judgment.

[799] "Then the Captain pulled down some of the purdahs on the port side to prevent their catching fire, and immediately afterwards he was, he says, driven to his own quarters by the flames and was obliged to jump over board with his wife, and he remained hanging on to one of the ropes which secured the flat to the shore till he was rescued by the jolly-boat of the flat which had been manned by the serang and some of the crew.

"There were two pumps on the *Khyber*, one in the Captain's quarters and one aft in the crew's quarters, and the Captain says that when work stopped for the day he went round the flat and found the pumps rigged and ready for use and the cargo in good order. He again went the round of the flat previous to retiring for the night and he found then that everything was in proper order. That was about 9 or 9-30 P.M.

[800] "As the result of the fire, the flat with all the goods then on board, including the goods in suit, were totally destroyed. Under these circumstances various questions have been raised which I shall deal with in order.

"The first question is whether, by reason of any of the provisions of the special contract, the defendant Company are exempted from liability in respect of this loss. When the fire broke out there were still on board some 8,000 drums of jute, all the rest of the ori-[801] ginal cargo having been delivered to the various mills at which the flat had called.

"The defendant Company rely on the 7th clause of the forwarding note as effectually protecting them from liability for the loss of the plaintiffs' goods under the circumstances I have detailed

"That clause runs as follows —

"'The Company will not be under any liability for damages or compensation in respect of loss or damage to goods (whether such goods may be at the time of such loss or damage on board of any steamer, flat or craft, or otherwise situated) except such liability as they are or may be subject to *under the provisions of any law for the time being in force*, or of any contract other than this for the time being in existence between the Company and the shipper.'

"The plaintiffs contend that this clause does not create any exemption from liability in favour of the defendant Company, but that the effect of it is to impose on them the ordinary liability of common carriers, that is the liability of insurers. It is said that the law which is referred to in the clause is general law in force at the time, and that the liability of the defendant Company imposed by law was the liability of insurers, which was only subject to limitation by a special contract as provided by the Carriers Act.

"The defendant Company, on the other hand, contend that having regard to the relations between the parties at the time the contract was entered into, and looking to the contract as a whole, it must be taken that it was intended by this clause to limit the liability of the defendant Company in the manner provided by the Act, and that on a proper construction of the clause it should be read as exempting the Company from all liability except such liability as by the Carriers Act they were prohibited from relieving themselves of.

"This clause has been recently considered by Mr. Justice HILL in the case of the *Central Cachar Tea Company* v. *The Rivers Steam Navigation Company*,* where the question arose as to what the proper construction of the clause in question [802] was, and on that point the learned Judge in a considered judgment expresses himself as follows —

"'But it was contended that assuming this to be so, the 7th condition of the bill of lading (here, it is the forwarding note) could not have the effect of

* Unreported. The judgment of the Court of Appeal affirming Mr Justice HILL'S decision are given *ante*, p. 787 *note*.

lessening the common-law liability of the defendant Company, because the Company is thereby protected from liability for loss or damage, 'except such liability as they are or may be subject to under the provisions of any law for the time being in force;' or in other words it was said, except liability for loss occasioned otherwise than by the act of God or of the Queen's enemies, since the law imposes upon them liability for loss occasioned by any other means than these. The clause is not happily worded, but such a construction as this would have the result of altogether nullifying its intended effect, which I think clearly was at all events to carry the Company's immunity from liability for loss of goods beyond the point where the common law left it; and it appears to me that the fair construction to put upon it is, that the carrying Company was to be liable for loss or damage only when brought about by causes in respect of which the law would not permit them to relieve themselves from liability. That is, they were to be liable only for loss occasioned by the negligence or criminal acts of themselves or their servants or agents unless that liability was enlarged by a distinct contract, which in the present instance there is no pretence for saying was so.' "

"I have come to the conclusion that I ought to adopt that construction of the clause, and I would only make one additional observation, and that is that, if the plaintiffs' construction be the correct one, the clause itself would be unnecessary, because, if it were struck out, the position of the defendant Company would be precisely that in which the plaintiffs contend the 7th clause places them; whereas, on the other hand, the words 'provisions of any law for the time being in force' to my mind point rather to some written law or statutory enactment than to the unwritten or common law; and if one is to look to the liability which is imposed on the defendant Company by statutory enactment at the time the contract was entered into, it becomes necessary to see what exactly was the liability which, by the terms of the Carriers Act, was imposed on the defendant Company.

[803] "Now the object of the Act, as stated in the preamble, is as follows:—

" 'Whereas it is expedient, not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried, but also to declare their liability for loss of or damage to such property occasioned by the negligence or criminal acts of themselves, their servants or agents, it is enacted.'

"According to the preamble, therefore, it was intended that the common law liability of the defendant Company at that time existing should be left untouched by the Act, but so far as the imposition of any liability is concerned the only liability expressly imposed is for loss caused by the negligence of the carriers or their agents or servants. Therefore, reading the words in the 7th clause as referring to that liability, that is, the liability for negligence, the effect of the clause is to exempt the Company from all liability except for loss occasioned by the negligence or criminal act of themselves or their servants.

"But even if that be the true construction of the clause, it is said that the defendant Company have disentitled themselves to the protection afforded by the clause by reason of a breach on their part of the conditions of the contract.

"The alleged breach is of a two-fold character.

"It is said, first, that the *Khyber* came into Calcutta and then improperly went outside the limits of Calcutta to the Lower Hooghly Mills; and in the second place it is said that the duty of the defendant Company being to deliver the goods at Juggernath Ghat, where they ordinarily deliver goods

when they have no special instructions to the contrary, it was a breach of duty on their part to go to the Union Press, which is situated further up the river, without having, in the first place, delivered the plaintiffs' goods at Juggernath Ghat.

"The contract was one to carry the goods from Serajgunge to Calcutta. I think there can be no doubt that *Calcutta*, as used in the contract, means the *Port* of Calcutta; and that the parties so intended it, is clear from the 11th clause which refers to the *Port* of shipment and *Port* of discharge. There is no doubt that both the Lower Hooghly Mills and the Union Press are within the limits of the Port of Calcutta.

[804] "It has been contended that the contract was to carry the plaintiffs' goods from Serajgunge, and to deliver them within a reasonable time at Juggernath Ghat, but in my opinion there is no such duty imposed on the defendant Company by the contract. The duty of the defendant Company on bringing the goods within the Port of Calcutta was to give notice to the consignees of the arrival of the goods and to deliver the goods within a reasonable time at a reasonable place which the owners or consignees should appoint, and, failing such appointment, to deliver the goods at a reasonable place to be fixed by themselves. If any other meaning is to be ascribed to this contract, it would be impossible for the Company as a carrying company to carry on their business. They bring down from places up-country a large quantity of goods for many constituents, and I think the plan they adopt as regards delivery is the only reasonable one. That plan is as follows: When the place of delivery is fixed by the shipper or his agents at the time of shipment, the notice of such fixture is given in the course of voyage by the commander of the flat to the Company in Calcutta, and arrangements are then made to give delivery of such goods at the places in the order in which the flat passes them in coming up the river. As regards those goods, as to which the owners or consignees have given no instructions as to the place of delivery, they are delivered at Juggernath Ghat as soon as the arrangements made for the delivery of the other goods will allow, and due notice of such delivery is given to the owners or to the consignees when the latter are known.

"Between the 17th November and the 4th December a very large portion of the goods had been delivered, and I can find no reason for the suggestion that there had been any unreasonable delay in the delivery of such goods. It must be remembered that between those dates about 20,000 maunds of jute, baled and in drums, had been delivered; and as a matter of fact the *Khyber* was sent to the Union Press with the object of giving delivery there of one of the two lots of drums of jute which had been shipped by the plaintiffs from Serajgunge under the forwarding note to which I have referred. Both of those lots are stated by the forwarding note to be consigned "to order," and it appears **[805]** that subsequently notice was received by the Company from the owners or consignees of the second lot to deliver at the Union Press, and it was while the Company were engaged in delivering that lot that the fire occurred in which the other lot covered by the forwarding note, together with the remainder of the jute that was being delivered, was destroyed.

"As regards the goods in suit the Company received no notice to deliver at Juggernath Ghat or elsewhere. I think, therefore, there was no breach of any of the conditions of the contract of carriage by the defendant Company up to the time the flat was moored opposite the Union Press.

"The only remaining question is, whether the loss was occasioned by the negligence or other misconduct of the defendant Company.

"There is no doubt that the onus of showing that the loss was not occasioned by any negligence or other misconduct of the Company or their

servants is on the defendant Company, and the way in which they seek to discharge it is by showing what took place immediately before and at the time the fire broke out, and also by showing what precautions had been taken by them for preventing any injury to the goods while in their custody.

"The conclusion to which, it seems to me, one ought to arrive on this question must depend upon the credit which is to be attached to the witnesses who have given their evidence in this case; because, if the story told by them is one which ought to be substantially accepted, I do not think there can be any reasonable doubt that the precautions against injury which a person of ordinary prudence would adopt, had been and were adopted by the defendant Company at the time of the loss. What the evidence shows is not merely that the possibility had been excluded of the fire having originated inside the flat, but it is also shown that steps had been taken which it might reasonably be supposed would have been sufficient to prevent fire from being communicated from the outside.

"I have very carefully considered the evidence of the three witnesses, and I have come to the conclusion that in substance the [806] story they tell is a reliable one, and that they are witnesses who were honestly desirous of telling the truth regarding the occurrences at the time of the fire. All the witnesses were subjected to a searching and able cross-examination; and it appeared to me, both from the demeanour of the witnesses and from various statements elicited in cross-examination which must, I think, have been unpremeditated, and which tended strongly to corroborate their story, that they were speaking from an honest recollection of the events as they happened and certainly were not telling a tutored story.

"There are discrepancies, of course, but I think none other than one would expect to find in the evidence of witnesses called on to relate what they remembered of facts which took place two and a half years ago. The precautionary system adopted by the defendant Company has been criticised in respect of three or four matters. It was said that it was improper to keep the staging up after work had ceased for the night, and thus to keep up communication with the shore; and further that, owing to the proximity of native cargo boats with fires on them, it was improper of the commander of the flat to remain where he was, especially as there was nothing to prevent his proceeding further out into the stream so as to avoid the neighbourhood of these native boats.

"I think on the evidence it would be impossible for me to say that there was any negligence in not adopting either of these precautions. The evidence shows that those in command of the flat, I mean the Captain and the serang and the watchman also, were on the evening in question at least alive to the possibility of danger from the proximity of these cargo boats. It is said that there is a serious discrepancy in the evidence of the Captain and the serang with reference to the fires on board these native cargo boats. There is no question that at the time Captain Duncan made his protest he stated that at 7 o'clock, when he went the round of the flat, he saw no fires or lights on any of these boats. Neither does he refer in his protest to a subsequent round which he says he went at 9 o'clock; but I think his evidence is capable of reasonable explanation, in this way, that in the evidence he gave in Court he was referring to a different time from that referred to in the protest. I think it very possible that at seven he saw no lights or did not remember them at the time he made his protest, but I think [807] it clear that at nine he did see the lights. Both he and the serang recollect the circumstances of the fire for cooking purposes on the *dinghy* nearest the flat. The Captain says he called to the persons on this *dinghy* to

put out the fire, and that so far as he observed they did not do so. The serang, on the other hand, says that about that time he was sent for by the Captain and requested to communicate with those on the *dinghy* and to insist on their putting out the fire, and he says he did so and the fire was put out.

"The variance in the two stories is, I think, capable of explanation, having regard to the time which has elapsed since it occurred, and I think probably the Captain recollected what he had to do with the matter but forgot that he subsequently asked the serang to intervene. I think it sufficiently appears on the evidence of both the Captain and the serang that at nine o'clock there were fires, but with the exception of the cooking fire on the *dinghy*, the others were the lights from oil lamps ordinarily to be seen on the native craft of the sort spoken to by the witnesses, and I think there was nothing in that evidence which ought to have led the Captain as a prudent person to anticipate any actual danger from the proximity of these boats, or to suppose that the precautions adopted against accident were insufficient for the purpose. It is to be remembered, having regard to the circumstances connected with the navigation of the Hooghly, that it is not easy for a Captain of a flat to keep himself constantly clear from the proximity of native boats.

"It is also said that the evidence does not exclude the possibility of there having been coolies who had been working on this flat still remaining on board during the night in question in the space allotted to the cargo; but I think the evidence of the Captain and that of the serang also is opposed to the possibility of there being any coolies remaining on the portion allotted to the cargo after work had ceased for the day; and it must be remembered that there was no suggestion made during the cross-examination of the witnesses that that was the case. If it had then been made, it would have been possible for the defendant Company to address themselves to that point; but I think it would be unreasonable, on the evidence as it stands, for me to say that there is any foundation for the suggestion that there were [808] any coolies occupying the portion of the flat reserved for the cargo on the night of the 6th December. Nor, having regard to the evidence, is there any ground for the suggestion that the pumps were not in proper order, or that they were such as were unsuitable for an emergency such as that which occurred. It was the suddenness of the fire and the rapidity with which it spread which prevented communication between the Captain on the one side of the flat and the crew on the other. The pumps were fitted with a hundred feet of hose, and the Captain and the serang have between them sufficiently explained how it was impossible to make effective use of them. On the whole, therefore, I think that the evidence shows that the loss was not occasioned by any negligence or other misconduct on the part of the defendant Company. I think they adopted such precautions for the protection of the goods committed to their care as were reasonable and proper.

"There is no doubt that since this fire, rules of a still more stringent character have been adopted by the Company for securing the safety of the goods delivered to them for carriage; but I see no grounds for thinking that at the time this fire occurred the Company had any reason to suppose that the system they then adopted was insufficient for the purpose.

"It was only to be expected that further precautions, such as experience might suggest, should afterwards be adopted; but it does not follow that there was negligence on the part of the Company in not having adopted these measures before. I think, therefore, the loss falls within the exemption clause of the special contract, and the result is that the suit must be dismissed with costs on scale No. 2."

From this decision the plaintiffs appealed. The appeal was heard on the 14th, 15th and 16th of December 1896.

Mr. *Bonnerjee* (with him *The Advocate-General*, Sir *G. C. Paul*) for the Appellants.—The special contract on which the defendants rely has no meaning, and certainly not the meaning put upon it by the defendants. It would not be generally understood in the sense in which they use it. There is no evidence to show that it was explained to, or understood by, the person who signed it, and the signature is in Nagri. The defendants have not limited [809] their liability with regard to any particular matter. The exemption here sought to be had is in general terms. There is, therefore, no special contract; and consequently the defendants are liable, whether there was negligence on their part or not.

Next, the duties and liabilities of common carriers are regulated by the common law of England. The Carriers Act does not alter the common law,—*Irrawaddy Flotilla Company* v. *Bugwandass* (L. R., 18 I. A., 121: I. L. R., 18 Cal., 620), and does not allow a carrier to contract himself out of liability for his own negligence. And a common carrier, by the Act, can only limit his liability; he cannot get rid of it altogether. Nor can he refuse to take goods without a special contract,— Macnamara on Carriers, pp. 24, 27.

The defendants did not take such care of the goods as a prudent man would take. The cargo was so packed against the bulkheads that in the event of an outbreak of fire, the hose could not be brought out; and when at length it was brought out, it was found to be too short to be of any use. And if a proper watch had been kept, the fire could not have broken out. Another instance of negligence was that the Captain of the flat allowed country cargo-boats with fires in them to lie within a few feet of the flat, though there was a strong breeze blowing. Negligence is defined in a variety of terms in *Blyth* v *Birmingham Waterworks Company* (11 Exch., 781); *Grill* v. *General Iron Screw Collier Company* (L. R., 1 C. P., 600); and *Heaven* v. *Pender* (L. R., 11 Q. B. D., 503); but here all the elements of negligence are present.

Mr. *Woodroffe* (with him Mr. *Hill* and Mr. *Dunne*) for the Respondents.—The duty of the defendants is to show that they acted as a reasonably prudent man would. It is not for them to negative negligence; but they must show that it was not their negligence that led to the loss. The defendants must take reasonable care of the goods entrusted to their charge—*Greenland* v. *Chaplin* (5 Exch., 243). But they are not called upon to account for the fire. They are required to take precautions to prevent a fire from occurring; they are not required to take the very best steps that may be suggested to put out a fire which they never anticipated, and which they did their best to prevent.

[810] If the forwarding note were meaningless, it would not have been necessary to go into evidence at all. But the plaintiffs themselves did not take that view, for they adduced evidence. The very making of this contract shows that the defendants were not accepting the goods on the responsibility of common carriers.

Mr. *Hill* (on the same side).—The Carriers Act does impose a liability on carriers, and this contract was made for the express purpose of limiting that liability. The tendency of the Court should be to give to the forwarding note a construction that would not render it devoid of efficacy.

No issue was raised at the trial as to the plaintiffs having entered into this special contract, nor was any evidence given that they did not understand it; nor have they made it a ground of appeal.

It may be, moreover, that the defendants themselves do not know the cause of the fire; it may be impossible for them to ascertain it. But if the evidence is consistent with due care on their part, they have discharged the onus that is on them. That was the *ratio decidendi* in the case of the *Central Cachar Tea Company* v. *The Rivers Steam Navigation Company* (*ante, p.* 787 *note*).

Even as regards the boats, the nearest of them was five feet away from the flat; and the wind blew in such a way as not to convey the sparks to the flat. The Captain could only request the boatmen to move away, and he did so. Again, the very precautions taken for the purpose of preventing a fire rendered it more difficult to put out a fire occurring in spite of all precautions. But that fact must not be taken against the defendants.

The precautions required and the measures to be adopted need not be the very best that can be devised; it is sufficient if they are such as a man of ordinary prudence would take, and such as it is reasonable to require without undue inconvenience to the defendants---*Fremantle* v. *The London and North Western Railway Company* (2 F. & F., 337); *Dimmock* v. *North Staffordshire Railway Company* [4 F. & F., 1058 (1063)]; *Scott* v. *London and St. Katherine Docks Company* (3 H. & C., 596).

Mr. *Bonnerjee* in reply.

C. A. V.

[811] The following **judgments** were delivered :—

Maclean, C.J.—The plaintiffs are merchants carrying on business at Calcutta and Serajgunge, the defendants are common carriers. Early in November 1893 the plaintiffs delivered to the defendants 432 drums of jute for carriage to Calcutta. The freight was duly paid and the goods were delivered on board the flat *Khyber*, which arrived in Calcutta about the 17th November 1893. The goods were carried under the terms of an agreement contained in a forwarding note, dated the 14th October 1893. On the 7th December about midnight a fire broke out on the flat, which was then moored in the stream, about 40 feet from the shore, and connected with the shore by a staging which had been erected by the servants of the defendant Company and used for the purpose of discharging the cargo. The construction of the flat is accurately described by the learned Judge in his judgment in the Court below. I need not repeat what he says.

The plaintiffs' jute was destroyed by the fire, and the question arises upon whom the loss is to fall.

Upon this, two questions arise --*First*, whether, under the terms of the forwarding note, the defendants are exempted from liability, save for negligence or the criminal acts of themselves or their servants, and, *secondly*, assuming that point in the defendants' favour, whether they have shown that there was no negligence on their part. The first question depends upon the construction of the forwarding note. The plaintiffs contend that it does not relieve the defendants from their ordinary liability as common carriers, that is, the liability of insurers, whilst the defendants, on the other hand, say that the forwarding note limits their liability in the manner provided by the Indian Carriers Act of 1865, and exempts them from all liability except such as under that Act they are prevented from contracting themselves out of. It is conceded by the defendants that the only clause in the document which can relieve them from their liability as insurers is clause 7.

In the view which I take of the second question in this case, it is unnecessary to decide the first, though I feel constrained to add that, having regard to the nature of the contract, one in [812] which the carrier seeks to

limit his common law liablity, and to the clear and definite language used, I entertain a serious doubt whether the view of Mr. Justice SALE on the point be correct.

I merely confine myself to saying that that construction cannot be arrived at without doing violence to the language used—language which, read in its ordinary meaning and signification, appears to me to be clear and precise, and used in a clause which is quite consistent with the other clauses of the document, and that the effect of that construction is to import into the contract words which are not there, and to place a forced and unnatural construction upon the words which are there.

Assuming, then, in the defendants' favour that the true construction of the forwarding note is such as they contend for, the remaining question is whether the defendants have discharged the onus which is undoubtedly and admittedly cast upon them of showing that there was no negligence on their part.

Negligence has been defined by Mr. Baron ALDERSON in *Blyth* v. *Birmingham Water Works Company* [11 Exch.,781 (784)] in the following terms: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do;" and this definition has been subsequently adopted by other Judges.

In the present case, no evidence has been adduced except by the defendants; the plaintiffs apparently could adduce none.

In applying to this case the principle laid down by Baron ALDERSON, it becomes necessary to ascertain, if possible, how the fire originated, and what precaution the defendants had taken to provide against fire, and for extinguishing it. The theory, as to the origin of the fire, put forward by the Captain of the flat and his serang, is that the fire was caused by a spark from the fire in the small native boats which were close to the flat and between it and the shore, from which direction the wind was blowing. This view, however, is not accepted by the respondent's Counsel at the Bar. Looking to the hour at which the fire occurred, to the time when, according to the serang's evidence (between whose evidence [813] and the Captain's there is some discrepancy on this point, the Captain saying that when he turned in at 9 P.M the fires in the native boats were still burning, and the serang saying that they were all then out), the fires in the native boats were out, to the fact of the purdahs on the flat being made of thick canvas, and to the month of the year, when there would likely be a heavy dew on the purdahs, I think it is extremely improbable that the fire so originated. If this view be correct, and it not being suggested that the fire arose from the intervention of any natural agency, for example lightning, the inference is irresistible that it arose within, and was caused from within, the flat itself. If that be so, the question arises whether the mere occurrence of the fire, arising as I think it must be taken to have arisen, from some cause within the flat, which was under the management and control of the defendants or their servants, is, in the absence of explanation by the defendants, *per se* evidence of negligence. So far as the cases cited before us show, there is no very express authority upon the point; though in the case of *Scott* v. *The London and St. Katherine's Dock Company* [3 H. & C., 596 (601)], Chief Justice ERLE says: "When the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." No doubt, those words were used with reference to an accident different and arising under circumstances

different from the present case. If there be no evidence as to the origin of the fire, and no explanation afforded by the defendants, can they be said to have discharged the onus which is admittedly cast upon them of disproving negligence? The defendants contend that if they lay all the evidence they can before the Court, it is for the Court to say whether they had discharged the onus, and reliance was placed on the case of the *Central Cachar Tea Company* v. *The Rivers Steam Navigation Company* (*ante, p. 787 note*) which was decided by this Court on the 4th March 1896, but is not reported. That case, however, decides no question of law applicable to the present: it only [814] decided, first, that there was a special contract, as to which there could have been no reasonable doubt; and, secondly, upon the facts, that negligence was disproved.

The plaintiffs say that not only have the defendants not disproved negligence, but upon their own showing they have been guilty of it. They say that the Captain did not, under the circumstances, take those precautions which a reasonable man, in the position in which he was, would take and ought to have taken. They contend that the appliances for extinguishing fire were absolutely ineffective, and that the watch was insufficient, and that the watchman, an old lascar, upon his own showing, was not doing his duty.

In all cases the amount of care to be taken must be proportionate to the degree of risk likely to be run. Applying that principle to the present case, we find that the cargo was admittedly of a very inflammable nature; and, in my opinion, having regard to the nature of the cargo, the defendants ought to have had at hand at all times proper and effective appliances for extinguishing the fire, should one accidentally arise.

I now come to a consideration of the evidence. There is a discrepancy of some importance in what the Captain stated in his protest and in his subsequent evidence: in the former he says nothing about going on deck at 9 P.M. and seeing the fire in the native boats, some five or ten of which were between the flat and the shore. It is certainly matter for comment that he should have said nothing about this in his protest. But I will take his evidence. He says that he went round the flat at 5-30 P.M. to see if everything was right, and to rig the two pumps, one aft and one forward, which he says he did. One pump is forward of the forward bulkhead and the after pump is abaft the after bulkhead. He says he locked the sliding doors of the bulkheads, that all the fires on the flat were out at 7 P.M., and that everything was then all right. He came up again at 9 o'clock, and he says that all the cargo boats had their fires, and that when he went to bed at 9 o'clock they all had fires. This is not consistent with what the serang tells us. He speaks as if there were then but one fire, which, upon his remonstrance, was put out. The Captain was [815] evidently anxious about the proximity of the fires in the native cargo boats. This is clear from the serang's evidence at pages 64 and 65 of the Paper Book. He says: "It was because the fire on the *dinghy* was dangerous to the flat that the Captain sent for me. Yes, the Captain did speak to me about the danger. At first when I went up to the Captain, the Captain said to me I was not taking proper care. He abused me and said, "There is fire in the *dinghy* close by. Go and tell the people to put the fire out. Our flat may catch fire."

The Captain thought there was danger from these fires; his attention was directly called to the risk. Under these circumstances, I think, a prudent man would have made a point of seeing that the pumps on his flat were in a really workable condition. The Captain, however, did nothing, but went to bed.

The fire broke out about 12-30. An old lascar, named Tamizuddin, was the watchman on the starboard side and he came on watch at 12. One Omed

Ali was on the watch on the port side, but owing to ill-health he could not be called. His absence from the witness box is, to say the least, unfortunate. According to Tamizuddin's statement all was well when he came on watch: he came on watch as he tells us, amongst other duties, to guard against fire. He went forward and was looking at the anchor to which some jungle had stuck for some 7 or 8 minutes and then he saw the glare of the fire. He tells us that if he had noticed the fire in time he could have put it out, and the Captain also tells us that when he first saw it, it was not very big. If Tamizuddin had been moving backwards and forwards along the covering board, instead of standing and looking for 7 or 8 minutes at the anchor, for which there could apparently be no necessity, he would, according to his own showing, have seen the fire as soon as it originated when, as he says, he could have put it out. This, I think, is what he means by his evidence that if he had seen it at first he could have put it out. It is not very easy to determine from this witness's evidence whether, at this hour, there were fires in the native cargo boats. He speaks of lights and fires rather indiscriminately: but, as the result of his evidence, I think he means there were lights and not fires.

When he saw the fire he shouted out to Omed Ali and to the [816] Captain, and then went along the covering board on the port side to the stern, and poured water on the burning jute from buckets, and then he makes the significant statement that they tried to put the fire out with the pumps, but the hose did not reach the place where the fire was. In other words the hose was too short. The vessel was about 270 feet long and the place between the bulkheads was about 225 feet. The pumps being behind the bulkheads, each pump ought, in order to command the whole of the cargo space in the event of fire, to have had about 110 feet of hose. There is no evidence what the length of hose was, but it was admittedly not long enough. This is what the Captain says about the pumps at p. 49: "I could not do anything with the pumps single-handed. The pumps were all ready to work in a moment. The pumps would have been of use at the commencement of the fire, that is when the fire was first seen. If both pumps had been in the same place and well worked, they may have put the fire out when I first saw it. But as placed where they were, I don't think they would have been sufficient from where they were. They required 100 feet of hose to each pump." And at p. 56 he says: "No attempt was made by the crew to use the pumps. The pumps would have been of use when the fire was first seen. It had been burning not very long, 2 or 3 minutes."

It appears from this that the pump at the fore part of the flat was useless as there were no men there to work it, and the Captain could not work it single-handed; that in the Captain's view the pumps ought to have been together, and, if so, and properly worked, they probably would have put the fire out, and that the hose was too short. A prudent man, in my opinion, especially when his attention had been so markedly drawn to the danger of fire only a few hours before, would not have left the pumps in practically a useless condition.

The serang's evidence is important. He says at p. 62: "We began to pour in water with the buckets. We did nothing else. Yes, there was a pump on board. There were two pumps, one on the fore part of the vessel and the other on the after part. There was no room for working the pump,"—this, I think, must mean the pump in the after part of the flat—[817] "because the coolies had taken up cargo from the holds and the deck was jammed with the cargo. The throwing of water with the buckets did no good. We did nothing else" At page 63 he says: "The cargo inside was right

up to these bulkhead doors. Yes, the doorway was completely blocked up in front of the door from the doorway to the roof. At page 65 he says: "The aft pump which we could not work was situate aft of the aft bulkhead. The whole of the deck was covered with cargo. We have not 100 feet of hose attached to that pump. There were no goods about the pump, but there was the bulkhead against the pump and jute against the bulkhead, so we could not carry in water through the bulkhead and the cargo. The pumps are fixed pumps. They could be removed; they were not permanently fixed. The fire was spreading inside where the cargo was, and it was not possible to pump in water by carrying the hose along the covering board. We tried to work the pump, but we found the hose could not carry the water to where the fire was. We could not remove our boat because there was this staging right over our boat."

That, virtually, is the whole story, and it comes to this: that the pumps were absolutely useless. The aft pump could not be worked through the aft bulkhead doors, because the door was jammed up by the jute which was piled up on the deck; the pump in the fore part could not be worked because the Captain was single-handed and the hose was too short, neither pump could be worked along the covering board because the hose was too short, and it could not be worked from the small boat because the staging was over it, and the boat could not be made available.

Consequently, the appliances for putting out fire were obviously insufficient and ineffective. The Captain must have known this, or any way ought to have known it. It appears to me that any reasonable man, with the danger of fire brought so immediately to his attention as it had been on the night in question, and having regard to the combustible nature of the cargo, would have taken every precaution to see that the pumps were in effective working order. Had they been in proper working order, it is a fair inference to be drawn from the evidence put in by the defendants that the fire in all reasonable probability would have [818] been put out when the Captain first saw it, in which case the loss probably would not have occurred. In my opinion the mere occurrence of the fire, under circumstances such as the present, is evidence of negligence, the flat being under the management of the defendants' servants, and there being no evidence adduced by them to show how the fire originated, and no explanation afforded,--I say no explanation afforded because the suggestion that the fire originated from a spark outside has been abandoned at the bar. Furthermore, the ineffective condition of the appliances on board the flat for extinguishing fire satisfies me that those precautions which an ordinarily prudent man would adopt were not taken by the defendants' servants, and this neglect appears to me to amount to negligence

The defendants, therefore, have not discharged the onus cast upon them by law of showing that there was no negligence, and that being so, the plaintiff is entitled to recover, with costs here and in the Court below. The appeal must be allowed.

Macpherson, J.—If it was necessary to decide whether there was a special contract limiting the liability of the respondent, I should not be disposed to dissent from the construction which Mr. Justice SALE has put upon the 7th clause of the forwarding note. That clause, which must have been intended by the parties to have some meaning, purports to exonerate the Company from any liability with an exception which is broadly but vaguely stated. The intention to be gathered from it is, I think, the intention to limit the Company's liability to the extent allowed by the law then in force, *viz.*, the Carriers Act, although this Act is not specially mentioned.

It may be true that that Act did not subject common carriers to any new liability, although the preamble purports to declare their liability for loss

occasioned by the negligence or criminal acts of themselves, their servants or agents. But the Act, while enabling them to limit their liability by special contract, declared that notwithstanding such contract they should still be liable when the loss arose from the negligence or criminal acts of themselves, their servants or agents.

The excepted liability in the 7th clause may, I think, fairly be taken to be the liability there referred to, *viz.*, the liability [819] for negligence, etc.; otherwise the clause has, as Mr. Justice SALE points out, no meaning at all.

It is said that the clause was not explained to the appellant who did not understand it in that sense. No such question was raised before Mr. Justice SALE, and cannot for the first time be raised here. The only question raised was as to the construction of the clause.

But whether there was or was not a special contract, the respondents have, I consider, failed to clear themselves of negligence. The effect of the 9th section of the Carriers Act is to make the loss of the goods evidence of negligence which the carrier must displace. The plaintiff is not required to give any evidence of negligence, and the carrier must account for the loss in such a way as to get rid of the presumption of negligence arising from it.

The respondents account for the loss of the goods by shewing that they were destroyed by fire, but they do not, in any way, account for the fire. They in effect say: "We cannot account for the fire, but as we took and have shown that we took all proper precautions to prevent such an occurrence, it cannot be attributed to any negligence on our part." The answer, I think, is that the fire occurred at a time and under circumstances which, in the absence of any explanation as to its origin, negative the existence of proper precautions, and that it is therefore in itself evidence of negligence of which the respondents must clear themselves. The facts as disclosed are that the flat, which was in the course of being unloaded, was exclusively in charge of the respondents' servants; and the unloaded portion of the cargo, consisting of drums of jute, was for the most part stowed on deck. Soon after midnight, hours after work had ceased, either the jute on the starboard side of the deck about amidships, or the outside canvas purdah in the immediate vicinity of that jute, it is not clear which, took fire, with the result that the cargo was destroyed.

The Captain of the flat suggested that the fire came from outside, and that a spark from a boat near at hand ignited the canvas purdah. This suggestion is not adopted by respondents' [820] Counsel in this Court, and there is no real foundation for it. I do not believe that the fire was so caused, or that the canvas purdah took fire in the first instance. If it was so caused, I should be disposed on the evidence to hold that there was negligence, and that with a proper look-out it might and should have been extinguished. The mere fact that there was a fire near at hand from which sparks might come made it necessary to take extra precautions and use extra vigilance, and the Captain was fully aware of this.

The only other alternative is that the fire originated on the flat; and it is, I think, for the respondents to account for it. They are the only persons who can do so. It is their case that there were not and had not been for hours previously any fires or lights on board the flat from which the jute or purdah could have become ignited; that the part of the deck where the fire occurred was completely shut off from the rest of the deck; and that no one, whether belonging to the crew or from outside, had access to it.

The evidence on the latter point is certainly not exhaustive, and I am not satisfied that no one had access there. The only watchman who has

been examined is the man who went on watch on the starboard side shortly before the fire broke out, and we know little of what happened on the port side or in the previous watches. If all the precautions said to have been taken had been taken, it is almost impossible that this fire could have occurred, and that there should have been no explanation of it.

This is not a case in which the Court can point to some particular act or omission in connection with the fire, and say that it amounts to negligence,—and for this reason, that the facts are not fully before the Court, the cause of the fire being unexplained. Great stress has been placed upon the statement of the late Chief Justice in the case of the *Central Cachar Tea Company* v. *The Rivers Steam Navigation Company* (*ante, p.* 787 *note*) that "when the parties have placed all the evidence on which they rely before the Court, it is for the Court to say upon that evidence whether or not the loss was caused by the negligence of the carriers or their servants." That was a case of a very different kind. There all the facts were fully before the Court, and the Court was in a position to say upon [821] those facts that there was no negligence. What the Chief Justice said had reference, I think, only to the particular circumstances of the case before him.

Treating the fire as evidence of negligence, that evidence has not in my opinion been displaced.

I also agree with the learned Chief Justice for the reasons which he has given that the appliances for extinguishing a fire were ineffectual and insufficient. The appeal must, therefore, succeed.

Trevelyan, J.—The two questions in this case are, first, what is the meaning (if any) of the 7th clause of the forwarding note? and, second, if the construction put upon that paragraph is correct, are the defendants under the circumstances of this case liable for the loss of the jute? As to the first question I am not prepared to differ from the views expressed by Mr. Justice SALE in this case and by Mr. Justice HILL in the case of the *Central Cachar Tea Company* v. *The Rivers Steam Navigation Company* (unreported).

The construction which they have adopted seems to me to be the only one which can give any effect to the paragraph in question.

The construction suggested by the appellant is one which renders the paragraph completely nugatory. It can never have been intended by this elaborate paragraph to inform the consignor that the Company's liability was co-extensive with that of other carriers who did not make special contracts. By this paragraph the Company must have intended to guard itself from any liability out of which the law permitted it to contract itself.

It may be, as Mr. *Bonnerjee* says, that it would be exceedingly difficult to translate this paragraph intelligibly into any vernacular language; but the defendant did not in the original Court deny his understanding of the contract, and no issue which would include this question has been framed The only issue on the subject of the contract is as follows: "Whether, assuming that loss was not due to negligence or misconduct of the defendant Company, is the defendant Company, under the terms of the forwarding note, protected from such liability and loss." This issue [822] only raises the question of the construction of the forwarding note. It is, therefore, necessary to consider the second question.

On this question I have no doubt that under the law it is for the defendant to disprove negligence; that is, to show a state of facts which are inconsistent with negligence on their part.

Section 9 of the Carriers Act provides "that in any suit brought against a common carrier for the loss, damage, or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage, or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents." In other words, the loss of the goods is *primâ facie* evidence of the negligence or criminal act of the carrier, his servants or agents, and, therefore, if the carrier seeks to exempt himself from liability, he must negative such *primâ facie* evidence, that is to say, he must prove that the loss was or must have been occasioned otherwise than by the negligence or criminal act of himself, his servants or agents. It is contended that the late Chief Justice's judgment in the *Central Cachar Tea Company* v. *The Rivers Steam Navigation Company* (*ante, p.* 787 *note*) has placed a different interpretation upon the law. I am not prepared to say it has. In that case all the facts were apparent; the loss of the ship was caused by an impediment to the navigation, and the only question was whether the Captain was negligent in not avoiding that impediment. Of course, if all the facts are before the Court, and there is nothing to discover or disclose, then the Court has on those facts to say whether there is negligence. But here there is really nothing to show what the cause of the fire was; we can only guess at it.

It remains to be seen whether in this case the defendant Company has disproved negligence, or has placed before the Court a state of facts which is inconsistent with negligence or a criminal act.

They have not really attempted to shew how the fire arose. There is no doubt that in the Court below the defendants put forward the theory that the cargo must have been ignited by a spark coming from the neighbouring boats. This theory has [823] been repudiated by the learned Counsel who represented the Company before us. There is no doubt that it is one which will not bear investigation.

According to the story for the defence there was a thick curtain completely protecting the cargo on the east side of the flat. A spark from one of the fires in the boats, even if there was any fire alight at that time of night, could not have ignited the purdah or the cargo. If it did so, the look-out man, if he was on the watch, must have seen it happening. The defendants' evidence, if it is to be believed, makes it quite clear that the fire could not have originated from outside, at any rate from the shore side. The precautions which are said to have been taken would have been sufficient to ward off the catastrophe.

It being clear from the defendants' own case that the fire could not have originated from the cargo boats or the shore, the only alternative is that the fire owed its origin to the act or negligence of some one on board either the flat itself or the *Hafjan*. It cannot have arisen from any fire on board of the *Hafjan* as the wind was blowing off the shore and the fire broke out on the shore side of the *Khyber*. Even if the fire did break out in consequence of something done by some one on board the *Hafjan*, the defendants would be responsible. To my mind the evidence shows that the fire must have been started by the design of, or by an accident happening to, some one on board the *Khyber*. On the evidence I can conceive no other possibility.

The only persons on the *Khyber* were the servants and agents of the defendant Company. The Company is responsible for their acts.

Having regard to the fact that the fire must have commenced on the *Khyber*, and that the *Khyber* was in sole occupation of the defendant Company, I am prepared to go so far as to say that it was the duty of the defendant

Company to prove how it broke out. I do not, for a moment, believe that every man who was then on board that flat is ignorant as to the cause of the fire. Learned Counsel for the appellants suggests that the fire came from outside, *i.e.*, from the adjoining cargo boats. If he is right as to this the defence cannot be accepted.

[824] If these fires on the boats were a source of danger, additional precautions should have been taken, and the watch should have been strengthened. Learned Counsel for the respondents also asserts that the fire came from outside, but he is unable to show us how it so came.

To my mind the defendant Company has omitted to prove any facts which can throw any light whatever upon the origin of this fire.

It seems to me that evidence as to precautions against fire is worth very little, unless it be combined with evidence to show that the fire in question was of a kind which one might reasonably have expected to be avoided by the particular precautions. Lastly I think that the evidence shews that the means provided on this flat for extinguishing fire were wholly inadequate to the occasions which might be expected to arise. As far as I can make out from the evidence, a fire in the Captain's cabin or in the quarters occupied by the crew might have been extinguished by the means available if discovered in time. But very little else could have been done. The actual length of the hose has not been proved, but it was obviously of little practical use to put out a fire in the centre of the ship. I quite realise that elaborate contrivances for the extinction of the fire might, to some extent, impede the operations of loading and discharging cargo; but if a carrier, in order to facilitate his business, omits to provide sufficient apparatus to extinguish fire in all parts of his ship, it can scarcely be said that he has taken reasonable precautions against fire.

I would allow the appeal, order an enquiry as to the damages, and give the plaintiffs their costs in both Courts.

H. W. *Appeal allowed.*

Attorney for the Appellant: Babu *Ashutosh De.*

Attorney for the Respondents: Messrs. *Orr, Robertson & Burton.*

NOTES.

[I. This was **affirmed** by the Privy Council in **(1898) 26 Cal., 398** P.C. See also 26 Cal., 465.

II. The mere loss being *prima facie* evidence of negligence, the onus lies on the common carrier even in a case covered by special contract, to disprove negligence :—(1913) 40 Cal., 716; (1914) 16 Bom.L.R., 467; (1911) 14 I.C., 793 (Bom.).]

[825] APPELLATE CIVIL.

The 17th May, 1897.

PRESENT.

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR JUSTICE BANERJEE

Ishan Chunder Das Sarkar . . Plaintiff

versus

Bishu Sirdar and others . . Defendants.*

Transfer of Property Act (IV of 1882), section 53—Rights of a transferee in good faith and for consideration— Good faith, Meaning, of—Effect of transfer made with the object to delay or defeat a creditor, the transferee not being aware of such an intention —Second appeal— Civil Procedure Code (Act XIV of 1882), sections 584 and 585—Findings of fact—Inference of law which the facts found were insufficient to justify.

Where a transferee for value is not aware of any intention on the part of the transferor to defeat or delay his creditors, but has knowledge only of an impending execution against the transferor, such knowledge itself is not sufficient to vitiate the transfer, and does not make the transferee a transferee otherwise than in good faith within the meaning of section 53 † of the Transfer of Property Act (IV of 1882)

Ramburun Singh v *Jankee Sahoo* (22 W. R 473), referred to

Where the Lower Appellate Court arrives at a conclusion, which is an inference based upon an erroneous view of law, the judgment is open to question in second appeal

Lachmeswar Singh v. *Manowar Hossein* (I L R, 19 Cal, 253 L R, 19 I A, 48), and *Ram Gopal* v *Shamskhaton* (I L R, 20 Cal 93 L R, 19 I A, 228), referred to

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

Mr *Woodroffe*, Mr *W C Bonnerjee* and Babu *Upendra Nath Mitter* for the Appellant

Mr *Jackson* and Babu *Girija Sunker Mazoomdar* for the Respondents.

[826] The **judgment** of the High Court (**Maclean, C J**, and **Banerjee, J.**) was as follows —

This appeal arises out of a suit brought by the plaintiff (appellant) for declaration of his title to, and for confirmation of his possession of, an eight annas share of a certain *jote*, on the allegation that the said share, which

*Appeal from Appellate Decree No 803 of 1895 against the decree of B C. Mittra, Esq, District Judge of Faridpore, dated the 30th of January 1895, affirming the decree of Babu Beni Madhub Roy, Munsif of Goalundo, dated the 28th of December 1892.

† [Sec 53 —Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed

Fraudulent transfer

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration]

belonged originally to defendants Nos. 5 and 6, was purchased by the plaintiff from these defendants for Rs. 1,000 on the 18th Pous 1297, (1st January 1891), under a registered deed of sale; that defendant No. 4 having, in execution of a decree held by him against defendants 5 and 6, attached the said share, the plaintiff preferred a claim, but the same was disallowed; and that the property was sold in execution of the decree of defendant No. 4 and purchased by defendants Nos. 1 to 3 on the 21st March 1891. Two other persons were made defendants in the case, but subsequently, at the plaintiff's instance, their names were removed from the record.

The suit was defended by defendants Nos. 1 to 4, and their defence, so far as it is necessary to be considered for the purposes of the present appeal, was a denial of the plaintiff's purchase as a real and *bonâ fide* transaction.

The first Court found that the purchase of the plaintiff was not a real and *bonâ fide* transaction, but was merely a nominal one, resorted to with the object of defeating the claim of defendant No. 4, and it accordingly dismissed the suit.

On appeal by the plaintiff, the Lower Appellate Court has found that the plaintiff purchased the property, but not in good faith, and it has accordingly affirmed the decree of the first Court, dismissing the suit. In second appeal it is contended for the plaintiff that the decision of the Lower Appellate Court is wrong in law, because the mere circumstance of the plaintiff having been aware of the fact that the defendant No. 4 had taken out or was going to take out execution against defendants Nos. 5 and 6 was not sufficient to make his purchase one not in good faith, as the Lower Appellate Court has held. It is further contended that the only thing necessary to constitute a purchase in good faith was that the purchase should be real and for value, and a real purchase for value, even if it was with the object of defeating or delaying [827] creditors, would still be a purchase in good faith and entitled to be upheld; and in support of this contention the cases of *Wood* v. *Dixie* (7 Q. B., 892), *Hale* v. *Saloon Omnibus Co.* (4 Drew., 492), *Rambuxun Singh* v. *Jankee Sahoo* (22 W. R., 473), *Sankarappa* v. *Kamayya* (3 Mad H. C., 231), *Suba Bibi* v. *Balgobind Das* (I. L. R., 8 All, 178), and *Sekharam Mahipat* v. *Dawud Valad Jawabhai* (I. L R., 4 Bom., 76 note) are relied upon.

On the other hand, it has been argued for the respondents that the question of good faith is a question of fact, and the Lower Appellate Court having found that the purchase of the plaintiff was not in good faith, it is not open to this Court to interfere with its judgment in second appeal, and in support of this argument the case of *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (I. L. R., 18 Cal., 23: L. R., 17 I. A., 122) is referred to.

Now, the validity of the purchase under which the plaintiff claims is to be determined with reference to section 53 of the Transfer of Property Act, which enacts that "every transfer of immoveable property" (we are only quoting so much of the section as is applicable to the present case) "made with intent to defeat or delay the creditors of the transferor is voidable at the option of any person so defeated or delayed." And then, after laying down a rule of evidence, the section further proceeds: "Nothing in this section shall impair the rights of any transferee in good faith and for consideration."

Reading this section as a whole then, what it means, so far as it is applicable to a case like the present, is this,—that where a transfer of immoveable property is made with intent to defeat or delay any creditor of the transferor it is voidable at his option; but where a transferee for value takes the property in good faith, that is without being a party to any design on the part of

the transferor to defeat or delay his creditors, his rights shall not be impaired by anything contained in this section.

The words "good faith" have not been defined in the Act; nor is there any definition of the expression in the General Clauses Act of [828] 1868, which was in force when the Transfer of Property Act was passed.

But a consideration of the section, taken as a whole, leads us to the view we have taken, that the object of the last paragraph of section 53 is to protect an innocent transferee for value, notwithstanding that the transferor may be actuated by a desire to defeat or delay his creditors. But there arises a further question,—whether, where a transferee for value has knowledge of an impending execution against the transferor, such knowledge itself is sufficient to vitiate the transfer and make it one not in good faith, notwithstanding that the transferee may not be aware of any intention on the part of the transferor to defeat or delay his creditors, and notwithstanding that he may honestly believe that the sale is resorted to for the purpose of paying the creditors. We are of opinion that mere knowledge of an impending execution against a transferor is not sufficient to make the transferee a transferee otherwise than in good faith, when he does not share the intention of the transferor to defeat or delay his creditors.

This view is fully supported not only by reason but also by authority: see the case of *Ramburun Singh* v. *Jankee Sahoo* (22 W. R., 473). We are not prepared, however, to accept as correct the extreme contention urged on behalf of the appellant, that all that was necessary to constitute a transferee in good faith within the meaning of section 53 was that the transfer should be real, and that, although the transferee might share the intention of the transferor to defeat or delay creditors, he would still be a transferee in good faith. It cannot be said that the transferee for value who accepts the transfer for the purpose of helping the transferor to convert his immoveable property into money which can easily be concealed and kept out of the reach of his creditors, and thus defeat or delay the creditors, is a transferee in good faith within the meaning of section 53. We do not think that the cases cited support this view. They are cases under 13 Elizabeth, c. 5; and though that Statute forms in part the groundwork of section 53 of the Transfer of Property Act, its language is different, and the Indian law goes much further than [829] the English Statute. In the case of *Wood* v. *Dixie* (7 Q. B., 892) it was held that a transfer of property for good consideration was not void merely because it was made with intent to defeat the expected execution of a judgment creditor; and the same view was taken in the case of *Hale* v. *Saloon Omnibus Co.* (4 Drew., 492); but they do not go so far as the appellant's contention goes. Indeed, it would almost be a contradiction in terms to say that a transferee for value, who takes the transfer with the intention of helping the transferor to convert his immoveable property into money which can easily be concealed, and thus to defeat or delay his creditors, should nevertheless be treated as a transferee in good faith, and the transfer to him should be upheld though section 53 says that a transfer made with such intention is voidable at the option of the creditors. Where the transferee is a creditor of the transferor and accepts the transfer in satisfaction of the debt due to him, though with the knowledge that his doing so has the effect of defeating other creditors of the transferor the transfer may come within the last paragraph of section 53 of the Transfer of Property Act. But that is not the case before us, and it is unnecessary to say more on this point.

There arises then the question whether the Court of Appeal below has come to a finding that the purchase of the plaintiff was not in good faith, so

as to preclude this Court from interfering in second appeal. No doubt, if the Lower Appellate Court has found upon the evidence that the plaintiff was not only aware of the impending execution of decree against his vendors but also shared the intention of his vendors to defeat or delay that execution, the finding would be unassailable in second appeal. But if, after having found that the intention of the vendors was to defeat or delay their creditors, and that the plaintiff was only aware of an impending execution against the vendors and nothing more, the Lower Appellate Court has come to the conclusion that the plaintiff's purchase was one not in good faith, then that conclusion is an inference based upon this view of law, that mere knowledge on the part of the transferee that there is an impending execution, coupled with an intention on the part of the transferor to defeat or delay his creditors—an intention not known to [830] the transferee—necessarily makes the purchase one other than in good faith—a view of the law which, as we have shown above, is erroneous. And, if that be so, the judgment is open to question in second appeal.

In support of this view we may refer to the cases of *Lachmeswar Singh* v. *Manowar Hossein* (I. L. R., 19 Cal., 253 : L. R., 19 I. A., 48) and *Ram Gopal* v. *Shamskhaton* (I. L. R., 20 Cal., 93 : L. R., 19 I. A., 228).

Now, as we understand the judgment of the learned Judge below, he has not come to any finding that the plaintiff shared the intention of defendants Nos. 5 and 6 to defeat or delay their creditors; but he has come to the conclusion that the plaintiff's purchase was not in good faith, because he found that the plaintiff was aware of the impending execution of decree against defendants Nos. 5 and 6 by defendant No. 4, and of that alone. But, as we have said above, such knowledge may be consistent with good faith in the plaintiff, and the purchase by the plaintiff will not be vitiated on the ground of bad faith, unless it can be clearly proved that the purchaser was a party to a design of his vendors to defeat or delay their creditors. We should add that we do not think that the learned Judge below was right in importing into section 53 the definition of constructive notice given in section 3 of the Act.

In this view it becomes necessary to remand the case to the Lower Appellate Court, in order that it may determine the question whether the plaintiff purchased the property in dispute from defendants Nos. 5 and 6 with the object of enabling them to defeat or delay their creditor, the defendant No. 4, or with the knowledge that they intended to do so.

If it come to an affirmative finding on that question, the suit must be dismissed. If it come to a negative finding the plaintiff will be entitled to a decree.

Costs will abide the result.

S. C. G. *Appeal allowed. Case remanded.*

NOTES.

[I. In **(1907) 34 Cal., 999**, 11 C.W.N., 889 : 6 C.L.J., 410 this was approved and it was held that a preferential transfer to one creditor, even of all the property when the real value did not exceed the debt, was not *ipso facto* fraudulent. See also (1908) 35 Cal., 1051 : 12 C.W.N., 761 : 7 C.L.J., 586 ; (1911) 10 I.C., 238 ; (1912) 13 M.L.T., 227 ; (1911) 10 M.L.T., 183 ; 11 I.C., 868.

II. As regards upholding the deed when the considerations are severable, see **(1908) 35 Cal., 1051** ; (1910) 7 I.C., 614 ; (1911) 10 M L.T., 183.

III. Findings based on erroneous view of the law may be questioned in second appeal :— **(1908) 5 Bom. L.R., 956.**]

[831] *The 7th and 29th June, 1897.*

PRESENT:

MR. JUSTICE O'KINEALY AND MR. JUSTICE HILL.

Ishan Chunder Hazra and others............Plaintiffs

versus

Rameswar Mondol and others............Defendants.*

Ejectment, Suit for—Suit against several defendants—Cause of action.

In a suit for ejectment against several defendants who set up various titles to different parts of the land claimed there is only one cause of action, not several distinct and separate causes of action.

So *held*, setting aside the decree of the District Judge who had dismissed the suit for misjoinder of causes of action.

THIS was a suit in ejectment by the plaintiffs as reversioners of one Brahmamayi Debi. The defendants set up their respective titles to different plots of the land by purchase from Brahmamayi Debi. The Munsif decreed the suit in part; but on appeal to the District Judge, the judgment and decree were set aside on the sole ground that there were distinct and separate causes of action, and that the suit was bad for misjoinder of them. The plaintiffs appealed.

Babu *Nolini Ranjan Chatterjee*, for the Appellants, having opened the appeal, the Court called upon

Babu *Harendro Narain Mitter*, who appeared for the Respondents.

He argued that as there was no evidence of combination among the defendants, and as the land was claimed by the defendants under distinct titles, the suit was bad for multifariousness. [O'KINEALY, J.—The decisions in *Vasudeva Shanbhaga* v. *Kuleadi Narnapai* (7 Mad. H. C, 290) and *Mahomed* v. *Krishnan* (I. L. R, 11 Mad, 106) are against you]. It had been held, in a similar case, that the plaintiff should elect which of the defendants he would proceed against—*Narsingh Das* v. *Mangal Dubey* (I. L. R., 5 All., 163); *Ram Narain Dut* v. *Annoda Prosad Joshi* [I. L. R., 14 Cal., 681 (687).]

[832] Babu *Nolini Ranjan Chatterjee* in reply cited *Abdul* v. *Ayaga* (I. L. R., 12 Mad. 234); *Sami Chetti* v. *Ammani Achy* (7 Mad. H.C., 260); *Ackjoo Bibee* v. *Lallah Ram Chunder Lall* (23 W. R., 400), and *Omur Ali* v. *Weylayet Ali* (4 C. L. R., 455). C. A. V.

The **judgment** of the Court (**O'Kinealy** and **Hill, JJ.**) was as follows:—

In this case the plaintiffs sued on the ground that they were reversioners on the death of one Brahmamayi Debi for the possession of land, in other words, in ejectment. The cause of action, namely, what the plaintiffs were bound to prove in order to succeed, was that they were the reversioners of Brahmamayi in regard to this property, and that the claim was not barred by limitation. The defendants then could raise any answer they thought fit to get rid of the claim; but the cause of action was one. Even in England, in an action in ejectment, all the parties in possession are joined. We think, therefore, that the decision of the Court below is wrong; and, setting it aside, we remand the case to the lower Court for trial on its merits. Costs to abide the result.

H. W. *Appeal allowed. Case remanded.*

* Appeal from Appellate Decree No. 1813 of 1895 from the decision of G. Gordon, Esq., Officiating District Judge of Birbhum, dated the 8th August 1895, reversing the decision of Babu Ram Churn Mullick, Munsif of Bolepur, dated the 6th August 1894.

NOTES.

[I. This was followed in (1910) 6 I.C., 577, Cal., (Reversioner's suit against several transferees from the same Hindu widow—held no misjoinder, though issues affecting the several defendants were required to be tried separately, following (1908) 33 Bom., 298 : 11 Bom. L.R., 34) ; (1908) 30 All., 560 ; (1902) 29 Cal., 871 (where the English Law is discussed) ; (1907) 29 All., 267.

II. Separate suits not forbidden in such cases :—(1910) 6 I.C , 226 (All.) ; see also (1899) 4 C.W.N., 297.

III. In (1902) 6 C.W.N., 585, those that infringed the right at different times were different sets of persons who acted under no combination, and that case was thus distinguished.]

[24 Cal 832]

The 29th May, and 28th June, 1897.

PRESENT :

MR. JUSTICE O'KINEALY AND MR. JUSTICE HILL.

Safiur Rahman............Defendant

versus

Maharamunnessa Bibi and others............Plaintiffs

and others...........Defendants.*

Specific Performance—Joint contractees—Right of one contractee to specific performance against the wish of the others—Specific Relief Act (I of 1877), section 16.

Under a single contract to convey land to several persons it is not open to some of the joint contractees to enforce specific performance of the contract if the other contractees refuse to have specific performance

THE defendant No 1 purchased, at an auction sale, certain lands belonging to the other defendants and the plaintiffs. He subsequently agreed to execute separate re-conveyances in favour **[833]** of each co owner, upon receiving Rs. 500 in addition to the price he had paid for the lands.

The plaintiffs desired performance of the contract ; but the other co-owners did not, and they refused to join the plaintiffs in a suit against the contractor. The plaintiffs accordingly made them defendants.

The Subordinate Judge decreed the suit, and his decision was upheld on appeal to the District Judge

The defendant No. 1 (the contractor) appealed.

Mr. *Khundkar* and Babu *Haro Chunder Chukerbutty* appeared for the appellant, and argued that the contract was not one, but many, that the suit was bad for multifariousness, and that, as some of the contractees did not desire specific performance, the suit ought not to have been decreed.

Moulvi *Mahomed Mustafa Khan* (with him Dr. *Rash Behari Ghose*) contended that the contract was severable, and that the case fell within section 16 of the Specific Relief Act. If one joint landlord refuse to join the others in a suit for rent, they may sue alone, and the same principle should be applied to the present case.

C A. V.

The **judgment** of the Court (**O'Kinealy** and **Hill, JJ.**) was as follows:—

The defendant No. 1, the appellant, made a joint contract with several persons that, "on receipt of Rs. 500 as profit in addition to the price paid by

* Appeal from Appellate Decree No. 1205 of 1895 from the decision of Babu Brojendra Kumar Seal, District Judge of Burdwan, dated the 22nd April 1895, affirming the decision of Babu Rajendra Kumar Bose, Subordinate Judge of Burdwan, dated the 29th September 1893.

him for the property," he would execute separate documents in favour of each person.

Some of the parties who entered into that contract with the defendant No. 1 claim specific performance of the contract, making the others, who refused to have the contract performed, defendants.

The question, therefore, is, can some of the parties to a single contract enforce specific performance against their adversary and the other persons who are defendants?

We think, on principle, that they cannot, and that in a suit for the performance of a single contract the parties on each side must be marshalled as plaintiffs and defendants. We therefore decree the appeal, and dismiss the suit with costs in all the Courts.

H. W. *Appeal allowed.*

NOTES.

[This was followed in (1911) 13 I.C., 315 (Mad.).]

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[834] PRIVY COUNCIL.

The 18th and 19th February, and 20th March, 1897.

PRESENT:

LORDS WATSON, HOBHOUSE AND DAVEY, AND SIR R. COUCH.

Lalit Mohun Singh Roy............Defendant

versus

Chukkun Lal Roy and others............Plaintiffs.

Bepin Mohun Singh Roy............Defendant

versus

Chukkun Lal Roy and others............Plaintiffs.

Priambada Roy and others............Defendants

versus

Chukkun Lal Roy and others............Plaintiffs.

[On appeal from the High Court at Calcutta.]

Hindu Law—Will—Construction of Will—Mitakshara family—Principles of construction of operative words in wills and documents—Effect of context upon technical, or clearly disposing, words used—Dispositions in accordance with the law of inheritance—" Putra putrade krame."

There are two cardinal principles in the construction of wills, deeds, and other documents. The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is that technical words, or

words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not use the technical terms in their proper sense. *Doe d. Gallini* v. *Gallini* (5 B. and Ad., 621) referred to and followed.

In a Hindu will an heritable and alienable estate is to be understood by the use of the words "shall become malik," unless the context indicates a different intention. The words *putra putrade krame* have acquired a technical force and are used as meaning an estate of inheritance.

That a testator may have imperfectly understood the words which he has used, or the effects of conferring an hereditary estate, would not justify the giving an interpretation to his words other than their legal meaning.

A will contained the following in favour of the testator's sister's son, *viz.*, that he "becoming my *sthuiabishikto* (substitute) and becoming *malik* of all my estate and properties shall . . enjoy, with son, grandson, and so on, in succession (*putra putrade krame*) the proceeds of my estate." Provisions followed for the maintenance of this nephew's widow, and of his daughter, should he die; and a gift over that "in the absence of the said nephew's son, grandson, great-grandson, and so on, then of the sons born of my sisters . . the eldest, with son, grandson, and so on in succession, shall" receive the ownership. On a claim by the [836] nearest *gotraja sapindas* of the testator against the nephew for the construction of the will:

Held, that on the true construction of the entire will, the *primâ facie* legal meaning of the disposing words used was not controlled by the context, so as to establish any contrary meaning by making it clear that the words were not used in their proper sense; that there was no intention expressed to give a succession of life-estates to the nephew and his male issue only—a disposition which would not have accorded with Hindu law; but that an alienable and heritable estate was devised to him.

Specified property was given by the will in trust for the income to be expended for religious and charitable purposes with an express prohibition of alienation of this property. There was also a gift of the testator's estates to Government for charitable purposes in the event of no one entitled to be the testator's *sthulabishikto* remaining alive. If expressed as to the heritable estate in which the beneficial interest accompanied the gift, the prohibition of alienation would have been merely void, without any effect upon the disposition of that estate. Made, however, as to property given for religious and charitable purposes, it was valid by Hindu law.

No decision as to the effect of the gift over of the secular heritable estate was required, inasmuch as the contingency upon which it was limited to go over had not occurred, and might not occur.

AN appeal, and two consolidated appeals, from a decree (7th July 1893) (*Chukkun Lal Roy* v. *Lalit Mohun Singh Roy*, I. L. R., 20 Cal., 906) of the High Court, reversing a decree (2nd February 1891) of the District Court of Hughli.

These three appeals, of which two were consolidated by order of the 20th July 1895, were heard together upon the question of the true construction of the will, dated the 17th September 1865, made by Saroda Pershad Roy, of Chakdigi, in the Burdwan District, who died on the 18th March 1868, having made a codicil on the 16th of the latter month, reciting the will. In 1875 the fact of the execution of the will was contested by his widow, Rajeswari Debi, in a suit against the testator's sister's son Lalit Mohun Roy, then an infant, appearing by his guardian *ad litem*. That the will had been duly executed was found in the District Court of East Burdwan, and on appeal on the 15th June 1877.

The present suit was filed on the 13th February 1889, after the death in February 1888 of the widow Rajeswari Debi, by the [836] testator's two nearest *gotraja sapinda* agnates, who were his great-grandfather's descendants

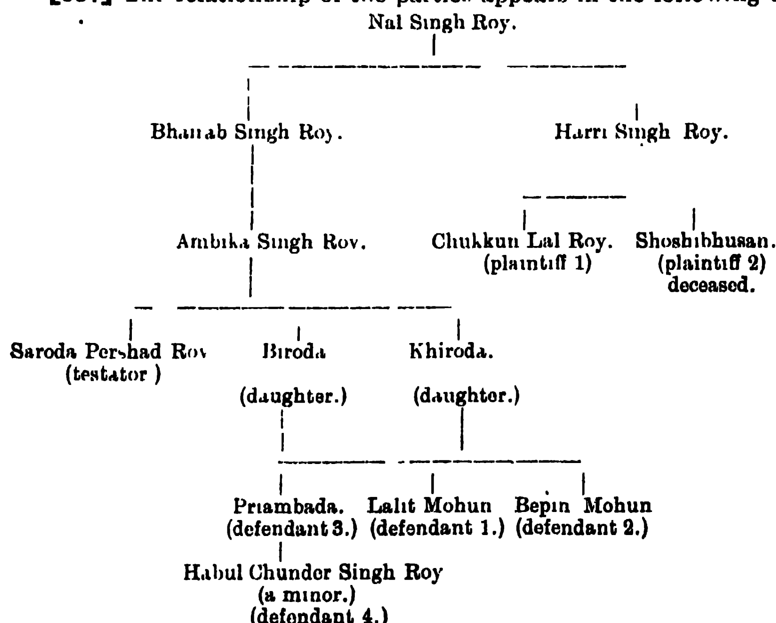
in the male line. The defendants were the sons of, or descended from, the testator's sisters, and they relied upon the will. According to the decision of the Court of First Instance, which in the end was held correct, the will gave to the first defendant Lalit Mohun Singh Roy, son of the testator's third sister, an absolute estate of inheritance. The High Court, in the decree from which this appeal was preferred, had declared Lalit Mohun to be entitled only to a life estate, and had decreed in favour of the plaintiffs as reversioners, on the ground of there having been an intestacy, as to all but the life-estate to Lalit Mohun, who was the principal of the present appellants.

The parties were under the Mitakshara, their ancestors having come from the North-West. The will and codicil, which were made before the passing of the Wills' Act, 1870, are sufficiently set forth in the judgment of Mr. Justice CHUNDER MADHUB GHOSE (I. L. R., 20 Cal., 921) on the appeal to the High Court, and their contents are stated in their Lordships' judgment on this appeal. Lalit Mohun Singh Roy was a minor when his mother's brother, Saroda Pershad Roy, died in 1868, without leaving either son or daughter. On the petition of the managers appointed by the will, the Court of Wards took charge of the estate on behalf of the infant. On his coming of age the Court of Wards placed him in possession, in which he continued.

There being in the will an ultimate bequest over to the Government, in case those whom the will benefited should not remain to carry on a certain charity to which the testator devoted some of his property, the Government, by an order of the first Court, made on the 17th August 1889, before the settling of the issues in this suit, was joined as a defendant. Having filed an answer the Government appeared no further.

The principal question now raised was whether the will gave to the appellant, Lalit Mohun, an absolute estate of inheritance; and, in connection with certain gifts over, there were disputed points as to whether the testator's dispositions of his property contravened the rules of inheritance according to Hindu law, and as to the effect of such contraventions, if any.

[837] The relationship of the parties appears in the following table:—



The plaint alleged that, under the will, neither Lalit Mohun nor any other person had acquired an absolute right to the testator's estate; and that subject to certain bequests for religious and charitable purposes, and such other bequests as might be declared valid, the whole estate vested in the plaintiffs as heirs-at-law according to the Mitakshara. Of this a declaration was claimed.

Lalit Mohun's defence was that, according to the true construction of the will, an absolute estate, heritable and alienable, was conferred upon him; that, at all events, his interest was defeasible only on his dying without leaving male issue; and that the gift over upon that happening was in favour of persons other than the plaintiffs. The heirs-at-law being excluded by ulterior valid bequests, after the bequest to him, could not claim.

Bepin Mohun Roy's defence supported Lalit Mohun, and was that the testator had clearly made known his intention to exclude the plaintiffs from the succession by his having conferred on Lalit Mohun Singh Roy, his sister's son, an absolute estate of inheritance, defeasible in favour of other nephews, as provided in the will, and that upon such defeazance he, Bepin Mohun, would take, and, failing Bepin Mohun, others named were to take an absolute estate.

Priambada filed a statement contending that the will was valid, and that the provisions in favour of himself and his representatives should take effect. The written statement filed for the Government was that the ultimate gift to them, contained in [838] the 13th para. of the will, would be absolute and valid in law, on the contemplated event happening, if it should happen.

The issues raised the principal question, whether the testator died intestate as to any, and what, part of his property, by reason of the will, or part of it, being inoperative, in that it attempted to create a new rule of succession opposed to the Hindu law, or whether the testator had validly disposed of an heritable and alienable estate.

The District Judge (J. Crawford, Esq.), construed the will in his judgment, giving a summary of it, with his own translation of the most material words. In his opinion it was obvious that the testator intended that the will should govern the succession to the whole of his estate, and that he wished to exclude from the succession those descendants who, like the plaintiffs, were descended in the male line from his great-grandfather. They would have been his heirs upon an intestacy, and it was equally clear that it was the testator's will that, in the event of his leaving no issue, an event which had happened, Lalit Mohun, his sister's son, should be the heir, or person principally to benefit by the will. According to this judgment, the fact that the testator expressly provided that the income of the property set apart for religious and charitable purposes was to be so applied in perpetuity, and that he forbade the alienation of such property (while not making either of these directions applicable to the rest of his property) was significant as showing that he meant his successors to take the property not devoted to religious and charitable objects as their own, subject to the provisions of the will.

The District Judge declared that he was not satisfied, in regard to the whole will, that it was the testator's intention to make a scheme of successive representatives to himself. He held, on the contrary, that the gift of the estate to Lalit Mohun was effectually made by apt and appropriate words, which were the words—"he shall be the proprietor (*malik*) of my estate," these being followed by other words giving to the donee, and his heirs, the income of the property, without any indication that their enjoyment of it was to be limited as to duration. In the Judge's opinion the gift had not been cut down by the

provisions of paragraph 9 of the will, of which the language, in his opinion, was [839] only to be regarded as advice in reference to the mode in which the donee was to enjoy the income of the estate. He was further of opinion that, even if the effect of the language of this paragraph was to fix a trust on the donee, as to the disposal of the balance, it was clear that such trust was one which the Court could not enforce. He came finally to the conclusion that the gift to Lalit Mohun was absolute. Part of the judgment was as follows :—

"The gift of the estate itself to Lalit appears to me to have been effectually made by appropriate words. The words 'he shall be the proprietor of my estate,' if they stood alone, would carry an estate of inheritance. *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* [9 B. L. R., 277 (395) : L. R., I. A., Sup. Vol., 47 (65)] at page 395 of the report, quoted in *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* [I. L. R., 4 Cal., 23 (27) : L. R., 5 I. A., 138 (147).] The position is greatly strengthened when words follow giving the donee and his heirs the income of the property, without any indication that his enjoyment of it is to be of limited duration.

"Next, it has to be considered whether the gift has been cut down by the provisions of paragraph 9. The words 'after deducting his own necessary expenses and the yearly expenses under the will, keeping in hand in the estate sufficient to preserve the estate, shall spend the remaining money in good works in order to increase the honour of the name of my family,' it is contended, reduce the donee to the position of a mere trustee as regards the balance of income. It seems to me very improbable that the testator, who had settled an annuity of Rs. 10,000 a year on his nephew if he did not succeed to the estate, should have wished to limit him to mere necessary expenses if he succeeded to it and had the position of head of the family to keep up ; and I am inclined to think that no trust was intended, but only advice as to the mode in which the donee should enjoy the income. This view is supported by the facts that to the donee is left entire discretion in determining what his own requirements are, that no scale of personal expenditure is enjoined, that no precise directions given as to what good works are to be done, and that the good works are not said to be for the benefit of the testator. The spiritual benefit or merit (*dharm*) to be gained would accrue to the donee, and the expenditure would in that sense be for his own benefit.

"Supposing, however, that the effect of the expressions used has been to fix a trust on the donee as regards the disposal of the balance, it is quite clear that it is of a nature that the Court will not enforce. It is bad from uncertainty both as to the subject-matter and the object of the trust. The question remains, whether there is any resulting trust in favour of the heirs, as is contended for by the plaintiffs. In support of their contention I have been referred to two cases, *Sib Chunder Mullick* v. *Treepoorah Soondry Dossee* [1 Fulton, 98 (108)] [840] and *Sandial* v. *Maitland* [1 Fulton, 475 (478—79)] and to the case of *Gokool Nath Guha* v. *Issur Lochun Roy* (I. L. R., 14 Cal., 222). In these cases, the Court gave the money, which could not be applied, owing to uncertainty of the purposes of the trust, to the heirs-at-law. The principle is said to be, that the trustee is to hold for the next of kin, if it is clear that he was not himself intended to take the money. In the cases quoted, I understand that the trustee had no beneficial interest. In this case he undoubtedly has, and the extent of his beneficial interest is quite undefined. In the case of *Mussoorie Bank* v. *Raynor* (I. L. R., 4 All., 500 : L. R., 9 I. A., 79) the Privy Council held that where the testator intended his wife to use the property according to her requirements, this was equivalent to an absolute estate to the wife. In the present case, that is just what the will does. It gives the donee in the first place (paragraph 4) full liberty to appropriate the whole of the income of the estate. Then (paragraph 9) it tells him to use it for his own requirements and to spend the balance on good works. This seems to be an absolute gift on the authority quoted, but if it be held not to be so, then it seems to me that the donee's beneficial interest is so great that, if the trust which I take to be for his benefit fails, he should take the money to the exclusion of the heir."

The District Judge, after distinguishing *Shookmoy Chundra Das* v. *Monoharri Dasi* (I. L. R., 11 Cal., 684 : L. R., 12 I. A., 103). proceeded thus :—

"The next questions are whether the testator intended that in the event of Lalit Mohun dying without male issue there should be a defeazance of his estate, and whether the gift over has been effectually made or is invalid.

"The contention on behalf of the plaintiffs has been that the first defendant took only a life-interest in the estate, and that there being a gift over which is bad on the ground that it is not made to any sentient being, but to a class, which is uncertain, and some of whom were incapable of taking at the testator's death, the plaintiffs are entitled to the possession of the estate, immediately on the death of Lalit Mohun. I have disposed of the first part of this contention by finding that the first defendant under the will took an absolute heritable and alienable estate in the property. This being so, it is unnecessary and undesirable that I should decide the other questions, as to whether any defeazance of Lalit Mohun's estate was intended, as to whether this would take place in the event of his dying leaving a son by adoption, and as to whether the gift over to other nephews of the testator, or residual gifts to the Government, were good. All these I leave undecided, as the events, rendering a decision on these points necessary, may never happen. I only wish to say that the testator possibly had in his mind, when stating the case of Lalit Mohun's dying without a son, the event of Lalit Mohun's predeceasing him."

[841] The decree made was this :—

"That the suit be dismissed, and that it be declared that the testator did not attempt to create a scheme of succession contrary to the Hindu law by which he was governed, and that consequently the will and its codicil are not invalid. It does not appear that the testator Saroda Pershad Roy died intestate with respect to any part of his estate. Since the death of Rajeswari Debi, the widow of the testator, the plaintiffs have not become entitled to succeed to the estate of the testator as alleged in the plaint, and they have no right or interest in the same. The defendant No. 1 has an absolute, heritable and alienable interest in the estate of the testator as stated in the 3rd paragraph of his will, subject to the charge on the Government promissory notes in favour of the charities, &c., specified in paragraph 1, and the other bequests made in the will. The plaintiffs have no cause of action, and they are not entitled to maintain this suit. The plaintiffs do pay the costs of all the defendants, and bear their own costs."

From this decree an appeal to the High Court was filed by the plaintiffs. The judgment of that Court, in which the Chief Justice concurred, was delivered by Mr. Justice CHUNDER MADHUB GHOSE, and is reported at length in I.L.R., 20 Cal., at page 921.

They held that the intention of the testator was not to give to Lalit Mohun an heritable and alienable estate, but that the estate which he acquired under the will was only an estate for life; that the gift over was invalid; that the testator had not made any valid disposition of his estate beyond the bequest of the life estate to Lalit Mohun, and certain specific bequests given, and charges created, by his will; and that, subject to such life estate, bequests, and charges, the plaintiffs in the suit, as heirs-at-law of the testator, were entitled to succeed to his estate. The High Court's decree set aside the judgment and decree of the first Court, and declared the construction of the will to the effect last mentioned.

From this decree Lalit Mohun appealed to Her Majesty in Council, as also did Bepin Mohun Roy, Priambada Roy, and Habul Chunder Singh Roy, in the consolidated appeals.

Mr. *R. B. Haldane*, Q.C., and Mr. *A. Phillips*, for the appellant Lalit Mohun Singh Roy.—The judgment of the first Court that this appellant took an heritable and alienable interest in the testator's estate, subject to all valid

charges, including the charitable trust, was correct. The gift over, also, was well made to take effect on the defeazance of the estate in the event of Lalit Mohun's [842] dying without male issue. The testator gave to sons, and, failing sons, to daughters, an absolute estate of inheritance. If no children should be born, as happened to be the case, then Lalit Mohun, the eldest son of the testator's third sister, was to become *sthulabishikto*, and *malik* of all, "enjoying with son, grandson, and so on, in succession, the proceeds of my estate." There was no attempt to create a perpetuity. It was a mistake to suppose that the gift over did not refer to the appellant's own death without leaving male issue; and he had not referred to indefinite failure of male issue at any period, nor was it right to read the will as expressly excluding the legal course of the inheritance by excluding females.

The Appellate Court below had wrongly considered the will as attempting to confer a succession of life estates upon devisees. That Court had construed the will to give, first, an estate for life to the testator's third sister's son, and then to attempt to give estates to his future sons and grandsons, excluding females, with a gift over on failure of issue indefinitely. Had this been a correct construction, the ground would have been laid for the Appellate Court's conclusion that the estate in remainder, after the life-estate to the first taker, would have been undisposed of by the will, and would have devolved, as upon an intestacy as to that remaining estate, upon the testator's right heirs. But the appellant's case was that the High Court's construction was incorrect. It was contended for Lalit Mohun that the words conferring an heritable and alienable estate upon him were clear; and that the bequest to him was not altered, or affected by subsequent gifts over, limited to take effect upon the defeazance of his estate by his being childless, a defeazance which had not yet taken place, and perhaps might never occur. That the words *putra putrade krame* were apt words for conferring an estate of inheritance was shown by the decision in *Ramlal Mookerjee* v. *The Secretary of State* (I. L. R., 7 Cal., 304: L. R., 8 I. A., 46). If the testator had excluded females, which was not the case, and if he had referred to the indefinite failure of male issue by the words "die sonless," which also was not the case, such contraventions of the rules of inheritance of Hindu law would only have involved the invalidity of limitations over and would not have [843] affected the validity of the main bequest to Lalit Mohun. The validity of gifts over as such was shown by *Soorjeemoney Dossee* v. *Denobundoo Mullick* (9 Moo. I. A., 123); and *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (9 B. L. R., 377: L. R., I. A., Sup. Vol., 47.)

The decision in *Tarokessur Roy* v. *Shoshi Shikhuressur Roy* (I. L. R., 9 Cal., 952: L. R., 10 I. A., 51), afforded no guide as to this case, for there the testator prohibited alienation by the devisee, and there the devise did import indefinite failure of issue, with a gift over upon it. Here there were only vague limitations following upon a previous absolute gift, expressed in apt and technical words. Such a gift as was made by the will to Lal Mohun could not be cut down by these subsequent dispositions. There was no reason for withholding the full proprietary right from him, to whom it had been given by clear and direct words. If such a gift could be overborne by words in the context, they must be words admitting of no doubt, but indicating perfectly the testator's intention to act in a manner contrary to his previous expressions.

Regarding the words "die sonless" it was contended that they did not import an indefinite failure of issue in the male line of Lal Mohun. The failure of sons should be construed as importing a defeazance, and as giving, should it operate, an estate over to the other nephews. *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (I. L. R., 4 Cal., 23: L. R., 5 I. A., 138) was cited.

Mr. *A. Phillips* (with whom was Mr. *H. H. Cozens Hardy*, Q.C.), appeared for the appellants in the consolidated appeals.

Mr. *A Phillips* submitted that there was a reason, on the High Court's own construction of the will, against their view that the gift over, on the defeasance of the estate to Lal Mohun, could not be maintained This was that the gift over was linked with the endowment for religious and charitable purposes This would make the gift over accord with Hindu law

Mr. *M. Crackanthorpe*, Q C, Mr *J D Mayne* and Mr *J H A Branson*, for the respondent Chukkun Lal Roy, contended that the construction put upon the will by the High Court [844] was right The testator s devise of the successive estates for life was invalid By devising these successive estates the will attempted to create a perpetuity Not one of them carried the full beneficial ownership, and such a marking out of proprietorship was not permissible, according to the Hindu law of inheritance The will gave only the income of the estate to the holders who were to take the profits for their lives, This brought the will within the scope of the decision in *Shookmoy Chandra Das* v *Monoharri Dasi* (I. L R, 11 Cal, 684, L R, 12 I A, 103) Only the first estate for life could be held good It was true that the words *putra putrade krame* would, if taken to be unqualified by the context, indicate an estate of inheritance But here there was much in the will to show that neither they, nor the word *malik*, were unqualified Reference was made to part of the judgment of Sir B PEACOCK, when Chief Justice, at the hearing of the first appeal in the *Tagore case* [4 B L R, O C, 103 (182)], as showing that the effect of *putra patrade, etc* might, in some wills, be lessened by words pointing to the testator's intention not to grant an absolute interest Reference was made to *Jatindra Mohan Tagore* v *Ganendra Mohan Tagore* (9 B L R, 377 · L R, I A, Sup Vol, 47) and *Mahomed Shumsool Hooda* v *Shewuk Ram* (14 B L R, 226, L R 2 I A, 7) As to the word *malik Punchoo Money Dossee* v. *Troylucko Mohiney Dossee* (I L R, 10 Cal, 342) was referred to. As to gifts over, or executory bequests, *Bissonauth Chunder* v. *Bama Soonder y Dossee* [12 Moo I A, 41 (47)]

As to the gift for religious and charitable purposes, it was not contended that the prohibition to alienate, as it was confined to the property left for those purposes, was invalid The estate conferred upon Lalit Mohun might be regarded as valid for his life, as the High Court had held it to be, but it was followed by dispositions which must be adjudged invalid (as they had been), because they were intended to create estates which must be considered to be inconsistent with the rules of inheritance according to Hindu law That intention was that the estate should pass [845] from male to male, never vesting in a female The gift over to other sister's sons, after the defeazance of the estate given to Lalit Mohun, was also invalid, because it had been made in favour of an uncertain class, and had been made to include persons who would not be capable of taking immediately upon Lalit Mohun s death Reference was made to *Venkata Mahapati Surya Rao* v *Gangahara Rama Rao* *, where there had been an ineffectual attempt to control the descent of property It could not be established for the appellants that this case was not governed by the rules contained in the judgment in the *Tagore case* (9 B L R., 377, L. R, I. A. Sup. Vol., 47), nor did the judgment in *Soorjeemoney Dossee* v *Denobundoo Mullick* (9 Moo I A, 123) carry the appellants' case far enough for their purposes, in deciding that gifts over on the defeazance of a prior estate were

*L R, 13 I. A, 97, I L R, 10 Mad, 15, reported as *Venkatadr Appa Yamma* v. *Peda Venkayamma*.

valid. *Tarokessur Roy* v. *Soshi Shikuressur Roy* (I. L. R., 9 Cal., 952; L. R., 10 I. A., 51) was also referred to.

Mr. *R. B. Haldane*, Q.C., replied.

Afterwards, on the 20th March, their Lordships' **judgment** was delivered by

Lord Davey.- The question on these appeals is the construction of the will of a Hindu gentleman named Saroda Pershad Roy who died on the 18th March 1868 at the age of thirty-three years. The testator was a man of considerable wealth, and, as appears from his will, was of a benevolent and generous disposition, and was also anxious for the maintenance and honour of his family. He left no issue, but left one widow who died in February 1888, about a year before the institution of the present suit. The District Judge held that the testator's nephew, the appellant Lalit Mohun Roy, took an heritable and alienable interest in the testator's estate subject to a charitable gift which will be mentioned presently, but reserved the question whether any defeazance of Lalit Mohan's estate was intended, as the events requiring a decision of that question might never arise. The decree of the District Judge was reversed by the High [846] Court. The Chief Justice Sir W. C. PETHERAM and Mr. Justice CHUNDER MADHUB GHOSE held that the appellant Lalit Mohun Roy has only a life interest in the testator's estate, that the gift over to take effect in the event of the failure of male issue of the appellant in the male line is bad in law and invalid; and that, subject to the appellant's life interest and subject to the bequests, legacies and charges made in favour of religious and charitable institutions, the plaintiffs in the action as heirs-at-law are entitled to succeed to the estate left by the testator. The present appeal is from this decision of the High Court.

There are two cardinal principles in the construction of wills, deeds and other documents, which their Lordships think are applicable to the decision of this case The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is, to use Lord DENMAN'S language, that technical words or words of known legal import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense—*Deo d. Gallini* v. *Gallini*(5 B. and Ad. 621).

The will in the present case commences with a preamble containing the following words relied on by the respondent Chukkun Lal Roy as showing an intention to make his estate inalienable:—

"It is very necessary that there should be some special ordination to secure temporal and spiritual welfare; and that suitable means providing that the work so ordained to be done should after my death be carried on without interruption, and that the members of my family should have no trouble, and that, hereafter my *sthulabhishikto* (persons installed in my place) should not, by destroying the property, &c., at pleasure, extinguish the name of my family and become troublers, &c."

By paragraph 1 the testator provided for the maintenance, out of the income of certain specified *putni taluks*, of religious foundations established by his garandfather and mother, of a dispensary established by himself, and the permanent support of [847] fifty helpless people in a house he intended to build for the purpose, and he directed that the profits of all these *taluks* should continue in perpetuity to be expended in the manner prescribed—that the *taluks* should be inalienable—and that the profits of the properties should not be expended or used for any save the purposes aforesaid. In case of deficiency of

the income of the *taluks* the amount needed was to be defrayed in perpetuity out of the interest of Rs. 2,40,000 Company's paper belonging to the testator.

By paragraph 2 he provided for his own right of control in respect of all the *taluks*, and that after his death that right should remain with the person appointed to his place.

After reciting in paragraph 3 that he possessed a large property in addition to that which he had appropriated to religious and charitable purposes the testator, in paragraph 4, disposed of his estate in the following words —

"4. If, by the will of God, one or more sons are born to me then after my death, my son or sons shall be the owner (or owners) of my estate, and the charge of managing the *deb. shebas* and dispensary, and the care of the helpless people to be fed daily, and all other business, shall rest with them What shall remain over from the profits of the estate after the monthly allowances, &c., according to the provisions of the will have been given, shall continue to be spent, as may be necessary, subject to their wishes and those of their successors. If no son is born, but one or more daughters are born, then those daughters shall with sons, grandsons and so on in succession, receiving the ownership of my estate and the management of all the work, viz, of the *deb shebas* and the dispensary, and the oversight of the helpless people to be daily fed, &c , conduct all the work If no children are born to me that is to say, son or son's son or son's son's son, or daughter or daughter's son, or if, at the time of my death, they are not alive, then the eldest son born of the womb of my third sister Srimati Khiroda, my nephew Sriman Kalit Mohun Roy Babaji, whom since his birth, I have continued to love as a son, and who remaining near me, is pleasing me by good conduct and the learning of good principles whom I have been going on supporting—this nephew Sriman Lalit Mohun Roy Babaji becoming, on my death, my *sthulabhishikto*, and becoming owner (*malik*) of all my estate and properties, &c shall, remaining my *sthulabhishikto*, obtaining the management of the *Iswarshebas* and the dispensary and the oversight of the people to be daily fed, &c , all affairs as above described, residing in my *nij* dwelling house in Suria Chakdigi the place of my ancestral abode, keeping the estate intact (*lit* , in place), enjoy, with son, grandson and so on in succession the proceeds of my estate [848] This nephew is under age If my death should occur whilst he is in a state of nonage, then my wife Srimati Rajeswari Debi and my father's sister's son Sriman Jogendra Nath Roy of Munirambati, becoming the minor's guardians and executors, shall, as long as he has not attained majority, discharge all the duties set down in my will The minor, on reaching majority, shall exercise ownership (*malikatwa*) over all the properties If he should die sonless, then his wife shall receive a monthly allowance of one hundred rupees as long as she lives If he should die leaving female offspring then that daughter or those daughters shall receive expenses and marriage expenses from my estate In the absence of the said nephew's son, grandson great-grandson and so on, then, of the sons born of the wombs of my sisters Biroda and Khiroda, he who remains the eldest after the exclusion of him who may be devoid of understanding or afflicted with any *potit rog* (any of those diseases which disqualify a man for the exercise of religious and social rights) shall receive the charge of managing my estate and properties, &c , and he with son grandson and so on in succession, receiving the ownership of my estate and the management of the *deb shebas* and the dispensary, and the oversight of the people to be daily fed &c , all affairs, shall protect the estate and enjoy the proceeds And he shall take the interest on the Company's papers, and have them renewed, &c., when necessary."

In paragraphs 5 to 7 are contained provisions of a heritable annuity to the appellant if the testator's sons or daughter get the estate, and provisions by way of maintenance and grant of allowances to the testator's sisters and another nephew The only thing noticeable is that the same words are used as occur in the gift over in paragraph 4 "in the absence of son, grandson, great-grandson and so on" In paragraph 5 they may mean death without leaving male issue or issue, and in paragraph 7 they must from the context have that meaning.

Paragraph 9, it was conceded, does not create a trust of the income of the estate but merely imports a pious expression of desire or hope.

Paragraph 13 contains a gift of the testator's estates to Government for charitable purposes in an event expressed in these words :—

"If hereafter on the death of the several persons who I have determined in this will shall be my *sthulabhishikto* no one whoever it be (entitled) to become my *sthulabhishikto* should remain alive."

The testator made a codicil to his will dated on the day of his [849] death. It contains a recital of the will which in some respects varies from the actual language of the will, but it does not appear to their Lordships that any light or assistance can be obtained from it on the construction of the will itself even if it be permissible to refer to it for that purpose.

It was not disputed on the part of the heirs-at-law that the son of the testator if there had been one, or his daughter if there had been one, would have taken an absolute, heritable and alienable estate, nor that those to whom the estate is given after the gift to the appellant and his issue would take a like estate. Nor was it disputed that the words of gift to the appellant were such as to confer on him also an heritable and alienable estate. The words "become owner (*malik*) of all my estates and properties would, unless the context indicated a different meaning, be sufficient for that purpose even without the words "enjoy with son, grandson and so on in succession," which latter words are frequently used in Hindu wills and have acquired the force of technical words conveying a heritable and alienable estate. The respondents, however, contended that the *primâ facie* legal meaning of the words used was controlled and qualified by the context of the will and they put their argument in two ways. First it was said that there was a general intention expressed in the will to give only a succession of life estates to the appellant and his male issue without power of alienation, and that such general expression of intention was confirmed by the words "keeping the estate intact" and the clause following the gift to the appellant. Secondly, it was contended that the will contained such a sufficiently expressed intention to exclude females from the succession as would cut down the words of inheritance to heirs male and give the appellant only an estate to him and his heirs male which would be void beyond the life estate according to the well-settled principle of Hindu law.

Their Lordships do not find any express prohibition in this will against alienation of the estates, the beneficial enjoyment of which is given to the devisees, as there is of the estates appropriated to religious and charitable purposes. If there were such a clause added to a gift of a heritable estate it would be repugnant and void. This is not like the case of *Shookhmoy Chunder Das* [850] v. *Monohari Dasi* (I. L. R., 11 Cal, 684, L. R, 12 I. A., 103) in which it was held independently of the provision against alienation that there was no intention to pass the estate. The gift over to the Government in clause 13 of the will, on which some reliance was placed by the respondents, may be construed either as taking effect on failure of the persons named as substitutes or taking by purchase, in which case it might be valid, but the event has not occurred, or it may be construed as providing for a general failure of heirs in which case it would of course be void. It is possible that a testator may have imperfectly understood the words he has used, or may have misconceived the effect of conferring a heritable estate, but this would not justify the Court in giving an interpretation to the language other than the ordinary legal meaning.

The alternative branch of the argument is more plausible, and appears to be that which mainly found favour with the learned Judges in the High Court.

It was said that the provision for the appellant's widow in case he died sonless and the provision for his daughters was inconsistent with a gift to him and his heirs in legal succession, because in that event, according to the law of the Mitakshara, the widow and daughters would succeed as the appellant's heirs. But the provisions for the widow and daughters of the appellant must be read with the clause which immediately follows and would more accurately precede them. It was decided in *Soorjeemoney Dossee* v. *Denobundoo Mullick* (9 Moo. I. A., 123) that a Hindu testator may give property by way of executory bequest (to borrow a term from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being, and (it has since been explained) in favour of a person born in the testator's lifetime.

Their Lordships do not propose to express any opinion on the construction or validity of the gift over in paragraph 4 of the will before them. They do not find it necessary to do so. The event (whatever it may be) may never occur, and if it does the question will probably arise between parties other than the present litigants. If the event referred to in the clause is the death of [851] the appellant without leaving male issue it makes a consistent and intelligible series of limitations. It would be a gift in fee (to use an English term) to the appellant defeasible in case of his death without leaving male issue, with a provision in that event for his widow and daughters who would be disappointed by the operation of the gift over. It was pressed upon their Lordships that the event referred to is an indefinite failure of issue male. The clause in that event would of course be void but for the purpose of construction and ascertaining the testator's meaning the effect of it on the other provisions of the will must be considered. In the opinion of their Lordships the words of the clause do not indicate any intention to give a succession of life interests to the appellant and his issue male or to vary the terms of the gift to Lalit Mohun Roy: and if it could have effect given to it, the provisions for the wife and daughters would still not be unmeaning. Their Lordships cannot find any sufficient reason for impoiting into the gift to the appellant an implied prohibition against females succeeding as heirs so as to limit the nature or extent of the estate taken by the appellant or confine it by construction to heirs male although his estate may be defeasible if the gift over is valid and the event on which it is to take effect should occur.

Their Lordships, therefore, think that the decree of the High Court should be reversed and the decree of the District Judge be restored in substance. They think, however, to avoid any misapprehension hereafter, the word "absolute" should be omitted, and the following words should be added, viz, "But this Court does not think fit to make any declaration at present as to the construction or validity of the clause of defeasance or gift over annexed to the estate of the defendant No. 1 contained in the testator's will."

Wtih regard to costs, the respondent Chukkun Lal Roy and his deceased brother Shoshi Bhusan Roy whom he now represents (plaintiffs in the action) were ordered to pay the costs of all the appellants by the decree of the District Judge. That decree was reversed in the High Court and the costs of the appellants there in the lower Court and the High Court were given out of the estate. Their Lordships were asked to give the costs of the respondents [852] of this appeal out of the estate, but that would be making the appellants pay the costs of their successful appeal. Their Lordships are not disposed to vary the directions as to costs in the District Court The respondent Chukkun Lal claims not under but against the will, and their Lordships think that the appellants in the High Court ought to pay the costs of that appeal which, in their opinion, ought to have been dismissed, and that Chukkun Lal Roy should pay the costs of Lalit Mohun Roy of his present appeal.

In addition, however, to the principal appeal two other appeals against the decree of the High Court have been presented by persons who may become entitled under the gift over. So far as the respondent Chukkun Lal Roy is concerned their case is a common one with that of the first appellant. If Lalit takes an heritable estate the heirs-at-law have no direct interest in the construction or validity of the gift over, as they are equally excluded whether Lalit's estate is defeasible or indefeasible. The two sets of appellants declined to argue any question between themselves or to ask for any declaration as to the construction or validity of the gift over. As, however, the presentation of those appeals was justified by the form of the decree of the High Court, although in the result they have proved to be unnecessary, their Lordships think they cannot order the appellants to pay any costs to the respondents.

Their Lordships therefore will humbly advise Her Majesty that the decree of the High Court be reversed, and instead thereof the decree of the District Court be varied by the omission of the word "absolute "and by the addition of the words mentioned above, and as varied the decree of the District Court be affirmed and the plaintiffs in the action be ordered to pay the costs of the appeal to the High Court. The respondent Chukkun Lal Roy will also pay to the appellant Lalit Mohun Singh Roy the costs of his present appeal, and there will be no order as to the costs of the two consolidated appeals, or the costs of Bepin Mohun Roy, Priambada, and the son of Priambada, as respondents in the principal appeal. The Secretary of State for India in Council was made a party to the suit and a respondent to this appeal, but he has not put in any case and does not appear. Their [853] Lordships therefore will not make any order as to his costs (if any) of this appeal.

Appeal allowed.

Solicitors for the Appellant, Lalit Mohun Singh Roy: Messrs. *Withers & Withers.*

Solicitor for the Appellants, Bepin Mohun Singh, Priambada Roy and Habul Chunder Roy: Mr. *James T. Withers.*

Solicitors for the Respondent, Chukkun Lal Roy: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[**I. TECHNICAL TERMS**:—

They should have their primary legal meaning, unless modified by context etc. :—(1908) 31 Mad., 283 : 18 M.L.J., 331.

II. MALIK:—

In **(1907) 30 All., 84** the Privy Council expressly followed their observations in this case.

"This case (24 Cal., 834) seems to adopt and apply the same view of the word '*malik*' as was taken in the Calcutta case in the 24 W.R., above cited, with the result that in order to cut down the full proprietary rights that the word imports, something must be found in the context to qualify it. Nothing has been found in the context here or the surrounding circumstances or is relied upon by the respondents, but the fact that the donee is a woman and a widow, which was expressly decided in the last mentioned case not tosuffice etc. ", at p. 89. See also (1906) 29 All., 217 ; (1908) 8 C.L.J., 20: (1900) 5 C.W.N., 800; (1899) 29 Cal., 44 where the rule was applied. The circumstance of the donee being a woman who takes a limited estate by inheritance was much too largely relied on in (1903) 25 All., 351 ; (1904) 27 All., 364.

III. FROM GENERATION TO GENERATION ETC.—

These words generally confer an absolute estate :—(1897) 22 Bom., 355 ; (1907) 7 C.L.J., 291 unless the context should qualify their import, (1910) 6 I.C., 355; (1904) 9 C.W.N., 309 ; (1908) 30 Cal., 896 reversing (1906) 33 Cal., 947 ; (1914) 25 I.C., 986.

IV. RESTRICTIVE CONDITIONS:—

When the conditions are inconsistent with the estate given, the gift takes effect without those conditions :—(1903) 31 Cal., 111.

V. FUTURE EVENTS:—

They should be dealt with as they arise :—(1906) 33 Cal., 947 at 965 : 10 C.W.N., 695 : 3 C.L.J., 502.]

[24 Cal. 853]

The 19th and 24th February, and 20th March, 1897.

PRESENT:

LORDS WATSON, HOBHOUSE AND DAVEY, AND SIR R. COUCH.

Ram Autar and others............Defendants

versus

Mahammad Mumtaz Ali............Plaintiff.

[On appeal from the Court of the Judicial Commissioner of Oudh].

Minor—Wrongful admission of title against a minor—Suppression of facts by a Manager appointed by the Court of Wards—Order of Settlement Court cancelled.

At a settlement of a district in Oudh a sub-settlement was decreed in conformity with Act XXVI of 1866, which legalizes rules as to claims in respect of subordinate rights to land. The claimant alleged himself to be, in virtue of a *birt* tenure held by him, under-proprietor of a village within the *taluk* of a *talukdar*, then a minor, whose estate was under charge of the Court of Wards, whose representative, the Deputy Commissioner of the District, had appointed a manager of the estate. This manager having reported favourably on the claim, the Deputy Commissioner sanctioned its admission; whereupon a decree for sub-settlement was made on the 30th June 1871. The present suit was brought by the *talukdar*, after attaining full age, to have that decree set aside as having been obtained by fraud and collusion. That the manager was brother of the alleged *birt*-holder, and that he was family shareholder with him in the village, facts which the manager had suppressed, were facts proved in this suit. The defendants attempted, but failed, to establish by evidence the existence of the alleged *birt*.

Held, that the admission in the Settlement Court in 1871 was not binding on the plaintiff, and that, even assuming that the defendants' ancestor had been in some way in occupancy before 1857, the evidence was quite insufficient to show that a grant of a perpetual under-proprietary right had been obtained. The decree of the Lower Appellate Court, cancelling the Settlement Court's order, was therefore upheld.

APPEAL from a decree (3rd July 1891) of the Court of the [854] Judicial Commissioner, reversing a decree (6th January 1890) of the District Judge of Fyzabad.

The plaintiff in this suit, now respondent, was Raja Mahammad Mumtaz Ali Khan, *sanad*-holding *talukdar* of Bilaspur in the gonda district including the *taluk* of Utrauli. Within the latter was situate *mouzah* Mahammadpur Banjarha, as to which this litigation arose. Of this village Ram Ghulam, son of Jawahir Lal, and grandfather of Ram Autar, the first defendant in this suit, obtained in 1871, at a settlement in progress in the Gonda district in that year, a sub-settlement as under-proprietor within Act XXVI of 1866, the Oudh Sub-Settlement Act. Ram Ghulam alleged at the settlement that he held a *birt* tenure of the village which had been granted to Jawahir Lal, his father, in the year 1838 by Raja Mahammad Khan Jeo, then the *talukdar*, who died in 1865.

Jawahir Lal was also father of Salig Ram, the second defendant in this suit, who died while this appeal was pending, and was now represented by his sons, who were substituted for him on this record on the 21st November 1895.

The order, dated 30th June 1871, made by a Deputy Collector as Settlement Officer, was headed" *Ram Ghulam* v *Raja Mumtaz Ali Khan, talukdar,*" and referred to an *ikbaldawa* filed on that day by Salig Ram, general agent, manager, as admitting the claim *Birt* right over the village Mahammadpur was then decreed to Ram Ghulam

The Raja was then an infant aged but a few years. His estate, entered in the lists I and II, prepared under the Oudh Estate Act, 1869, was under charge of the Court of Wards, represented, in conformity with Regulation X of 1793, by the Deputy Commissioner of the district, who appointed a manager of the estate, as that law directs The manager thus appointed was Salig Ram, who had managed the estate under the preceding *talukdar* This manager, when called on by the Deputy Commissioner to report as to the claim made before the Settlement Officer, reported in favour of it, suppressing the fact that being Ram Ghulam's own brother he was entitled to a fourth share in village Mahammadpur with him The Deputy Commissioner, on the manager's representation, sanctioned the filing of the above admission of the claim.

[856] On this appeal, the principal questions were whether the admission, upon which the decree of the Settlement Court was based, and the decree, were binding upon the Raja It was also in dispute whether the defendants had to discharge the burden of proving that the *birt* tenure existed, and, if so, whether, or not, they had given sufficient evidence of it

On the Raja s coming of age in 1886, the Court of Wards made over charge of the *talukdari* estate to him On the 8th March 1889 he brought this suit to have the settlement decree of 1871 set aside, as having been founded on an admission which was false and collusive, and an unproved claim

All the facts appear in their Lordships judgment, as well as the substance of the cases made by the plaintiff and the defendants

The District Judge in his judgment arrived at the conclusion that the Court of Wards had been properly made defendants in the settlement suit of 1871, and that the claim of the plaintiff in that suit had been admitted by an officer having the powers of a Court of Wards and that, therefore, the settlement decree was valid and binding between the parties Referring to the fraud and collusion charged, the Judge said that, no doubt Salig Ram had a direct interest in the sub settlement, and the under proprietary right as *birtia* being decreed to his brother Ram Ghulam with whom he was co-sharer in estate, and his not having mentioned these facts in his report " told strongly against his *bonâ fides* in the whole transaction " But, on that ground alone, the Court could not presume that he had been guilty of fraud Under section 111 of the Indian Evidence Act, 1872, it was incumbent on the appellants to prove the good faith of the transaction But the answer to this was that it was a true claim that had been admitted and not a false one This last proposition was derived from the consideration of the whole of the documentary evidence, upon which the Court found that Ram Ghulam had been proved to be *birt*-holder The plaintiff's suit was dismissed with costs

The Appellate Court (the Judicial Commissioner and the Additional Judicial Commissioner) reviewed the evidence, finding that the materials on which the Deputy Commissioner, as [856] representing the Court of Wards, sanctioned the admission of the claim in 1871, were meagre and insufficient.

They considered that there had been want of care of the interests of the ward, contrary to the injunctions and intent of Regulation X of 1793, section 16 They referred to the remarks in the judgment in *Luchmeswar Singh* v. *Chairman of the Darbhanga Municipality* (I L R, 18 Cal., 99, L. R, 17 I.

A., 90). They decided that in the present suit the defendants had failed to establish a right to an under-tenure such as could be recognized by law (Act XXVI of 1866). They referred to section 2 of that Act, and the rules scheduled as an appendix to it. Also to *Drig Bejai Singh* v. *Gopal Dat Panday* (I. L. R., 6 Cal., 218; L. R., 7 I. A., 17). They reversed the decree of the first Court, and decreed the village to the plaintiff.

On the defendant's appeal,—

Mr. *A. F. Murison* for the appellants argued that there was no sufficient proof of the fraud charged in the plaint. The decree of the Settlement Court had been regularly obtained in 1871, and ought to be regarded as valid. Setting aside the question of the admission and its effect, the evidence in the suit was sufficient to establish a title in Ram Ghulam and his heirs in virtue of the *birt*. In the judgment of the Judicial Commissioners there had been a presumption of fraud against the manager, which had not been warranted by the evidence, and had been in excess of just inference. The general rule that fraud was not to be presumed had not been kept in view. Again, regard had not been paid to the title of the appellants having been one which was not established by or through the rights of the *talukdar*, but was, in effect, independent of the title of the latter. This was shewn by the letters of the Government (10th and 19th October 1859), as scheduled in the Act XXVI of 1866, relating to under-proprietary rights, and to sub-settlement with those possessed of subordinate rights of property. Further, it had been shown that, irrespectively of the decree of the Settlement Court of 1871, the appellants were entitled to hold as *birtias*. and it was submitted that, even if the right of the [857] appellants to sub-settlement had not been established, they were not, in consequence of that state of things, liable to be dispossessed of their holdings. Reference, in regard to the effect of the manager's admission, was made to *Muhammad Mumtaz Ali Khan* v. *Sheoruttangir* (I. L. R., 23 Cal., 934; L.R., 23 I. A., 75).

Mr. *J. D. Mayne*, and Mr. *C. W. Arathoon*, for the Respondent, were not called upon.

Afterwards, on the 20th March, their Lordships' **judgment** was delivered by

Lord Watson.—The respondent Rajah Mahammad Mumtaz Ali Khan succeeded on the death of his uncle the Rajah Umrao Ali Khan to the Bilaspur estate in district Gonda, which includes the *taluka* of Utraula. At that time the respondent was a mere infant and his estate remained under the charge of the Court of Wards from the end of the year 1865 until October 1886 when he attained majority. In March 1889 he instituted the present suit before the District Court of Fyzabad against Ram Autar, Salig Ram and others, in which he prays for (1) a decree for possession of the entire village Mahammadpur Banjarha which is within *taluka* Utraula, (2) cancellation of an order passed by the Settlement Court on the 30th June 1871 which decreed the village Banjarha "for *birt*," to one Ram Ghulam, and (3) a decree for mesne profits.

The appellants are the original or substituted defendants in the suit; and with the exception of one who has acquired by purchase a share in the interest claimed by the others they are the lineal descendants of one Jawahir Lal to whom they allege that a perpetual under-proprietary right in the village was granted in or about the year 1838 by the Rajah Mahammad Khan Jeo, a predecessor of the respondent. Jawahir Lal had four sons, the eldest being Ram Ghulam the grandfather of the said Ram Autar, and the youngest Salig Ram who was an original defendant in this suit. On the death of Jawahir it

is said that the members of his family succeeded to his under-proprietary interest in village Banjarha. Ram Ghulam obtained from the Settlement Court in 1871 the order sought to be cancelled as representative and for behoof of the whole of the members of the family. For many [868] years prior to the death of Raja Umrao Khan in 1865, Salig Ram was employed by him as manager of the estate; and he continued to act in the same capacity during the whole period of its administration under the Court of Wards.

The case maintained by the respondent is in substance that Jawahir Lal had no grant of under-proprietary right from his ancestor, and that the defendants have no such interest in village Banjarha; that the decree of the Settlement Court in favour of Ram Ghulam was obtained by fraud and collusion; that no evidence was produced and no inquiry made as to the existence of the right then asserted by Ram Ghulam, and that the latter caused or induced his brother Salig Ram to give an admission on behalf of the Court of Wards in respect of which the decree passed. In their written statement the appellants allege that the original *birtpatr* of 1838 by Rajah Mahammad Khan Jeo to Jawahir Lal was produced at the summary settlement, but that the file of papers, including that document, had been destroyed during the Mutiny. If so the production of the document in the Settlement Court must have been of an earlier date than 1871. They also denied the respondent's allegations of fraud and collusion, and averred that the admission of Ram Ghulam's claim was made "in accordance with instructions of the manager of the Court of Wards, who had after inquiry given him (*i.e.*, Salig Ram) instructions to admit the same"; and that they and their predecessors had, since 1838, been in possession of the village as proprietors, under the *talukdar* of Utraula.

Four issues were adjusted by the District Judge for the trial of the cause: (1) Is not plaintiff bound by the decree of 1871? (2) If not, is the present claim barred by limitation? (3) If not barred, are the defendants not entitled to hold the village as *birt*-holders? (4) If not so entitled, to what relief, if any, is the plaintiff entitled? The learned Judge, in their Lordships' opinion erroneously, laid the onus of establishing the third issue upon the respondent. In the event of its being held that the decree of 1871 was not such as to constitute a bar to the action, the duty of proving their own title *aliunde* was incumbent upon the appellants. Upon the issue of limitation, both Courts below found against the appellants; and no question has [869] been raised with regard to it in this appeal. The District Judge, on the 6th January 1890, found for the appellants upon the first and third issues; in consequence of which findings, it became unnecessary to consider the fourth issue, and the respondent's suit was dismissed by him, with costs. Upon an appeal by the respondent, the Judicial Commissioner reversed the decision of the District Judge upon the first and third issues, and found upon both of them for the respondent. He accordingly gave the respondent a decree for possession of the village Mahammadpur Banjarha in terms of his plaint. He dismissed the prayer of the plaint in relation to mesne profits, because no evidence had been adduced at the trial in support of the fourth issue; and he deprived the respondent of his costs in both Courts below, because forged interpolations had been made in certain documents put in by him, connected with the Settlement Court proceedings of 1871.

When the judgments delivered by the District Judge of Fyzabad and the Judicial Commissioner are examined, it becomes apparent that the only real difference of opinion between them was in regard to the third issue. The learned Judge of the District Court was of opinion that the appellants would

not have been entitled to a finding in their favour upon the first issue, if it had stood alone. But seeing that, in his opinion, they were entitled to have a finding, under the third issue, that they were possessed of a valid under-proprietary right, independently of the decree of 30th June 1871, he appears to have thougt that the decree of 1871 ought to be regarded as sufficient, inasmuch as, in his opinion, Ram Ghulam would have been entitled to, and would have obtained it, if due investigation had been made at the time, instead of its proceeding upon an admission given by Salig Ram, who was himself interested, to the extent of a 5 anna 4 pie share, in the right claimed by his brother Ram Ghulam. The reasoning of the learned Judge does not appear to their Lordships to be altogether satisfactory. If the circumstances attendant upon the granting of the decree of June 1871 were such that it could not be set up by the appellants as a title sufficient to exclude the possession of the *talukdar*, the finding upon the first issue ought to have been to that effect: and it would not have prejudiced the appellants' defence, in the event of their being able to **[860]** establish under the third issue, that they had obtained an under-proprietary right from one of the respondent's predecessors.

It does not, in their Lordships' opinion, admit of reasonable doubt that, having regard to the facts disclosed by the proof, the settlement decree cannot be regarded as binding upon the respondent who was at its date a minor under the guardianship of the Court of Wards. The local manager of his estate under the Court of Wards was Salig Ram, for behoof of whom, as well as of himself and of other members of Jawahir Lal's family, the petition of Ram Ghulam was presented. Yet Salig Ram was the only person who appeared in the Settlement Court to represent the Court of Wards, and to protect the interests of the respondent against possible encroachment by Jawahir Lal's descendants It is obvious that the Deputy Commissioner, who was the chief officer of the Court of Wards in that district of Oudh, was induced to sanction the admission of their right, in consequence of representations made to him by his servant Salig Ram, whom he directed to report upon the application. It is hardly conceivable that an official in his position would have entrusted such an inquiry to Salig Ram, or would have acted upon his report, if he had known the reporter's relationship to the applicants, or his personal interest in the success of their application.

Salig Ram, as might naturally have been expected in those circumstances, made a report in all points favourable to his brother's claim. It states that the village Banjarha was *birt* of Ram Ghulam ; that, in the commencement of 1844, he had cleared and populated the jungle according to the grant previously made by the Rajah ; and that, from and after the time of the grant, he had possession by receipt of *haq-i-chaharum*, and by payment of the Government revenue to the Rajah ; that, in 1857, settlement of the village was made with him as *birtia*, on the same terms ; that settlement was again made with him in 1859, recognising his *birt* tenure , and that, from the time when its administration began, the Court of Wards continued his possession, upon his payment of the Government revenue due for the village, under deduction of one-fourth, as *haq-i-chaharum*. Acting upon the faith of these representations by his manager, the Deputy Commissioner authorised an admission of the claim, **[861]** which was duly filed by Salig Ram ; and, in respect of it, the Settlement Court issued its order affirming the under-proprietary right of Ram Ghulam. Notwithstanding the assertion made by the appellants in their written statement, there is no trace of the *birtpatr* or any similar document having been laid before the Settlement Court either in 1857 or in 1859. On both these occasions, the village was temporarily settled with

Jawahir Lal's descendants; but there was no inquiry into the question of their alleged under-proprietary right. These settlements were probably made because they were found in possession, and they may have been facilitated by the fact that Salig Ram was then, as he was in 1871, manager of the estate.

Salig Ram was examined as a witness in his own behalf in this suit, and he explained that, in reporting upon his brother's application to the Settlement Court, "I did not think it necessary to say that Ram Ghulam was my brother, as everyone knew he was my brother," but he does not explain why he failed to communicate the fact that the application was partly made for his personal benefit, and that he had a substantial pecuniary interest in its success. What he does state in evidence amounts to nothing more than this, that those persons who happened to be acquainted with Jawahir Lal's family were aware of his relationship to the petitioner Ram Ghulam. Their Lordships agree with the observation of the District Judge that "this amounts to an admission that he did not report that Ram Ghulam was his brother, and this fact tells strongly against his *bonâ fides* in the whole transaction." Their Lordships may add that, in their opinion, it is sufficient to justify a suspicion that, in 1871, Salig and his brother Ram Ghulam were not possessed of documents showing the under-proprietary right which they claimed, or at least that they had some good reason for desiring to avoid submitting their documents to the examination of the Settlement Court. Their Lordships must assume that the Deputy Commissioner was kept in ignorance of the facts which made Salig Ram an interested and unreliable adviser. Had he known these facts, his acceptance of Salig Ram's report would, in their opinion, have constituted a grave breach of duty, sufficient in itself to prevent the decree of the Settlement Court from becoming binding upon the respondent.

[862] The only question remaining to be considered is, whether the respondents have succeeded in establishing an under-proprietary right in the village Banjarha, derived from the *talukdar* of Utraula, before the Mutiny? Upon that point, the learned Judges of the Courts below have come to opposite conclusions

It appears to be the fair result of the evidence, and may be assumed, that Jawahir Lal and his family were in the occupation under some title or other, of the village in dispute, from the year 1838 until the Mutiny. The question between the parties is therefore narrowed to the issue, whether the occupation which they had during that period was attributable to a tenure under the Rajah, of a temporary character or in perpetuity. The respondents, besides leading oral testimony, which is *per se* inconclusive upon the matter of title, have produced and founded upon a mass of documents, some of which are not proved at all, and others of which are of no value as evidence, in a question with the *talukdar*, whilst the genuineness of other documents, which bear most directly upon the nature of the appellants' title, is disputed by the respondent.

One main reason which induced the learned Judge of the District Court to come to a conclusion favourable to the appellants upon the third issue, is expressed in the following sentences. "The others (*i.e.*, documents) prove beyond any doubt that one Ram Ghulam held possession of this village as *birt*-holder from before the Mutiny until 1861; *and this is not denied by the plaintiff*, but evidence on behalf of the plaintiff has been given to show that the Ram Ghulam who held the village was one Ram Ghulam, *Misr*, and not the Ram Ghulam who obtained the decree in 1871, who is a *Kayesth*. The plaintiff when he filed this suit never asserted that the village had been held by one Ram Ghulam, *Misr*, and it was only on 16th November 1889, when the remarks

in Column 16 of the *muafi* statement for the village in suit were read, that this contention was raised on behalf of the plaintiff. It is perfectly clear to me that the remarks in Column 16 are a clerical error. Another village called Ambawa was held by one Ram Ghulam, *Misr*, and the clerk who drew up the two statements thought that both the Ram Ghulam of Amhawa and Ram Ghulam of Mahammadpur were one and the same person, hence the error."

[863] Their Lordships see no reason to doubt that the entry in the *muafi* statement which represents Ram Ghulam of Banjarha as a *Misr* by caste, was due to an error of the clerk who prepared it. The statement was made up in the year 1861, at a time when the same Ram Ghulam, who subsequently obtained the decree of 30th June 1871, had been placed in temporary possession by the Settlement Court. But they are of opinion that the learned Judge erred in assuming, as he appears to have done, that the respondent had, in the course of the suit, practically admitted that Ram Ghulam must be held to have possessed the under-proprietary title which the appellants claim, if it could be shown that the Ram Ghulam, called a *Misr*, was in reality a *Kayesth*. Their Lordships can find nothing in the record to warrant that assumption The *muafi* statement of 1861, if evidence of title at all, is a mere adminicle of proof, and, *per se*, inconclusive It is not shown upon whose information it was prepared, or that its terms were known to the Rajah, although they may possibly have been within the knowledge of his manager Salig Ram. The sole object of the evidence led by the respondent to which the learned Judge refers—that of Gupta, the son of Ram Ghulam, *Misr* —was to show that the document produced in aid of the appellants' title did not support it.

The most important by far of the writings produced and relied on by the appellants are three in number, all of which purport to be documents emanating from the Rajah, and are the only documents of that character which are to be found in the record. As stated by the learned Judges in both Courts below, their genuineness was disputed, and it has not in this appeal been conceded by the respondent. The Judicial Commissioner decided against the appellants upon the assumption, and without deciding, that they were genuine; and their Lordships, upon considering the tenor of the documents, are not prepared to differ from the result at which he arrived.

The first of these documents purports to be a receipt granted to Jawahir Lal, dated in the year 1838, under the seal of the Maharajah Mahammad Khan, for Rs. 141, "on account of *birt* zamindari of village Mahammadpur *alias* Banjarha." It also **[864]** contains these words "Hence this receipt has been executed so that it may remain as a *sanad* " The document is represented by the appellants to be an acknowledgment by the Maharajah for the sum paid to him by Jawahir Lal as consideration for the grant of a perpetual under-proprietary right to the village. It must be observed, however, that no mention is made in it, either of the conditions of the tenure or of its duration. These are supposed to have been expressed in the deed of grant itself, or *birt-patr*, which the appellants allege to have been produced at the summary settlement, and to have been destroyed during the Mutiny.

The second document is a lease of 1844 in favour of Jawahir Lal, under the seal of the Rajah Umrao Ali Khan, for clearing jungle in " village Mahammadpur *alias* Banjarha," the area of which " is one thousand five hundred and five (1,505) bighas, standard." The duration of the lease is thus defined: " He may for seven years enjoy free of rent (*khanti bunti*) the forest produce and after seven years he shall have to divide (with me) the grain produce at the *batai* rate prevailing in jungle villages, and he may take his

hissa chaharum (¼ share) on account of his zamindari *birt*, out of his Government revenue."

The third document is a lease, dated in 1850, also under the seal of the Rajah Umrao Ali Khan, and in favour of the same Jawahir Lal. It demises to the latter, for the period of four years, the same village Mahammadpur Banjarha, on a *jama* of Rs. 282, and it provides that "he (*i.e.*, Jawahir Lal the tenant) should without any anxiety cultivate and bring under tillage (lands), settle, and get others to settle there, and pay the Government revenue year by year, and instalment by instalment, and should take ¼ out of the Government revenue as his zamindari due."

The receipt of 1838 is, in their Lordships' opinion, quite insufficient to show that Jawahir Lal in that year obtained from the Rajah a perpetual grant of an under-proprietary right to the village as the appellants assert. The existence of such a right is inconsistent with the fact that Jawahir Lal subsequently accepted from the Rajah, in 1841 and 1850, leases, for a short period, of **[865]** the same subjects which, according to the appellants' contention, already belonged to him absolutely and of right as under-proprietor.

Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from and to dismiss the appeal. The appellants must pay to the respondent his costs of this appeal.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Walker & Rowe.*

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[I. In (1907) **30 All., 708 P.C.**, the Privy Council accepted the conclusions, with the reasons on which they were based, of the Judicial Commissioner in that case, and at p. 724 there are his observations on this decision which greatly detract from its value as an authority.

II. As regards compromises affecting minors, see also (1911) 41 I.C., 105.]

[24 Cal. 865]

PRIVY COUNCIL.

The 18th March and 7th April, 1897.

PRESENT:

LORDS WATSON, HOBHOUSE AND DAVEY, AND SIR R. COUCH.

Debi Pershad Singh and another............Plaintiffs

versus

Joynath Singh and others............Defendants.

[On appeal from the High Court at Fort William in Bengal.]

Riparian owners—Water rights for irrigation where a stream flows through separate estates—Relative rights of upper and lower proprietors on the banks to the use of the water—Issues not raising actual rights.

A riparian owner, where a stream flows in a channel down from a property higher up, is entitled to the flow of water without interruption, and without substantial diminution caused by the upper proprietor, who may for legitimate purposes withdraw so much only of the water as will not materially lessen the downward flow on to his neighbour's land.

In this suit the upper proprietor claimed the right to dam up a stream on his own estate, and to impound so much of its water as he might find convenient for irrigation, leaving only the surplus, if any, for the use of the proprietors below. He has no such right, in the absence of a right obtained by him in virtue of contract with the lower proprietors, or acquired by him as a consequence of prescriptive use. His common law right is to take for the purpose of irrigation so much water only as can be abstracted without materially diminishing what is to be allowed to descend. What quantity of water can be abstracted and used without infringing that essential condition must in all cases be a question of the circumstances, depending mainly upon the size of the stream and the proportion which the water taken bears to its entire volume.

In this suit, the upper proprietor's claim having been put too high, the real question as to the proportion of his share had been omitted. No issue had raised it, and no evidence had been given to determine it approximately. The Court of First Instance and the first Appellate Court had attempted to [866] decree what they considered would be the just proportion, but the High Court had rightly pointed out that there had been no materials before the Courts upon which a right of a more limited kind than that which had been in excess claimed could be decreed to the upper proprietor; and the suit had been rightly dismissed.

APPEAL from a decree (May 19th, 1893) of the High Court, reversing a decree (June 30th, 1891) of the Subordinate Judge of Shahabad, who had affirmed, with a variation of detail, a decree (December 21st, 1889) in favour of the plaintiff made by the Munsif of Sasseram.

The plaintiffs, now appellants, claimed in effect that they were entitled to the unrestricted use for irrigation purposes of the water of a stream, the Kudra, passing through their village Ramgurh in Shahabad, without their right being limited by that of the defendants, who were proprietors of villages lower down the stream.

Ramgurh lay between Chikhuria, a *mouzah* belonging to the Maharaja of Dumraon, to the south, and *mouzahs* Hata, Khaja, and Narainpur, belonging to the defendants, to the north The course of the Kudra was from south to north, passing through all these villages. The present plaintiffs, before 1884, made a *bandh*, or dam, on the stream in Chikhuria above their own land to lead the water of the Kudra into a *tal* or reservoir, about 150 *bighas* in area, in their *mouzah* Ramgurh, for irrigation purposes. This was the occasion of two suits being brought against them in 1884-85 to restrain their keeping up this *bandh*, one by the Maharaja, and the other by the present defendants. That litigation ended on the 4th November on a decision of the High Court (WILSON and O'KINEALY, JJ.) supporting decrees of the local Courts of Shahabad for the removal of the *bandh*.

The plaintiffs then made, or attempted to make, another *bandh* to dam up the Kudra, with the same object, within the limits of their own village, Ramgurh. This having been thrown down by the defendants, the plaintiffs filed this suit on the 9th January 1889.

The plaint stated that, after those suits had been decided, the plaintiffs constructed a *bandh* across the Kudra within the limits of their own village, Ramgurh, for the purpose of filling the reservoir or *tal*; that the defendants in September 1888 destroyed this [867] *bandh*--acts for which the plaintiffs failed to get any redress on their application to the Criminal Courts. This suit was accordingly brought to recover damages for the injury suffered and for a declaration—

"That the plaintiffs are entitled to carry the water to their *tal* by placing *bandhs* at any part of the Kudra within the estate of the plaintiffs, and that the defendants have no right to obstruct the plaintiffs in making any *bandh* on the bed of the river at any place above the defendants' estate."

The plaint added—

"The plaintiffs submit that irrespectively of any decision of any Court, they, as riparian proprietors, are entitled to the fullest use of the water of the river which passes through their estate, and in order thereto they are entitled to construct any *bandh* across the bed of the river within the limits of their estate, and to cut any channel for the conveyance of the water to the *tal* at Ramgurh for the purpose of irrigation."

"The defendants as riparian proprietors lower down the river are entitled to such water of it as remains after the plaintiffs' *tal* at Ramgurh is filled."

In their written statement the defendants objected that for more than a hundred years the water had flowed in an uninterrupted course to the *mouzahs* Hata, Khaja, and Narainpur, their property below Ramgurh, and that they had acquired a right of user with which the plaintiffs could not lawfully interfere. The principal issues were —

"Has the plaintiffs' right to lead the water from the *baha* into Ramgurh *tal* been declared by a competent Court, or have they acquired a right of easement to use the water of the *nuddi* for irrigation by virtue of long enjoyment for more than twenty years, if so, where? And are they entitled to erect a *bandh* at a new spot, the former *bandh* at Chikhuria being stopped?"

"Whether the plaintiffs, as riparian proprietors, are entitled to take the water of the stream to feed their *tal* at Ramgurh for the purposes of irrigation of the lands of the said village, and does that right of the plaintiffs still subsist?"

"To what damages or relief are the plaintiffs entitled?"

The Munsif dealt with the question as to the plaintiffs' rights, either as riparian proprietors, or under the previous decrees, to divert whatever water they might require to fill their *tal* without regard to the defendants' requirements. He was of opinion that [868] they had no such right at law, citing many authorities to that effect He was, however, also of opinion that, although the plaintiffs were not entitled to the declaration sought, they were entitled to a fair and reasonable share of the water of the stream' to enable them to irrigate their *mouzah*, without substantially diminishing the supply of water to the *mouzahs* below He concluded thus —

"I am of opinion that the plaintiffs are entitled to a fair and reasonable share of the water of the stream to enable them to irrigate their *mouzah* without substantially diminishing the supply of water to the *mouzahs* below A careful study of the subject and some experience in these suits relating to water-courses, have convinced me that such an order, unless supplemented by proper instructions, sometimes proves indefinite, often giving rise to much confusion in the Execution Department The order which I now propose to make is that the plaintiffs shall be entitled to a fair and reasonable use and share of the water of Kudra *nullah*, so as not to interfere with, or substantially diminish the supply of, water to the defendants below At the spot where they propose to make the cut or channel, they may make a permanent or temporary construction some masonry or earthen work, either on the bank or across the bed of the stream or on both, but so as not to completely dam it up, whereby they can get a quantity not exceeding a fourth of the whole volume of the water of the *nuddi* which comes down to that point If it be necessary, in order to give effect to this order, to shift the position or site of the proposed channel up or down the bank within the limits of Ramgurh, it may be done. If after making an estimate, if it be possible so to do, of the whole volume of water which comes down the hill stream, an abstraction of a fourth would not keep sufficient quantity available for the proprietors below, it can be reduced to a fifth. Other instructions may be issued to the Commissioner who may be selected from among the engineers of the Irrigation Department, as had been done by this

Court in some instances, when this order comes to be executed, e g, as varying, altering the width or depth of the stream.

"Should it, however, be impracticable to execute this order at all without putting a *bandh* all along the bed of the *nuddi*, it may be done, but there must be an opening or openings in the *bandh* so as not to wholly obstruct the flow of water down; there may be a diversion to the *tal*, but it should not even temporarily stop the flow of water

"Till such time as this order is not carried out completely, matters must be allowed to stand as they are Under the circumstances, I would not allow damages to the plaintiffs even if they had sustained any The suit is decreed in the above form Parties under the circumstances would bear their own costs"

Both parties appealed to the Judge's Court The Subordinate Judge modified the Munsif's decree on the ground that the [869] mode of execution prescribed would be difficult to carry out, and expressed his judgment as follows:—

"Having regard to the size of the stream the custom observed by the higher riparian proprietors of throwing up a temporary *bandh* across this stream to carry water to their lands, and the higher elevation of the plaintiffs *tal* I am obliged to declare in favour of the plaintiffs, that they are entitled to put up temporarily a dam or *bandh* across the bed of the stream within the limits of their *mouzah*, and thus carry the water of the stream through a channel to their lands or if necessary to Ramgurh *tal* that the *bandh* may be thrown during the first seven days of every Fusli month and must be removed at the plaintiffs' own expense on the eighth day They will have the free and full flow of the stream during the said period, after which the water will go to the lower riparian proprietors

'The Munsif's order may be theoretically good but it will be impossible so to regulate the flow as to bring only one fourth of the water to plaintiffs and no more and at the same time to keep the flow downwards unimpeded

'I see no reason to allow damages and I will make each party bear his own costs

'With this modification the judgment of the Munsif is confirmed'

Both parties appealed to the High Court, whose judgment (MACPHERSON and BANERJEE, JJ) after a statement of the plaint, and the proceedings in the first Court, continued thus —

'Both parties appealed from that decree and the Lower Appellate Court while affirming generally the view which the Munsif took of the rights of the parties held properly enough, that the decree of the Munsif as to the mode in which the plaintiffs were to get their one-fourth share of the water, was impracticable but in the absence of any other reasonable suggestion as to how the flow was to be regulated he held that the simplest way was to declare as he did do the plaintiffs right to erect temporary dams across the bed of the stream within the limits of their *mouzah* and to appropriate the whole of the water during the first seven days of every Fusli month and that during the remaining period of the month the *bandhs* were to be removed and the water was to be allowed to take its full and unchecked course

"Neither Court has in any way explained on what basis it has been found that the plaintiffs are entitled to one fourth of the flow of the water and if the scheme adopted by the Munsif was impracticable, that adopted by the Subordinate Judge is it seems to us, though perhaps simpler, objectionable in many ways and neither party is satisfied with it It is a very rough method of solving a difficulty which undoubtedly exists in this case and in all other cases of the kind and one which, we think could not be adopted otherwise than by consent of parties It is obvious that very great difficulties might arise if the same method were adopted of settling the disputes [870] of riparian proprietors whose lands were situated higher up or lower down It is clear that the right which the plaintiffs sought to establish was the unrestricted right of stopping the flow of this stream for the purpose of utilising the water of it to such an extent as they might think fit at any time, even if the effect of the obstruction was wholly to deprive the defendants of the water. We think that

the Courts were undoubtedly right in holding that that was not the plaintiffs' right under the law, and no authority for a contrary conclusion has been shown to us. It was not the plaintiffs' case that failing the establishment of the very broad right which they claimed they were entitled to something less; that they were entitled to put up a *bandh* of fixed and limited dimensions, which, while giving them a certain amount of water, would leave to the defendants a quantity sufficient for irrigating their lands. There was no alternative right set up, and when the substantial right claimed was not established the Courts, we think, were wrong to go on and determine the more qualified right to which they thought the plaintiffs were entitled. No proper apportionment of the water to be appropriated by the parties to this suit could moreover be made without reference to, and consideration of, the rights of other riparian proprietors both above and below.

"It is contended before us that the plaintiffs were at least entitled to an adjudication of their claim for damages, and that the Courts below have failed to understand the principle upon which that claim was based. It is said that the plaintiffs' cause of action arose from the destruction of the *bandh* which they had constructed, and that the compensation to which they are entitled is compensation for the damage caused by that destruction and by the loss of the crops which ensued from it. That may be so; but that was not the form in which the claim was advanced either in the first Court or in the Lower Appellate Court. As already stated, the right which the plaintiffs claimed was a right of the very widest description to obstruct the entire flow of the water so as if necessary to divert the whole of it into a channel leading into their *tal* at Ramgurh. There is nothing in the plaint to show that the *bandh* which they had erected in 1888, and which the defendants are said to have destroyed, was a *bandh* which did not wholly obstruct the flow of the water and which left to the defendants as the riparian proprietors down stream a sufficient quantity of water for the purpose for which they were entitled to get it. And the Courts below appear to have considered, and we think, after a perusal of the plaint, very fairly considered, that the *bandh* which the plaintiffs put up and the defendants are said to have pulled down, was a *bandh* of the same dimensions as that which the plaintiffs claim a right in the present case to construct. If, therefore, the proper issue was not raised, it was, we think, the fault of the plaintiffs; and it is too late now after this litigation has been going on for a period of upwards of four years, to ask that the case should be sent back and proper issues framed. In our opinion, as the plaintiffs have failed to establish the particular right which they asserted, and to which we have already referred, their suit must be dismissed. It is impossible, in [871] cases of this sort, to define in general words what the rights of the parties are; there are no materials upon which rights of a more limited kind could be determined, and to endeavour to do so would lead to difficulties and complications in the future.

"Without, therefore, deciding what the rights of the plaintiffs as riparian proprietors are, we think it enough to say, that this suit must be dismissed on the ground that they have failed to establish the only right which they asserted, that is, a right to erect a *bandh* of any size or kind, even if it had the effect of wholly interrupting the flow of water either for a limited or unlimited time."

The plaintiffs having appealed,

Mr. *J. D. Mayne*, for the appellants, argued that the High Court had not taken the right view in deciding that it was not open to the Court to consider to what alternative relief the plaintiffs were entitled, either under the decree made, or as riparian proprietors. It was contended that they had shown themselves entitled to a modified relief, though their larger claim must have been rejected as untenable. Each party had put their case too high. But the Munsif's impracticable plan, though rightly discarded, had been suggested with a view to the actual law and rights of the parties, *viz.*, that each proprietor was entitled to take such an amount of water as would not be too much. In the plaint there was an excessive claim, but that should not preclude the making a just decree, for the use of so much water as would not interfere

with the reasonable right of the lower proprietor. It was submitted that the sections 565 or 566 of the Civil Procedure Code were applicable to such a case as the present—the former section when the evidence on the record should be sufficient to enable the Appellate Court to determine the case—the latter when the evidence should not be sufficient and providing for new issues to be framed for trial of the merits. Section 42 of the Specific Relief Act (I of 1877) was also referred to. As to the substantive rights of the parties, reference was made to *Miner* v. *Gilmour* (12 Moo. P. C., 156), *Orr Ewing* v. *Colquhoun* [L. R., 2 App. Ca., 839 (855).], *Perumal* v. *Ramasami Chetti* (I. L. R., 11 Mad., 16).

Mr. *A. Phillips*, for the respondents, was not called upon.

[872] Afterwards on the 7th April their Lordships' **judgment** was delivered by

Lord Watson.—The appellants are the proprietors of *mehal* Ramgurh, including three *mouzahs*, through which there runs a hill stream or *nullah*, there known as the Kudra, its course being from south to north Before entering Ramgurh from the south, the Kudra intersects the adjoining *mouzah* of Chikhuria, belonging to the Maharaja of Dumraon, and, on the north, it passes from Ramgurh into *mouzahs* Hata, Khaja and Narainpur, which are the property of the respondents in this appeal

The appellants at one time used, for purposes of irrigation, water diverted from the Kudra, which was stored in a *tal* or reservoir in Ramgurh, before being distributed over the surface of the land The diversion was made within *mouzah* Chikhuria, by the erection of a *bandh* or dam upon the bed of the stream belonging to the Maharaja of Dumraon, from which the water was conducted by a channel or cut, passing at first through the lands of Chikhuria to the appellants' *tal*. The bed of that channel or cut was on a higher level than that of the surface of the water of the stream in its ordinary flow. Before the end of the year 1884, the appellants made some alterations upon the structure of the dam, in consequence of which two separate actions were brought against them, concluding for its removal, one by the present respondents, and the other by the Maharaja of Dumraon.

These actions depended before the Munsif of Sasseram, who heard the cases together, and made the following order applicable to both : "That a modified decree be passed in both these suits for the removal of the *bandh* in dispute, it being decided that the *bandh* is recent, and that the plaintiffs are entitled to have it removed, that both the plaintiffs and defendants in both suits are entitled to irrigate their lands in their *mouzahs* from the water of the *baha*; that the channel to Ramgurh *tal* is also old and the plaintiffs are not entitled to have this filled up, that the defendants and the plaintiffs in suit No. 339 (*i.e.*, the Maharaja's suit) are entitled to erect temporary *bandhs* at the place in (torn), but not so as to (torn) the flow of water downwards to the detriment of the plaintiffs and other **[873]** proprietors lower down." Appeals were taken against that decree to the Subordinate Judge of Shahabad, and thence to the High Court, with the result that, as between the parties to this appeal it was affirmed, and, as between the present appellants and the Maharaja of Dumraon, was materially altered, it being finally adjudged that, in a question with him, the appellants have no right to construct a dam within the *mouzah* Chikhuria for the purpose of diverting the water of the Kudra into the old channel leading to their *tal*.

These litigations were not finally disposed of until November 1887. Some time thereafter, the appellants placed a dam across the Kudra within their own property, and made a new channel leading through it from the stream to their

reservoir. The dam was destroyed by the respondents; and the appellants, in consequence, made an application against them to the Criminal Court, which was rejected on the 5th December 1888, upon the ground that they ought to establish their rights in the Civil Court. The present suit was, in consequence, brought before the Court of the Munsif at Sasseram on the 9th January 1889.

It is necessary to examine the terms of the plaint, because the rights therein asserted, and the remedies craved, from the main grounds of the judgment of the High Court, of which the appellants complain in this appeal.

The plaint, in substance, concludes for a declaration of the appellants' right, in terms which necessarily involve the illegality of the respondents' action in interfering with their dam; and that declaration is followed by a prayer for an injunction against the respondents committing these or similar acts in the future, and also for pecuniary damages in respect of the injury which the appellants have sustained. It contains six conclusions in all. The first, which is the basis of all the rest, is to have it declared "that the plaintiffs are entitled to carry the water of the river to their *tal* at Ramgurh by placing *bandhs* at any part of the river within the estate of the plaintiffs, and that the defendants have no right to obstruct and oppose the plaintiffs in the construction of any *bandh* on the bed of the river at any place above their estate, and the acts of the defendants complained of above are illegal." The second conclusion is for an injunction against any repetition [874] of the respondents' illegal acts. The next two conclusions are for damages, the third being in respect of the injury already occasioned by the destruction of the *bandh*, and the fourth for loss to be sustained until the appellants shall be enabled, under the sanction of the Court, to convey water from the river to the Ramgurh *tal*. The fifth is for such other relief "as appears to the Court fit and proper for free flow of water from the river to the *tal* for irrigation", and the sixth and last relates to the costs of suit.

The right of a riparian proprietor to divert and use water for the purpose of irrigation is certainly not understated in the plaint. The right claimed by the appellants in the first conclusion is not less broadly asserted in the body of the plaint, and is neither more nor less than a right on the part of an upper proprietor to dam back a river running through his land, and to impound as much of its water as he may find convenient for the purposes of irrigation, leaving only the surplus, if any, for the use of proprietors below. In the absence of a right acquired by contract with the lower heritors, or by prescriptive use, the law concedes no such right. The common law right of a proprietor, in the position of the appellants, is to take and use for the purpose of irrigation, so much only of the water of the stream as can be abstracted without materially diminishing the quantity which is allowed to descend for the use of riparian proprietors below, and without impairing its quality. What quantity of water can be abstracted and consumed, without infringing that essential condition, must in all cases be a question of circumstances, depending mainly upon the size of the river or stream, and the proportion which the water abstracted bears to its entire volume.

The plaint contains no statement in regard to the character of the dam which is alleged to have been illegally destroyed by the respondents, or in regard to the quantity of water which it had the effect of diverting from the channel of the Kudra into the Ramgurh *tal*; and there was no issue adjusted to try the question whether the *bandh* destroyed was one which the appellants were legally entitled to construct. Yet it is obvious that, until that question had been raised and determined in the appellants' favour, no injunction could issue, and no decree for [875] damages could be made against

the respondents. The plaint is likewise silent in regard to the size and character of the *bandh* or dam which the appellants claim the privilege of erecting within their own lands of Ramgurh, under the sanction of the Court, and as to the quantity of water which by means thereof they would be enabled to divert from the Kudra, without making any provision for its return to the stream. They appear to have ignored the fact that their right to take the water, and the quantity they were entitled to take, were matters inseparably connected with each other and were mainly dependent upon the very considerations which they have omitted to state; and they relied upon a claim of right which, on the face of it, is extravagant. The unfortunate result has been that none of the issues adjusted for the trial of the cause (with the exception possibly of those relating to the law of limitation, for which there does not appear to have been any foundation in fact) can, in the opinion of their Lordships, admit of a satisfactory, if any, answer, without an investigation into facts, which have neither been averred nor made the subject of proof

It is a somewhat singular circumstance that each of the parties should have relied, with equal confidence, upon the decrees obtained in the previous suits with reference to the Chikhuria dam, as *res judicatæ* in their favour. The decree obtained by the Maharaja of Dumraon is *res inter alias*, and cannot affect the present case. In the suit at the instance of the present respondents, it was, no doubt, expressly found that both parties to this appeal were entitled to take water from the Kudra for the purposes of irrigation. In neither of these suits does there appear to have been any issue taken, or proof led, in regard to the actual quantity of water diverted into the appellants' *tal*, by means of the Chikhuria *bandh*. The appellants can take no benefit from the finding, as supporting the claim put forward by them in this suit, because it was qualified by the condition that they were not entitled to interfere unduly with the flow of the stream, in prejudice of the respondents and other lower proprietors. As for the finding that the respondents were entitled to take water for the irrigation of their lands, it was plainly outside of and irrelevant to the case which the learned Judge was deciding. The existence of their right to take water for such a purpose, and, if existing, its extent, [876] could not be determined, except in a question with proprietors of riparian lands below their *mouzahs*.

The Munsif, after taking evidence, gave judgment upon the 31st December 1889. He referred to authorities showing that the law of India, in relation to water rights, does not differ from that of England, and he affirmed, in their Lordships' opinion correctly, that a riparian proprietor who desires to use the water of a stream flowing in a defined channel, must not so use it as to destroy or render useless, or materially diminish or affect, the application of the water by riparian owners below. Accordingly, he declined to affirm the first conclusion of the plaint, and did not deal with the injunction or damages craved; but he found that the appellants were "entitled to a fair and reasonable use and share of the water of Kudra *nullah*, so as not to interfere with or substantially diminish the supply of water to the defendants holding lands below." That finding considered by itself appears to their Lordships to be unexceptionable, although it does not affirm any proposition which is to be found in the appellants' pleadings. The learned Judge then proceeded to make an order in these terms: "At the spot where they (*i e.*, the appellants) propose to cut (the land) or make a channel, they may make a permanent or temporary construction, some masonry or earthwork, either on the bank or across the bed of the stream or on both, but so as not to completely dam it up, whereby they can get a quantity not exceeding a fourth of the whole volume

of the water of the *nuddi* which comes down to that point." To that order, three conditions were attached: (1) that the position of the dam and channel might, if necessary, be shifted within the limits of Ramgurh; (2) that if, after making an estimate, if possible, of the whole volume of water coming down the stream, the obstruction of a fourth would not keep a sufficient quantity available for the proprietors below, it could be reduced to a fifth; and (3) that, when the order came to be executed, instructions might be given to an engineer of the Irrigation Department, selected for that purpose, as to varying and altering the width or depth of the stream, and similar details.

On appeal by the respondents from that decision it was [877] confirmed by the Subordinate Judge of Shahabad, with this modification, that instead of allowing the appellants to take one-fourth or, as it might be, one-fifth of the volume of the Kudra, by means of a permanent *bandh*, the learned Judge ordained that the appellants should have leave to erect and maintain a temporary dam across the bed of the stream for seven days and no more of each lunar month, carrying the entire water of the stream into the Ramgurh *tal* during that period, the whole of the free flow being allowed to go to the lower riparian proprietors during the remaining twenty-one days of the month. The learned Judge observed: "The Munsif's order may be theoretically good; but it will be impossible so to regulate the flow as to bring only one-fourth of the water to plaintiffs and no more, and at the same time keep the flow downwards unimpeded."

There is considerable force in the observation of the Subordinate Judge, but it appears to their Lordships that the main objection to the decree of the Munsif consists in this, that the proportion of the entire water of the Kudra which he authorised the appellants to appropriate for irrigation purposes was fixed by him without any evidence and without inquiry. The modification of his order made by the Subordinate Judge is open to the same criticism, and is, from a legal aspect, more objectionable than the order which it qualifies. The legal right of the lower riparian owners is to have the water of the stream transmitted to them continuously and without interruption, and without any substantial diminution in volume, their right being only subject to the qualification that an upper proprietor may, for purposes which the law regards as legitimate, withdraw from the stream as it passes along his lands, so much of its stream as will not materially affect its downward flow, or impair their uses of it.

The appellants and the respondents both appealed against the decision of the Subordinate Judge, and, on the 19th May 1893, a Divisional Court, consisting of Mr. Justice W. MACPHERSON, and Mr. Justice GURU DAS BANERJEE, dismissed the appellant's appeal, allowed the appeal of the respondents and dismissed the suit with costs. Their Lordships cannot hesitate to concur in the judgment of the High Court. The appellants' suit is based upon the assertion of a legal right which is plainly untenable; and [878] unless it were affirmed, they could not obtain the remedies of injunction and damages, which are of the essence of their action. If their right to maintain the *bandh* had been supported upon the ground that the amount of water which is diverted into their *tal* did not materially diminish the flow of the stream, and was therefore no more than they were entitled to, the Court might have been enabled to determine what proportion of the water of the Kudra they could legally divert for purposes of irrigation without prejudicing the rights and interests of the respondents; and also in what manner and by what means that amount was to be withdrawn. In the present shape of the record, it is impossible to arrive at a satisfactory decision upon those points, which were dealt with,

without evidence or inquiry, by the learned Judges of the first and second Courts.

Their Lordships will, accordingly, humbly advise Her Majesty to affirm the judgment appealed from. The appellants must pay to the respondents their costs of this appeal.

Appeal dismissed.

Solicitors for the Appellants : Messrs *T. L Wilson & Co.*

Solicitor for the Respondents Mr. *James T. Withers.*

C. B.

NOTES

[This was followed in (1901) 29 Cal , 100, (1906) 11 C W.N., 86 4 C L J 371, (1908) 35 Cal., 851, (1904) 28 Mad., 236, (1911) 10 I C , 181 (oudh), (1912) 18 I C , 294 (Mad.).

See also *Robert Fisher* v *The Secretary of State* (1908) 32 Mad , 141 19 M L J. 131 from which the appeal to the Privy council is still pending]

[24 Cal 878]

APPELLATE CIVIL

The 18th June, 1897.

PRESENT

MR JUSTICE TREVELYAN AND MR JUSTICE STEVENS.

Munni Ram Chowdhry. .. ..Defendant

versus

Bishen Perkash Narain Singh............Plaintiff *

Appeal—Order granting review of judgment – Civil Procedure Code (Act XIV of 1882), section 629- Grounds of Appeal

No appeal lies from an order granting a review of judgment except in cases specified in section 629† of the Civil Procedure Code *Bombay and Persia Steam Navigation Company* v. *S. S. ' Zuari "* (I L R , 12 Bom , 171) followed *Har Nandan Sahai* v *Behari Singh*

* Appeal from Original Order No 313 of 1896, against the order of Babu Dwarka Nath Mitter, Subordinate Judge of Sarun dated the 18th of July 1896

†[Sec 629 —An order of the Court for rejecting the application shall be final, but whenever such application is admitted, the admission may be objected to on the ground that it was

Order of rejection final
Objections to admission

(a) in contravention of the provisions of Section 624,

(b) in contravention of the provisions of Section 626, or

(c) after the expiration of the period of limitation prescribed therefor and without sufficient cause

Such objection may be made at once by an appeal against the order granting the application, or may be taken in any appeal against the final decree or order made in the suit

Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, if it be proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court may order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same

No order shall be made under this section unless the applicant has served the opposite party with notice in writing of the latter application

No application to review an order passed on review or on an application for a review shall be entertained.]

(I. L. R., 22 Cal., 3) and *Baroda Churn Ghose* v. *Gobind Proshad Tewary* (I. L. R., 22 Cal., 984) referred to.

[879] That the Court which has granted the review has done so without sufficient reasons is not a valid ground of appeal under section 629.

THE facts of this case, so far as they are necessary for the purposes of this report, are as follows:—

The plaintiff filed his plaint on the 17th August 1895, and after various adjournments, the 8th of April 1896 was fixed as the date for final hearing. On that day the plaintiff applied for postponement which was refused. He thereupon declined to adduce any evidence. The witnesses for the defendant were then examined and the suit dismissed with costs. On the 5th May 1896, the plaintiff made an application for review of judgment, which was opposed by the defendant, but eventually granted on the 18th July 1896. The defendant appealed against this order under section 629 of the Civil Procedure Code on the ground that there was no sufficient reason for granting the review.

Moulvi *Mahomed Yusuf* and Babu *Digambar Chatterjee* for the Appellant.

Dr. *Rashbehary Ghose* and Dr. *Asutosh Mookerjee* for the Respondent.

Moulvi *Mahomed Yusuf* discussed the evidence and contended that there was no sufficient reason for granting the review.

Dr. *Rashbehary Ghose*.—No appeal lies from an order granting a review of judgment except on the grounds specified in section 629 of the Civil Procedure Code, which do not include the ground now urged before this Court. The case of *Bombay and Persia Steam Navigation Company* v. *S.S "Zuari"* (I. L. R., 12 Bom., 171) is precisely in point. [TREVELYAN, J.—Is there any case in point in this Court?] The principle of the Bombay case has been followed in *Har Nandan Sahai* v. *Behari Singh* (I. L. R., 22 Cal., 3) and *Baroda Churn Ghose* v. *Gobind Proshad Tewary* (I.L.R., 22 Cal, 984).

Moulvi *Mahomed Yusuf* in reply.—If the Court below has admitted the review without sufficient reason, as I contend it has done, it has acted in contravention of the provisions of section 626, para. 1 of the Civil Procedure Code. The case is, therefore, **[880]** covered by section 629, clause (*b*) of the Civil Procedure Code.

The **judgment** of the High Court (**Trevelyan** and **Stevens, JJ.**) was as follows:—

This is an appeal from an order admitting a review. The cases in which such an appeal is possible are mentioned in section 629 of the Civil Procedure Code, and there is the express authority of the Bombay High Court in the case of the *Bombay and Persia Steam Navigation Company* v. *S. S. "Zuari"* (I. L. R., 12 Bom, 171) that an appeal will not directly lie except on the grounds mentioned in that section. Section 629 of the Civil Procedure Code says that the objection may be made either by way of appeal against the order granting the application, or may be taken in any appeal against the final decree. That would show that in either case, that is, either in an appeal against the order or in an appeal from the final decree only, an appeal will lie on those particular grounds and no others There are two authorities of this Court in *Har Nandan Sahai* v. *Behari Singh* (I. L. R., 22 Cal., 3) and *Baroda Churn Ghose* v. *Gobind Proshad Tewary* (I. L. R., 22 Cal., 984), which show that the grounds which have been urged in this appeal are not grounds which can be taken in an appeal from the final decree. The same reasoning will apply to the present case. Moreover, both these decisions of this Court approve of the decision of the Bombay High Court to which we have referred, and which is expressly in point. The grounds urged by the learned Vakil for the

appellant are not grounds under section 629, and therefore it is not competent for us to consider them.

For this reason we dismiss this appeal with costs.

S. C. C. *Appeal dismissed.*

NOTES.

[See also (1907) 31 Mad., 49; (1913) 22 I.C., 772 (Cal.); 14 I.C., 39 (Cal.,) wherein the modifications in the C.P.C., 1908 were considered; (1911) 9 I.C., 320; (1911) 12 I.C., 624 (Punjab); (1909) 14 C.W.N., 244, in which this decision was followed.]

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[881] CRIMINAL REVISION.

The 20th July, 1897.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE WILKINS

Tulsi Bewah........ ....Petitioner

versus

Sweeney......... .Opposite Party.*

Prevention of Cruelty to Animals Act (XI of 1890), sections 2 and 3—Crabs—Animals—Cruelty to animals.

The provisions of Act XI of 1890 apply to cruelty exercised towards any animal which is either "domestic" or which being *feræ naturæ* has been "captured" and is in captivity. Crabs are "animals" within the definition of section 2 of Act XI of 1890. If a person exposes them for sale at a public place with their legs broken and with their shells crushed in so as necessarily to cause them pain, he incurs the penalty prescribed by section 3† of the Act.

THE facts of the case appear sufficiently from the judgment of WILKINS, J.

Babu *Amarendro Nath Chatterji* appeared for the Petitioner.

The following **judgments** were delivered by the High Court (GHOSE and WILKINS, JJ.):—

Wilkins, J.—The petitioner in this case, Tulsi Bewah, was charged before the Presidency Magistrate of Calcutta with "having in her possession for

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* Criminal Revision No. 393 of 1897, made against the order passed by T. A. Pearson, Esq., Chief Presidency Magistrate of Calcutta, dated the 29th of April 1897.

Penalty for cruelty to animals in public places and for sale in such places of animals killed with unnecessary cruelty.

† [Sec. 3:—If any person in any street or in any other place, whether open or closed, to which the public have access, or within sight of any person in any street or in any such other place,—

(a) Cruelly and unnecessarily beats, overdrives, overloads or otherwise ill-treats any animal, or

(b) binds or carries any animal in such a manner or position as to subject the animal to unnecessary pain or suffering, or

(c) offers, exposes or has in his possession for sale any live animal which is suffering pain by reason of mutilation, starvation or other ill-treatment, or any dead animal which he has reason to believe to have been killed in an unnecessarily cruel manner,

he shall be punished with fine which may extend to one hundred rupees, or with imprisonment for a term which may extend to three months, or with both.]

sale certain crabs, suffering pain by reason of mutilation, on the 20th April 1897 at the New Market." The evidence showed that she had two hundred live crabs for sale, with all their legs pulled off, and the witness Sweeney saw her break the backs of some living crabs with the shell of a dead crab to show purchasers that the living crabs were healthy.

The accused admitted the facts charged, and was convicted under section 3 of the Prevention of Cruelty to Animals Act (XI of 1890), and she was sentenced to pay a fine of Rs 20, and in default to undergo one month's simple imprisonment.

Before us it has been contended on her behalf that the conviction is illegal, inasmuch as a crab is not an "animal" within the meaning of the Act; that is, that it is not a "domestic or captured animal"

[882] The learned pleader who argued the case before us based this position upon the allegation that the whole course of the special legislation upon this subject, both in England and in India, shows that the Legislature never intended it to apply to any animals other than those which may be described as either "domestic" or "domesticated."

In support of this contention he referred us to Bengal Act I of 1869 (which is not now in force in Calcutta) and to several English Statutes from 2 and 3 Vic. cap 47 to 39 and 40 Vic cap 77, both inclusive, and he relied especially upon the cases of *Aplin* v. *Porritt* [L R, (1893) 2 Q. B. D., 57] and *Harper* v. *Marcks* [L. R., (1894) 2 Q.B D., 319] Both of these cases were decided under the Cruelty to Animals Acts of 1849 and 1854, *viz*, 12 and 13 Vic. cap. 92 and 17 and 18 Vic, cap. 60 In the first-named case, the question to be determined was whether certain wild rabbits which had been caught in nets five or six days previously and since kept in confinement were "domestic" animals within the meaning of those statutes, in the second case, the same question had to be decided with reference to certain lions kept in a cage, which had been taught or coerced to perform certain tricks. In both cases it was held that the animals were not "domestic animals" within the meaning of the statutes And indeed neither these statutes, nor any other statutes in force in England (with perhaps one exception which does not affect this case), deal with any animals which, not being domestic, are captured animals such as are described in the Act XI of 1890, which is in force in India.

It was, however, contended by the petitioner's pleader that the course of legislation in England and the cases decided there shewed that the intention of the Legislature in India was to include only two classes of animals within the scope of the law, that is, (1) animals which are domestic in themselves by breed or otherwise, and (2) animals which, though captured in a wild state, had become "domestic," or rather "domesticated," after capture. This contention is, in my opinion, entirely opposed to the very plain and obvious meaning of the words which define "animal" in the Act of 1890. It cannot hold good unless [883] we interpret the word "or" in that definition to mean, not "or," but "and." I think that we should not be justified in so doing. We are bound when interpreting a statute to give to the language of it its plain and obvious meaning, without any assumption as to its having probably been the intention to leave unaltered the law as it existed before—*Norendro Nath Sircar* v. *Kamalbasini Dasi* (I.L.R., 23 Cal., 563), so that when we find that the language of Act XI of 1890 has in clear and unmistakable words enlarged the definition of "animal" to an extent not known before, we should not be justified in assuming that this was not deliberately intended by the Legislature. We cannot distort and twist the words of an Act so as to interpret them to mean the opposite of what they obviously

purport to mean. Clearly, therefore, the provisions of Act XI of 1890 apply to cruelty exercised towards any animal which is either "domestic" or which being *feræ naturæ* has been "captured" and is in captivity.

Then it has been urged before us that, if this conviction be upheld, the effect of it will be to put an end to a trade which has been in existence from time immemorial and which furnishes a means of existence to a large body of persons. I fear that this is a consideration which we cannot allow to affect us. It was one for the Legislature to deal with when framing the Act; and for all that we know, it was then dealt with. We have merely to interpret and administer the law as we find it

Finally, it was represented for the petitioner that, in the absence of evidence to show that the crabs suffered pain from the treatment alleged, the conviction could not stand I think it may fairly be assumed, in the absence of proof to the contrary—that to pull the legs off a living crab and to crush in its shell are acts which must necessarily cause it pain.

I would, therefore, discharge the rule.

Ghose, J.—I am of the same opinion. It seems to me that no argument can be derived from the statutes and the decisions in England upon the subject, as has been contended for. If any argument can be deduced, it is rather in favour of the prosecution than against it.

[884] In the statute 12 and 13 Vic. cap. 92 (sec 29) the word "animal" was thus defined

"The word 'animal' shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat or any other domestic animal." And in the later statute 17 and 18 Vic. cap. 60 it was laid down that "the word 'animal,' shall in the said Act (12 and 13 Vic cap. 92), and in this Act, mean any domestic animal, whether of the kind or species particularly enumerated in clause 29 of the said Act, or of any other kind or species whatever, and whether a quadruped or not." So that the operations of these statutes were clearly limited to *domestic* animals, of whatever species they might be, and whether they be quadrupeds or not. These two statutes were passed in 1849 and 1854, respectively. and we find that in the Act which the Legislature in this country passed on the subject in 1869 (Bengal Act I of 1869) and which evidently followed the English statutes, "animal" was thus defined: "The word 'animal' shall be taken to mean any domestic or tamed quadruped or any domestic or tamed bird." This definition was substantially to the same effect as that in the said statutes, and if we had to deal in the present case with the Act of 1869, the definition of "animal" as given therein would perhaps be an answer to the case for the prosecution, for a crab is neither a domestic or tamed quadruped, nor a domestic or tamed bird. The Bengal Act of 1869 was however superseded by Act XI of 1890, and we find that the word "animal" was therein defined in this wise "'animal' means any domestic or captured animal."

There can be no doubt, looking at this definition, that the Legislature in 1890 meant to bring within the operation of the law the cases of some other description of animals not contemplated by the Act of 1869. And I think we may well presume that the Legislature in this country, when they were engaged in passing an Act applicable to the whole of India, found, as the Judges in England in some of the cases [*e.g. Aplin* v. *Porritt* (L.R., (1893), 2 Q B.D., 57), *Harper* v. *Marcks* (L. R., (1894), 2 Q B D., 319)] also thought in respect to the statutes in that country, that the law as contained in the Bengal Act of 1869 was not sufficiently wide, enlarged the definition of the word "animal" so as to

bring within the operation of the law cases of animals other than domestic or tamed quadruped and bipeds; and they secured that object by using the word "domestic or captured animal." So long as an animal is *feræ naturæ*, and it is not brought under subjugation and control of man, it stands upon a wholly different ground; but when it is captured or domesticated, the law protects it from cruelty, if such cruelty is practised at a place or in the manner laid down in the Act.

The learned Vakil for the petitioner in the course of his argument incidentally raised the question whether a crab was an animal at all. There can, I think, be no doubt whatever on the point, for the word "animal" ordinarily means an organized or living being having sensation and power of voluntary motion, an inferior or irrational being as distinguished from man.

The crabs which were in the possession of the petitioner were captured animals; they were exposed for sale at a public place, in a mutilated condition, and with their shells broken, so as necessarily to cause them pain, and it follows, therefore, that the petitioner has incurred the penalty prescribed by section 3 of the Act.

The result is that this rule is discharged.

S. C. B. *Rule discharged.*

[24 Cal. 886]

The 26th July, 1897.

PRESENT.

MR. JUSTICE GHOSE AND MR. JUSTICE WILKINS.

Kanai Lal Gowala and another............Petitioners

versus

Queen-Empress.

Wrongful restraint—Penal Code (Act XLV of 1860), sections 79 and 341—Mistake of fact—Act done in good faith under belief it is justified by law.

A Court peon accompanied by two of the decree-holder's men (petitioners) went to execute a warrant of arrest against the judgment-debtor *M*. A *palki* with closed doors was noticed to be coming out of the male apartment of *M's* house. The petitioners believing that *M* was effecting his escape in that *palki* stopped it and examined it, although the persons accom- [886] panying the *palki* protested and said there was a lady in it. Admittedly, there was in the *palki* a *pardanishin* lady of rank.

* Criminal Revision No. 487 of 1897, made against the order passed by J. Knox-Wight, Sessions Judge of Patna, dated the 3rd May 1897, modifying the order passed by Babu Ramanugrah Narain Singh, Deputy Magistrate of Patna, dated the 16th March 1897.

Held, that having regard to the terms of section 79* of the Penal Code a conviction of the petitioners under section 341† was not right.

THE facts material for this report are stated above.

Mr. *P. L. Roy* and Mr. *K. N. Sen Gupta*, instructed by Moulvie *M. Ishfaq*, appeared on behalf of the Petitioners.

The **judgment** of the High Court (**Ghose** and **Wilkins, JJ.**) was as follows :—

We think, having regard to the terms of section 79 of the Indian Penal Code, that the conviction in this case is not right. The learned Sessions Judge seems to think that there was no mistake of fact when the petitioner took steps to examine the *palki*. He says that the petitioner "acted on a mere supposition, on the chance that the judgment-debtor might be in the *palki*." We find, however, that the *palki* was coming out at the time, not of the female but of the male apartments, and the judgment debtor being in the house in question, the petitioners, in the action they took, naturally thought there was some reason to believe that the judgment-debtor was getting out of the way, (there having been a warrant issued for his arrest) so as to evade the service of such warrant.

The lady who was in the *palki* has given her evidence in the case; and she says that the whole thing was the work of a moment That being so, we are unable to say that any harm was really intended by the petitioners when they went to examine the *palki*, since they had some reason to believe, as is apparent upon this record, that the judgment-debtor might be in the *palki*. We do not think, therefore, that the petitioners in this case should have been convicted of an offence under section 341 of the Indian Penal Code, and we accordingly set aside the conviction and sentence and direct that the fines, if realized, be refunded.

S. C. B. *Conviction set aside.*

Act done by a person justified or by mistake of fact believing himself justified by law.

*[Sec. 79 —Nothing is an offence which is done by any person who is justified by law, or who, by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it.]

Punishment for wrongful restraint.

†[Sec 341 —Whoever wrongfully restrains any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.]

[887] APPELLATE CIVIL.

The 3rd June, 1897.
PRESENT:
MR. JUSTICE TREVELYAN AND MR. JUSTICE WILKINS.

Koowar Singh...... ....Defendant
versus
Gour Sunder Pershad Singh and another............Plaintiffs.*

Sale for arrears of revenue—Purchaser at a revenue sale—Act XI of 1859, section 37—" Entire estate"—Estates Partition Act (Bengal Act VIII of 1876), section 123 —"Time of settlement."

A new estate created upon a partition by the Collector comes within the meaning of " entire estate " in section 37 of Act XI of 1859 The words "time of settlement" in that section mean the time when the contract was made with Government, and in the case of a permanently-settled estate mean the time of permanent settlement. A partition by the Collector merely apportions the amount of revenue, there is no *settlement* of the revenue in any sense at the time of such partition.

THIS was a suit for arrears of rent and cesses in respect of *kasht* land held by the defendant in *mouzah* Dulpur Jahanpur in the district of Shahabad. Raja Ram Singh, the former owner of the estate comprising this *mouzah*, mortgaged it under a deed whereby he assigned the rents over to the mortgagee in 1874. The plaintiffs are purchasers at a revenue sale of a 3 annas 4 *dams* of the *mouzah*, which was separated from the parent estate by a partition effected by the Collector in 1884, and numbered on the revenue roll as No. 6856. The rents and cesses claimed were on account of the years 1298 to 1301 F S., a period of four years commencing from 29th September 1890, subsequent to the purchase by the plaintiffs. The defendant pleaded payment under the deed of assignment, and urged, *inter alia*, that the plaintiff was not a purchaser of an " entire estate " within the meaning of section 37 of Act XI of 1859. that the time of settlement as given in that section was the time when the new estate was formed upon partition ; and that the purchase by the plaintiff was, therefore, not free of the assignment.

The Court of First Instance declined to try the question of [888] incumbrance, as being one which did not legitimately arise in a simple suit for arrears of rent, and dismissed the suit on the plea of payments made to the assignee of the former proprietor. The plaintiffs preferred an appeal to the District Judge, and their appeal was decreed.

The defendant appealed to the High Court

Moulvie *Mahomed Yusuf* for the Appellant.

Dr *Rash Behary Ghose* and Babu *Satish Chandra Ghose* for the Respondents.

The **judgment** of the High Court (**Trevelyan** and **Wilkins, JJ.**) was as follows.—

The plaintiffs are purchasers at a sale for arrears of Government revenue. They sue for arrears of rent. The defendants claim that they have paid their rent to persons to whom that rent was assigned by the former proprietor.

* Appeal from Appellate Decree No 16 of 1896, against the decree of F. H. Harding, Esq, District Judge of Shahabad, dated the 21st of October 1895, reversing the decree of Babu Mohin Chunder Sircar, Munsif of Arrah, dated the 26th of April 1895.

The sole question before us is whether having regard to the terms of section 37 of Act XI of 1859 the plaintiff is entitled to disregard the arrangement made with the former proprietor.

It has been argued before us that, although the plaintiff has purchased what upon a partition by the Collector has become a separate estate bearing a separate *towji* number, and charged with a separate amount of Government revenue, he is not the purchaser of an "entire estate" within the meaning of section 37, and also that he only acquires the estate free from the incumbrances which may have been imposed upon it after the separation. We fully agree with the learned District Judge's decision on both these questions and with the reasons which he has given. An estate, the revenue of which is partitioned under the Partition Act, becomes divided into several entire estates, each one becomes wholly independent of the other for all purposes, and is, therefore, an entire, that is, a complete and self-contained estate. As far as we know, it has always been considered that a partition by the Collector has this effect. Section 123 of the Partition Act is to our minds quite clear on this subject. The fact that the Partition Act is subsequent to Act XI of 1859 makes no difference. The only question is whether the new estate created is an entire estate such as was contemplated by Act XI of 1859. It has not been suggested to us that there is a difference of any **[889]** kind between an estate, the revenue of which has been separated under the Partition Act and of which separate possession has been given, and the entire estates contemplated by Act XI of 1859.

The second question depends upon what is the meaning of the words "the time of settlement" in section 37 of Act XI of 1859 It is clear, we think, from the preamble that the settlement means the contract with Government whenever that may have been made. In the case of a permanently-settled estate it means the permanent settlement In other cases it means the last settlement with Government whenever that may have been. The partition does not alter the amount of revenue payable, it merely apportions that amount. There is no settlement of the revenue in any sense at the time of such partition. We dismiss this appeal with costs.

S.C.C. *Appeal dismissed.*

NOTES.

[See also (1906) 10 C.W.N., 503.]

[24 Cal. 889]

The 9th July, 1897.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE AMEER ALI.

Aubhoya Churn Dey Roy and another... ....Plaintiffs

versus

Bissesswari and others............Defendants.*

Limitation Act (XV of 1877), section 4—Application to sue in forma pauperis *—Refusal of application—Extension of time granted for payment of Court-fee—Payment of Court-fee after period of limitation—Civil Procedure Code (Act XIV of 1882), sections 409, 410, 413.*

Where an application for permission to sue *in formâ pauperis* is rejected, and a full Court-fee is paid for a suit for the same relief, the suit must be considered, for the purposes of limitation, to have been instituted only after the payment of the Court-fee, and not at the date of presentation of the petition to sue as a pauper. Section 4† of the Limitation Act does not apply to such a case.

The plaintiff on 26th November 1890 applied for leave to sue *in forma pauperis* for the recovery of immoveable property. His application was rejected in May 1891, and time was given him to pay the full Court-fee, and his petition was then treated as the plaint in the suit. The period of limitation for the suit had then, however, expired, the cause of action being found to have arisen on 28th November 1878. *Held*, that the suit was insti-[890] tuted, not when the petition to sue as a pauper was presented, but only on the payment of the full Court-fee, and it was, therefore, barred by lapse of time.

Keshab Ramchandra Deshpande v. *Krishnarao Venkatesh Inamdar* (I. L. R., 20 Bom., 508), *Narain Kuar* v. *Makhan Lal* (I. L. R., 17 All., 526), and *Abbasi Begam* v. *Nanhi Begam* (I. L. R., 18 All., 206), followed. *Skinner* v. *Orde* (I. L. R., 2 All., 241) distinguished.

FOR the purposes of this report the facts are sufficiently stated in the judgment.

Babu *Srinath Das* and Babu *Murari Lall Majumdar* for the Appellants.

Dr. *Rash Behary Ghose* and Babu *Gobinda Chunder Das* for the Respondents.

The **judgment** of the High Court (**Macpherson** and **Ameer Ali, JJ.**) was as follows :—

On the 26th November 1890 the appellants presented an application for permission to sue *in formâ pauperis.*

The application was rejected on the 16th May 1891. The Subordinate Judge, by an order of the same date, allowed them time within which to pay the necessary Court-fee stamps. The stamps were afterwards put in, and

* Appeal from Appellate Decree No. 43 of 1896, against the decree of H. Cox, Esq., District Judge of Tipperah, dated the 21st of October 1895, affirming the decree of Babu Girish Chundra Chatterjee, Subordinate Judge of that District, dated the 7th of May 1892.

†[Sec. 4 :—Subject to the provisions contained in sections five to twenty-five (inclusive), every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule hereto annexed shall be dismissed, although limitation has not been set up as a defence.

Dismissal of suits, &c., instituted, &c., after period of limitation.

Explanation.—A suit is instituted in ordinary cases when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is filed; and in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.]

apparently affixed to the original pauper application which was treated as a plaint in the suit.

It is found that the appellant's cause of action in the suit arose on the 28th November 1878, so that the time within which the suit could have been brought expired two days after the application to sue as a pauper had been presented. Both the Courts have now dismissed the suit on the ground that it is barred by limitation, and we think it is quite clear that the decision is right.

Under section 409* of the Code of Civil Procedure, the Court was bound either to allow or to reject the application. If it allowed the application, it was to be numbered, registered and treated as a plaint in the suit. If it was rejected, then, under section 413†, the applicant could not again apply to sue as a pauper in respect of the same right, but he was at liberty to institute a suit in the ordinary manner in respect of such right. Section 4 of the [891] Limitation Act provides that, in the case of a pauper, the suit is instituted when the application for leave to sue as a pauper is filed. That obviously only applies to a case in which the application is granted.

The Subordinate Judge had no power, after the rejection of the application, to give time for the presentation of a plaint or to treat the old application as a plaint in the suit. It seems clear, from the provisions of sections 409, 410‡ and 413 of the Code of Civil Procedure and section 4 of the Limitation Act, that the suit must be taken to have been instituted some time after the application to sue as a pauper was rejected. What that exact time is we need not consider, because in any view of the matter the suit was out of time. The decision of the lower Courts is in accordance with the decisions of the Bombay High Court in the case of *Keshab Ramchandra Deshpande* v. *Krishna Rao Venkatesh Inamdar* (I. L. R., 20 Bom., 508), and of the Allahabad Court in the cases of *Naraini Kuar* v. *Makhan Lal* (I. L. R., 17 All., 526), and of *Abbasi Begam* v. *Nanhi Begam* (I. L. R., 18 All., 206).

The learned pleader for the appellant relied upon the case of *Skinner* v. *Orde* (I. L. R., 2 All., 241), but that case is clearly distinguishable, as there was

* [Sec 409.—On the day so fixed, or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may cross-examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

Procedure at hearing.

The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in section 407.

The Court shall then either allow or refuse to allow the applicant to sue as a pauper.]

† [Sec. 413.—An order of refusal made under section 409 to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue, but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by Government in opposing his application for leave to sue as a pauper.

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.

‡ [Sec. 410.—If the application be granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted under Chapter V, except that the plaintiff shall not be liable to any Court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader, or other proceeding connected with the suit.]

Procedure if application admitted.

in that case no order rejecting the application. The appeal is dismissed with costs.

B. D. B. ——— *Appeal dismissed.*

NOTES.

[In the explanation to sec 3 of the Indian Limitation Act, 1908, the words, '*leave to sue as a pauper is made*' are substituted for '*leave to sue as a pauper is filed.*'

See also (1899) 26 Cal, 925; (1912) 16 C.W N, 641; (1906) 33 Cal., 1168: 4 C.L.J., 234]

[24 Cal. 891]

INSOLVENCY JURISDICTION.

The 24th June, 1897

PRESENT:

MR. JUSTICE JENKINS.

In the matter of Beer Nursing Dutt, an Insolvent.

Taxation of costs—Discretion of Taxing Officer—Costs of Two Counsel—Insolvency Proceedings—Allegations of improper conduct—Purchaser.

A rule was obtained in certain Insolvency proceedings against the purchaser of property of the insolvent to show cause why such purchase should not be set aside, and alleging improper conduct on the part of the purchaser, who was represented by two Counsel at the hearing of the rule. On taxation of costs of the purchaser, the other parties objected to the costs of two Counsel on behalf of the purchaser being allowed

[892] *Held*, that having regard to the allegations made, the taxing Officer exercised a right discretion in allowing the costs of two Counsel

THIS was an application by way of objection to the taxation of a bill of costs on the ground that the costs of a second Counsel should not have been allowed to one of the parties, although the said party, who was the purchaser, was charged with collusion and fraud The insolvent, Beer Nursing Dutt, filed his petition in insolvency on 15th November 1895. The mortgagee of certain premises belonging to the insolvent obtained on 23rd January 1896 an order for the sale by the Official Assignee of the said premises which were duly sold and purchased by one Jogendro Nath Bose for and on behalf of his wife Koosom Koomary Dassee for the sum of Rs 6,100, which was paid, and the conveyance of the premises, to which the mortgagee was a party, duly executed and registered. The insolvent refused to give up possession of the premises under the vesting order made on 15th November 1895, and on 1st August 1896 the purchaser obtained a rule, and on 8th August an order that the insolvent do deliver up to the Official Assignee possession of the said house and premises. On the insolvent refusing to comply with the said order, a further rule was obtained by the purchaser on 5th September 1897 against the insolvent to show cause why he should not be committed to jail for contempt of Court in disobeying the order of 8th August 1896, and on 7th September 1896 an order was made, the insolvent not appearing, for a writ of attachment against the person of the insolvent for disobedience to the order of 8th August 1896. In the meantime, on 4th September 1896, a rule was obtained by certain creditors of the insolvent against the purchaser and the Official Assignee to show cause why the sale of the premises of the insolvent, in pursuance of the order of 23rd January 1896, should not be set aside and the premises resold, and the purchaser pay the costs of such sale and of this application; and pending the hearing of this rule the Official Assignee was

prohibited from proceeding further with the sale or delivering over possession of the premises to the purchaser. On 19th January 1897, this rule was discharged with costs as against the purchaser and the Official Assignee. At the hearing of the rule the creditors and the Official Assignee were represented by only one Counsel, but the purchaser was represented by [893] two Counsel. On the taxation of the costs of the purchaser, the Taxing Officer, Mr Belchambers, made the following order —

"In this case a house which had been mortgaged by the insolvent was sold by the Official Assignee under an order for sale obtained by the mortgagee. On payment of the purchase money, the purchaser applied for possession An order directing the insolvent to give possession was not complied with The insolvent's attorney on being written to replied that he had been informed by his client that "the premises in question have been in the occupation of Debendro Nath Dutt, the son of the insolvent, for some time past" This was at variance with the statements contained in the 16th, 17th and 18th paragraphs of the insolvent's affidavit, from which it appears that the insolvent was in possession and was withholding possession until an application could be made to set aside the sale Such an application was made, supported by the affidavits of persons who professed to have acted collusively and dishonestly for the purpose of depreciating the value of the property The allegations against the purchaser were disproved, and the application was refused with costs

"Objection is now taken to two briefs and two Counsel being allowed as between party and party on the following grounds —

"(1) That this is a matter in insolvency in which no special directions were given by the Court

"(2) That this is not a matter of importance

"(3) That the applicants engaged only one Counsel and so also did the Official Assignee.

"(1) As to the first ground the absence of special directions shows that it was not intended to affect the discretion of the Taxing Officer

"(2) To the purchaser whom it was sought to deprive of the benefit of the purchase on allegations of improper conduct, the application was of undoubted importance

"(3) The Official Assignee appeared only to watch the proceedings It was, therefore, not necessary that he should be represented by more than one Counsel. It is not denied that the applicants had only one Counsel, but that in itself is not a sufficient reason for refusing to allow two Counsel to the purchaser, who was most affected by the application

"Having regard to the nature and circumstances of the case, I consider that the purchaser was justified in having two Counsel, and that their fees, as moderated by me, and two briefs, ought to be allowed as between party and party"

The creditors of the insolvent, being dissatisfied with this order, filed exceptions on the ground that the costs of two Counsel ought [894] not to have been allowed to the purchaser The exceptions came on for hearing on 24th June 1897

Mr. *Zorab* for the purchaser

Mr. *D. Swinhoe* on behalf of the creditors —This is a matter in an Insolvency proceeding. In Insolvency proceedings the costs of only one Counsel are permitted as between party and party If a party wishes to be represented by two Counsel, he should be compelled to pay his own costs for the second Counsel. There is no difference between this and any other Insolvency proceeding. The Official Assignee and the creditors have throughout these proceedings been represented by only one Counsel This Court has power to reverse the order of the Taxing Officer, as he has exercised his discretion wrongly in the matter.

Jenkins, J.—This application is by way of objection to the taxation of a bill of costs on the ground that the costs of a second Counsel should not have been allowed. The case in which two Counsel were employed was in certain Insolvency proceedings and, as I learn from the statement of Counsel, the

client by whom these Counsel were employed was charged with collusion amounting to fraud.

In the exercise of his discretion the Taxing Master considered that the case was one in which it was proper to allow the costs of a second Counsel. I have been unable to see in the argument addressed to me anything to lead me to suppose that this discretion was wrongly exercised.

I therefore hold that the objection was ill-founded, and the exceptions will be disallowed with costs.

Attorneys for Koosom Koomary Dassee: Messrs. *Dignam & Co.*

Attorney for the Creditors: Babu *G. C. Dhur.*

C. E. G.

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[895] APPELLATE CIVIL.

The 26th March, 1897.

PRESENT.

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Kristodhone Ghose........... Plaintiff

versus

Brojo Gobindo Roy............Defendant.*

Landlord and Tenant--Suit for enhancement of rent—Bengal Tenancy Act (VIII of 1885), section 29--Enhancement of rent by contract by more than two-annas in the rupee—Void Agreement—Contract Act (IX of 1872), sections 23 and 24.

A contract under section 29 of the Bengal Tenancy Act, to pay an enhanced rent by more than two-annas in the rupee, is void.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

Sir *Griffith Evans* and Babu *Jasoda Nundan Pramanick* for the Appellant.

Babu *Nil Madhub Bose* and Babu *Lal Mohan Ganguly* for the Respondent.

The **judgment** of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows:—

Maclean, C.J. (BANERJEE, J. concurring).—This appeal raises a very short point. The plaintiff is a zemindar, the defendant is his tenant. By the *kabuliat*

* Appeal from Appellate Decree No. 868 of 1895, against the decree of F. B. Taylor, Esq., District Judge of Moorshidabad, dated the 18th of March 1895, modifying the decree of Babu Kapali Prasanna Mukerjee, Munsif of Kandi, dated the 28th of December 1894.

the defendant agreed to pay the plaintiff an enhanced rent of Rs. 12-12-10. This enhancement exceeds, by more than two-annas in the rupee, the rent previously paid by the tenant. By section 28 of the Bengal Tenancy Act, it is provided that "where an occupancy *raiyat* pays his rent in money, his rent shall not be enhanced except as provided by this Act." By section 29 the money rent may be enhanced by contract, and by sub-section (*b*) it must not be enhanced so as to exceed, by more than two-annas in the rupee, the rent previously payable by the *raiyat*. The plaintiff is suing the defendant for the enhanced rent; the latter says the [896] agreement contravenes the provisions of the Bengal Tenancy Act, and having regard to sections 23 and 24 of the Contract Act (Act IX of 1872) the agreement is void. I think he is right. But the appellant contends that the contract is severable, and that the good part can be severed from the bad, and a decree given for the good part, that is for so much of the enhanced rent as does not exceed the two-annas in the rupee. I am unable to accept this view. The object of the Bengal Tenancy Act is, I take it, protection of the *raiyat*. If the appellant's contention be sound, the landlord could enter into an agreement for an enhanced rent far beyond the statutory limit, run the risk of the *raiyat* subsequently disputing it, and if he did, then ask the Court to give him an enhancement only within the statutory limit. To adopt this view would, in my opinion, be very injurious to the *raiyat* Here the contract is to pay the enhanced rent, the contract, *qua* the payment of the enhanced rent, does not consist of two parts. How is the Court in this case to sever the illegal from the legal part of the contract? If it cannot do so the contract is void. If the appellant's argument be well founded, it would have the consequence I have indicated; he, in effect, is asking us to make a new contract for the parties. This view is consonant with those expressed in *Pickering* v. *Ilfracombe Railway Company* [L. R, 3 Com Pleas., 235 (250)] and *Baker* v. *Hedgecock* (L. R., 39 Ch. Div., 520). As Mr Justice CHITTY said in the latter case, "the Court cannot create or carve out a new covenant for the sake of validating an instrument which would otherwise be void." This view is in accord with that expressed by Mr. Justice RAMPINI in the unreported case of *Monmohun Sarkar* v. *Anath Mondol* (Appeal from Appellate Decree No. 365 of 1894) which has been referred to.

In my opinion the District Judge was right in holding that the agreement was void under the sections I have referred to, of the Contract Act and of the Bengal Tenancy Act. In this view it becomes immaterial to go into the question which rested upon the effect of sections 67 and 178 of the Bengal Tenancy Act. The appeal must be dismissed with costs

S. C. G. —— *Appeal dismissed.*

NOTES.

[This was followed in (1908) 36 Cal., 601. 9 C L J, 343, (1898) 25 Cal, 781, (1914) 22 I.C., 854 (Cal.).

See also (1900) 2 C.L J., 540, where BANERJEE, J., distinguished cases under sec. 48 from those falling within sec. 29 (24 Cal., 895) or sec. 85 (26 Cal, 16) of the Bengal Tenancy Act 1885.]

[897] *The 7th April, 1897.*

PRESENT.

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE AND MR JUSTICE BANERJEE

Alokeshi Dassi .. Defendant No. 1

versus

Hara Chand Dass .. Plaintiff *

Specific performance—Unsuccessful Denial of Contract by defendant—Dismissal of the suit for non-payment of the balance of the consideration money within the stipulated period—Right of plaintiff to return of deposit of the part of the consideration money paid, where specific performance is refused—Equity and good conscience—Bengal, N-W P and Assam Civil Courts Act (XII of 1887), section 37

In a suit for specific performance of a contract, the defendant denied the contract *in toto*. The Lower Appellate Court, while finding that there was a contract between the parties, refused to grant specific performance on the ground that the plaintiff failed to pay the balance of the consideration money on the stipulated day but made a decree for the refund of the deposit. On appeal by the defendant to the High Court,

Held, that inasmuch as the defendant unsuccessfully denied the contract *in toto*, and as there was no repudiation of the contract by the plaintiff he (the plaintiff) was entitled to a refund of the deposit made by him

THE facts of the case, so far as they are necessary for the purposes of this report and the arguments, appear sufficiently from the judgments of the High Court.

Babu *Boidyo Nath Dutt* for the Appellant

Babu *Lal Behary Mitter* for the Respondent

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J) —

Maclean, C.J.—This is a suit by the purchaser for specific performance of a contract to purchase certain property for Rs 525 The defendant No. 1 denied the contract *in toto*, and said that the plaintiff's case was wholly false. That was his defence

The matter was tried out by the Munsif, who dismissed the plaintiff's suit The Subordinate Judge found that there was a contract between the parties, and disbelieved the defendant's [898] case, but refused to grant specific performance on the ground that the plaintiff was in default in not paying the purchase money upon the stipulated day The agreement was an oral agreement, and there is no finding of fact in the judgment of the Subordinate Judge that the plaintiff ever agreed to pay the purchase money within one month from the date of the contract The Judge finds as a fact that the defendant agreed to execute a conveyance within a month, and he infers from that, and I dare say the inference is well-founded, that there was an agreement on the part of the plaintiff to pay the balance of the purchase

* Appeal from Appellate Decree No 1121 of 1895, against the decree of Babu Beni Madhub Mitter, Subordinate Judge of Hooghly, dated the 25th of March 1895, modifying the decree of Babu Sarat Kumar Ghosal dated the 29th of December 1893.

money within that period, but there is no distinct finding of fact by the Subordinate Judge on that point. Be that as it may, however, the Subordinate Judge refused to make a decree for specific performance. There is no appeal on that point, so I need say nothing as to that part of the case. The plaintiff, however, had paid by way of deposit, or, as the appellant's Vakil puts it, by way of earnest money, a sum of about Rs. 100. It is found as a fact by the Court below, and the fact is not challenged, nor could it be challenged, that that money was paid by the plaintiff to the defendant. The defendant insists on keeping that Rs. 100. The plaintiff contends that if not entitled to specific performance she, at any rate, is entitled to a return of her deposit. The Subordinate Judge accepted that view and has made a decree for the return of the deposit. The defendant appeals against that decision. The defendant, who, as I have pointed out, set up that there was no contract at all, now insists upon retaining the deposit. I think she is not so entitled. It is admitted that there is nothing either in the Specific Relief Act or in the Contract Act which touches the question. We have, therefore, to consider what is just and equitable, and may fairly consider the law in England upon the subject.

There are, I need scarcely say, various decisions in the English Courts upon the point, but I do not propose to go into them in detail. The learned Vakil for the appellant cited the case of *Howe* v. *Smith* (L R., 27 Ch. Div., 89). He cited that case as a decision in his favour, but the facts of that case are so different from the facts of this case that it has very little application. The case, however, is [899] valuable as illustrating what the late Lord Justice COTTON regarded as the principle upon which questions of this class are to be decided—a view which was not dissented from by the other Lord Justices who were members of the Court. At p. 95 of the report Lord Justice COTTON says: "I do not say that in all cases where this Court would refuse specific performance the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it, so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser, which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract."

In the present case there are no facts found by the learned Subordinate Judge to show that the plaintiff by her delay had lost her right to specific performance, or any conduct on her part such as to amount to a repudiation of the contract. On the contrary, the facts rather point in the opposite direction. In a case such as the present, where the defendant unsuccessfully denied the contract *in toto*, and where there has been no repudiation of the contract by the plaintiff, but on the other hand an attempt to enforce it, I do not think it would be equitable that the defendant should be allowed to retain the deposit.

On these grounds it seems to me that the judgment of the Court below is correct, and the appeal must be dismissed with costs.

Banerjee, J—I am of the same opinion. It being admitted on both sides that there is nothing either in the Contract Act or in the Specific Relief Act applicable to this case, it must, by sub-section 2 of section 37 of Act XII of 1887, be governed by the rules of justice, equity and good conscience. Now, is there anything in justice, equity and good conscience to entitle the defendant

No. 1 in this case to retain the money that was paid by the plaintiff as part of the consideration money for the sale of immoveable property that was contracted for? The [900] answer to this question must be in the negative. For upon the facts found it is impossible to say that the defendant No. 1 has made out any case to entitle her to retain this money as against the plaintiff. Her defence was not that by reason of any default of the plaintiff she had been damnified and that she was therefore entitled to retain the money. Her defence was an utter denial of the contract, a denial which has been found to be false.

That being so, and the only grounds upon which the plaintiff's prayer for specific performance has been refused being, firstly, that the plaintiff did not tender the balance of the purchase money within the time mentioned in his plaint, and, secondly, that the defendant No. 2 has purchased the property for value in good faith without notice of the contract in favour of the plaintiff, I do not think that there is anything to justify the defendant No. 1 in retaining the deposit.

As to the case cited, *Howe* v. *Smith* (L. R., 27 Ch. Div. 89) as pointed out by the learned Chief Justice, that case is no authority for the broad proposition contended for by the learned Vakil for the appellant. That case itself shows that it is not in every case where there is default in performance of a contract that the vendor is entitled to retain the deposit. He is entitled to do so only under special circumstances, none of which exist in this case.

S. C. G. *Appeal dismissed.*

NOTES.

["It does not necessarily follow from the dismissal of a suit for specific performance that an order for the refund of any part-payment of the purchase-money should also be denied. If any authority as to this be required, we need only refer to the cases of (1896) 21 Bom., 827; (1897) 24 Cal., 897; (1908) 31 All., 68; (1884) 27 Ch. D., 89; (1903) 27 Mad., 380. The plaintiff could, notwithstanding that his suit for specific performance had been dismissed, and no matter on what ground it failed, have brought a suit for the recovery of his deposit. This is, we think, clear from the terms of Sec., 29 of the Specific Relief Act, 1877, and the case of (1903) 27 Mad., 380." .– **(1912) 17 C.W.N., 100**: 15 I.C., 268.]

[24 Cal. 900]

The 30th June, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Peary Mohun Mookerjee............Petitioner

versus

Ambica Churn Bandopadhya, Chairman of the Municipal Commissioners of Utterparah............Opposite Party.*

Res judicata—*Civil Procedure Code (Act XIV of 1882), section 13, Explanation II—Dismissal of suit for want of notice, and also upon the merits—Matter directly and substantially in issue finally heard and decided—Bengal Municipal Act (Bengal Act III of 1884), section 363.*

In a suit brought by one *A* against *C* for damages for not removing certain offensive matter from his land, the questions raised were, whether there was notice, and whether the defendant was bound to remove the filth from the plaintiff's property. The Court having

* Civil Rule No. 768 of 1897.

found that there was no notice [901] which in its opinion was a ground sufficient for dismissal of the suit under section 363* of the Bengal Municipal Act, and also upon the merits, having come to the conclusion that the defendant was not bound to remove the offensive matter from the plaintiff's land, dismissed the suit. In a subsequent suit between the same parties, the plaintiff claiming the same relief as in the previous suit, the defence was that the suit was barred as *res judicata*.

Held, that inasmuch as the matter directly and substantially in issue in the subsequent suit, was directly and substantially in issue in the previous suit, and as it was finally heard and decided between the same parties, notwithstanding the fact that the previous suit failed by reason of the decision of the Court upon some other matter as well, the subsequent suit was barred as *res judicata*.

Shib Charan Lal v. *Raghu Nath* (I. L. R., 17 All., 174) distinguished.

THE facts of this rule and the arguments are fully set out in the judgments of the High Court.

Babu *Giris Chunder Chowdhry* in support of the rule.

Babu *Bhobani Churn Dutt* to show cause.

The following **judgments** were delivered by the Court (MACLEAN, C. J., and BANERJEE, J.): –

Maclean, C. J.—I have had the advantage of reading Mr. Justice BANERJEE'S judgment in this case, and I concur in the conclusion at which he arrives. He has gone so fully into the matter that I purpose to state very shortly the grounds upon which I consider this rule ought to be discharged. The only question we have to decide is, whether the plea of *res judicata* ought to prevail. Admittedly the present plaintiff, some short time ago, brought a suit against the present defendant claiming identically the same relief as is sought by the present suit, that is to say, damages against the defendant for not removing certain offensive matter from certain property belonging to the plaintiff. This suit failed upon two grounds: (1) want of notice under section 363 of the Bengal Municipal Act: (2) that upon the merits the defendants were not liable. The merits admittedly were gone into in that suit, and the suit was decided against the present plaintiff. The present suit is for the non-removal of the offensive matter over a subsequent period; the issue, however, in dispute is really identical.

The question we now have to decide is whether, having [902] regard to section 13 of the Code of Civil Procedure, and explanation II to that section, the matter directly and substantially in issue in the present suit was heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties. I think it was. The only ground alleged for the present suit not being barred by the plea of *res judicata* is that, inasmuch as the Court, in the previous suit, decided that the suit must fail for want of previous notice (I refrain from expressing any opinion as to whether, having regard to the language of section 363 of Bengal Act III of 1884, that

*[Sec. 363:—No suit shall be brought against the Commissioners of any municipality, or any of their officers, or any person acting under their direction, for anything done under this Act, until the expiration of one month next after notice in writing has been delivered or left at the office of such Commissioners, and also (if the suit is intended to be brought against any officer of the said Commissioners or any person acting under their direction) at the place of abode of the person against whom such suit is threatened to be brought, stating the cause of suit and the name and place of abode of the person who intends to bring the suit;

No action to be brought against the Commissioners or their officers until after one month's notice of cause of action.

and unless such notice be proved, the Court shall find for the defendant.

Every such action shall be commenced within three months next after the accrual of the cause of action, and not afterwards.

If the Commissioners or their officer, or any person to whom any such notice is given, shall before suit is brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover.]

view is sound), it became unnecessary to go into the other issues, and therefore that the merits cannot be regarded as so gone into in the previous suit as to entitle the defendants to say that the matter of the present suit was "directly and substantially" in issue and heard and finally decided in the former suit. But the answer to that argument appears to me to be that, in point of fact, the question, with the knowledge and assent of both the litigating parties, was gone into, was directly and substantially put in issue, and was heard and finally decided. Why was the question the less directly and substantially in issue, and not heard or finally decided, because the Court also decided another point which, if right, would have decided the suit, but which if wrong would not have done so. The decision upon the merits formed an additional ground for the dismissal of the suit; and both sides invited that decision. The plaintiff might have invited the decision of the Court upon the question of notice alone, and if that were given against him have declined to go into the merits. But he did not adopt that course, he allowed the merits, that is, the question of the defendant's liability, to be gone into, and took his chance of a decision in his favour. Can he turn round now and say they were not gone into or finally adjudicated upon? The question of the liability of the defendant to remove the offensive matter from the plaintiff's property was clearly matter "directly and substantially" in issue in the former suit, and it is the sole question now in issue in the present suit In the previous suit the plaintiff invited a decision upon the question of such liability, and the Court gave its decision upon the matter. The petitioner places great reliance upon the case of *Shib Charan Lal* v. *Raghunath* (I. L. R., 17 All, 174). For the reasons given by [903] Mr Justice BANERJEE, I think that case is distinguishable; the facts in the present case are very different. The rule must be discharged with costs.

Banerjee, J.—The petitioner before us, who was the plaintiff in the Court below, asks us under section 25 of the Provincial Small Cause Courts Act to set aside the decree of the lower Court, dismissing his suit for damages against the opposite party, the Chairman of the Municipal Commissioners of Utterparah.

The suit was brought by the plaintiff on the allegation that the defendant had wrongfully refused to remove offensive matter from certain property belonging to him, and that he had consequently been obliged to incur expense for removing the same. The defence was that the defendant was not liable to remove offensive matter from the plaintiff's property, and that the question of the defendant's liability was *res judicata* by reason of its having been decided against the plaintiff in a former suit brought by the plaintiff in respect of similar damages for a previous period. The Court below has given effect to the plea of *res judicata* and dismissed the suit, without going into the merits.

The learned Vakil for the petitioner contends that this decision is wrong, and that the judgment in the former suit is no bar to the present, as the decision in that suit upon the issue as to the defendant's liability was not necessary for the disposal of the case, the suit having failed for want of previous notice as required by section 363 of the Bengal Municipal Act; and in support of his contention the case of *Shib Charan Lal* v. *Raghunath* (I. L. R., 17 All., 174) is relied upon.

I am of opinion that this contention is not correct. It is true that in the former suit the Court decided, not only the issue as to the defendant's liability, but also that as to notice, against the plaintiff; and it is true also that in the absence of proof of notice, a suit against the Municipal Commissioners for anything done under Bengal Act III of 1884 must be dismissed under section 363 of the Act. But in the first place, it is doubtful whether the former suit came under section 363 when the suit was not for "anything done" under the Municipal Act, but for something left undone which, according to the plaintiff's

contention, the [904] Municipality was bound to do. And in the second place, even if that suit came under section 363, it does not follow that, because the suit failed for want of notice, the adjudication of the Court upon the question of the defendant's liability is no bar to its trial in a fresh suit when the question was raised, as it ought to have been, by the parties in the former suit, and the decision thereon formed an additional ground for the dismissal of the suit.

Section 13 of the Code of Civil Procedure enacts that "no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties"—I quote only so much of the section as bears upon the question now before us—"in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court;" and explanation II of the section says that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." Now the question of the liability of the defendant to remove filth from the plaintiff's property was clearly matter "directly and substantially in issue" in the former suit, as it is in this, in every sense of the expression; and the question is, was it any the less so in the former suit because that suit failed by reason of the decision of the Court upon some other matter as well?

When more questions than one arise in a suit, according to the circumstances of the case, depending upon the nature of the questions and of the decision arrived at, it may be either necessary to decide them all, or sufficient to decide only some of them, for the disposal of the suit.

The first case presents no difficulty so far as the point raised before us is concerned; but the case we have to consider is not one of that description. In cases of the second class, the Court may either decide only the questions that are found necessary to decide (and in that event no difficulty will arise) or it may decide all the questions raised.

In this latter class of cases again, the Court may either embody the result of its decision upon every question in the decree in [905] the form of a declaration or otherwise (and in that event too no difficulty can arise) or it may not do so.

Cases of this last mentioned description again sub-divide into two classes, in one of which the decree is supported by the decision upon each of the questions determined (and the case we have to consider is one of that description), and in the other it is in spite of the decision upon some of those questions, as, for instance, where a suit fails upon the question of limitation or of some preliminary notice, but the question of title is found for the plaintiff.

The case we are dealing with, not being of this latter description, it is not necessary to consider whether the Full Bench decision in *Niamut Khan* v. *Phadu Buldia* (I. L. R., 6 Cal., 319) is good law, or whether it has been in effect overruled by the Privy Council in *Run Bahadoor Singh* v. *Lucho Koer* (I. L. R. 11 Cal., 301: L. R., 12 I. A., 23)—a question which may be taken as settled by the cases of *Nando Lall Bhuttacharjee* v. *Bidhu Mookhy Debee* (I. L. R., 13 Cal., 17) and *Thakur Magundeo* v. *Thakur Mahadeo Singh* (I. L. R., 18 Cal., 647).

The judgment in the former suit, which is here made the basis of the plea of *res judicata*, determines each of the two questions raised, namely the question of notice and that of the defendant's liability against the plaintiff; and the question of the defendant's liability was raised as directly and substantially in the former suit as it is in this. So that it cannot be said, either that the decision in the former suit upon the question of the defendant's liability was superseded by the decree by reason of the decree being in spite of that decision, or that the question was not a direct and substantial question in the case. If the

question of notice had been found for the plaintiff, the question of the defendant's liability would clearly have been a direct and substantial question in the case. Can it then be said that it ceased to be so by reason of the decision upon the question of notice which came to be considered prior to the other question as being prior in point of logical order? Having regard to the language of explanation II of section 13, quoted above, which **[906]** makes any matter which might or ought to have been made ground of attack or defence come within the description of matter directly and substantially in issue, I find it very difficult to say that this question should be answered in the affirmative. It may no doubt be argued that as the plaintiff could not have taken advantage of any favourable finding in the former judgment on the question of the defendant's liability by reason of the decree being in spite of such finding, he ought not to be held bound by any unfavourable finding on that question. But the answer to that argument is this, that the plaintiff might well have avoided the effect of an adverse finding on the question of liability by asking the Court to determine first the question of notice, and not to go into the question of liability if the question of notice was found against him. If instead of doing that, the plaintiff led the Court and his adversary to go into the whole question of the liability of the defendant, presumably at considerable expense of time to both, it is too late now for him to complain of the result; and we should not be keeping in view the reason for the rule of *res judicata* which is to give finality to litigation, and to prevent any one from being twice vexed for the same matter, if we were to hold that the decision in the former suit does not operate as *res judicata*.

There is one other point of view suggested by the language of the former judgment from which the question might be viewed. Though the Court in the previous suit decided the question of notice against the plaintiff, it seems that it came to a somewhat hesitating decision upon that point, and so, to strengthen its conclusion that the suit ought to be dismissed, it went into the question of the defendant's liability as well, and found that no liability was established. If that was so, it could not be said that the decision upon the question of liability was not necessary for the disposal of the suit.

The only authority cited in support of the view contended for by the learned Vakil for the petitioner is the case of *Shib Charan Lal* v. *Raghunath* (I. L. R., 17 All., 174). That case is, however, quite distinguishable from the present. For the question for decision in that case was, whether the finding as to title in favour of the plaintiff in a former suit under section 42 of the **[907]** Specific Relief Act, which was dismissed by reason of the plaintiff being found to be out of possession, and therefore not entitled to ask for a mere declaratory decree, could operate as *res judicata* in a subsequent suit, and the question was, as it ought to have been, answered in the negative, the decree in the previous suit having been in spite of the finding in favour of the plaintiff upon the question of title, and having, therefore, in effect superseded that finding. That is not, as I said above, the nature of the question in this case. It is true that the learned Judges in their judgment in *Shib Charan Lal* v. *Raghunath* (I. L. R., 17 All., 174) observe: "Further if there were two findings of fact, either of which would justify in law the making of the decree which was made, that one of such two findings of fact which should in the logical sequence of necessary issues have been first found and the finding of which would have rendered the other of such two findings unnecessary for the making of the decree which was made, is the finding which can in our opinion operate as *res judicata*." And these observations no doubt are in favour of the petitioner. But they were not necessary for the decision of the case; and with all respect for the learned Judges who made those observations

I am unable, for the reasons given above, to follow in this case the rule embodied in them. I may add that, though the decision of either of two issues may be sufficient for the determination of a case, and though their logical sequence may be clear, yet where a Court does go into both of them instead of resting its conclusion upon the decision of that one of them which comes prior in point of logical order, it is not always easy or safe to say that the decision of the last mentioned issue alone was in fact necessary, and that the decision upon the other issue was superfluous.

When the law prohibits a second trial, not only of a suit for the same matter, but also of a direct and substantial issue in it, it is impossible to avoid the conclusion arrived at by the lower Court.

For the foregoing reasons, I think that the Court below was right in its decision, and that this rule ought to be discharged with costs.

S. C. G. *Rule discharged.*

NOTES,

[Issues other than those which were sufficient for the disposal of the case may be decided on:—(1904) 9 C.W.N., 60.

See also (1907) 36 Cal, 193 5 C.L J, 611; (1913) 19 I.C, 399 (Punjab); (1913) 19 C.L.J., 34: (1911) 13 Bom. L R., 1061 12 I C, 818; (1912) 16 C.W.N., 877, as regards the extent to which findings in a previous suit operate as *res judicata*]

[908] FULL BENCH.

The 12th March, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, MR. JUSTICE O'KINEALY, MR JUSTICE TREVELYAN, MR. JUSTICE BEVERLEY AND MR. JUSTICE BANERJEE.

Brojodurlabh Sinha............Defendant

versus

Ramanath Ghose............Plaintiff.*

Compromise of Suit— Recording compromise—Agreement made out of Court, and comprising also matters not the subject of suit—Code of Civil Procedure (Act XIV of 1882), section 375.

Held, by the majority of the Full Bench, MACLEAN, C J., and TREVELYAN and BANERJEE, JJ., (O'KINEALY and BEVERLEY, JJ, dissenting) that where the parties to a suit have by an agreement adjusted the subject-matter of the suit, the Court can, by an order made in the suit under section 375 † of the Code of Civil Procedure, direct such agreement to be recorded, and make a decree in accordance therewith, even if one of the parties to the agreement object.

Held (*per* O'KINEALY and BEVERLEY, JJ) that the Court could not make such an order, the case not being one to which section 375 applied

* Reference to a Full Bench in Appeal from Original Decree No. 18 of 1896.

† [Sec. 375:—If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final, so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction.]

Compromise of suits.

Per O'KINEALY, J —The High Court, on its Original Side, exercising the equitable jurisdiction of the High Court of Chancery, would not on a contested motion give a decree of this nature

Per BEVERLEY, J —Section 375 only applies to cases where the adjustment or satisfaction is made *in* Court, and should not be extended to cases adjusted out of Court

THIS case was referred to a Full Bench by MACLEAN, C.J., MACPHERSON and TREVELYAN, JJ, sitting as a Court of Appeal from decisions of the High Court in its Original Civil Jurisdiction. The reference was in the following terms —

"1. There has been much litigation between the plaintiff and defendant both in the Criminal and Civil Courts Amongst other litigation was the present suit, which was instituted on the 29th June 1893, by which the plaintiff sought an account against the defendant as his agent

"2 By an agreement, dated the 19th May 1894, the defendant agreed 'to consent to a decree for an account now pending in the **[909]** High Court, Original Side (being suit No 397 of 1893) within a week from date,' *i.e*, from the 19th May 1894 The suit No 397 is the present suit.

"3 On the 11th June 1894 the defendant instituted a suit to have that agreement set aside on the ground of duress and undue influence and pressure. That suit came on for hearing in due course, and the agreement was held to be valid by Mr Justice SALE, whose decision was recently affirmed on appeal by ourselves It must be taken, therefore, for the present purpose, that the defendant has entered into a valid and binding agreement, and has agreed to consent to a decree for an account in the present suit.

"4 Under these circumstances the plaintiff asks, under section 375 of the Code, to have the agreement recorded, and a decree made in accordance with the above agreement Mr Justice SALE made the decree as asked. The defendant contends that even where there has been an agreement, as in the present case, to adjust the suit, the Court can only act under section 375 upon that agreement if both parties consent, and that if they do not consent the agreement can only be enforced by a fresh suit for specific performance. The defendant relies upon the case of *Harasundari Debi* v. *Dukhinessur Malia* (I L R, 11 Cal, 250) The plaintiff relies upon the following cases: — *Venkatappa Nayanim* v *Thimma Nayanim* (I L R, 18 Mad, 410), *Ruttonsey Lalji* v *Poori Bai* (I L R, 7 Bom, 304), *The Goculdas Bulabdas Manufacturing Company* v *Scott* (I L R, 16 Bom, 202), *Appasami* v *Manikam* (I. L. R., 9 Mad, 103), and *Sami Bai* v *Premji Pragji* (I L R, 20 Bom, 304).

"We are unanimously of opinion that the view urged by the plaintiff and adopted by Mr Justice SALE is the correct one, but as our opinion is at variance with that expressed by the Court in the case of *Harasundari Debi* v *Dukhinessur Malia* (I L R, 11 Cal, 250), we refer to a Full Bench the following question Whether, when the parties to a suit have by an agreement adjusted the subject-matter of the suit, the Court can, or cannot, by an order made in the suit, order such agreement to be recorded, and make a decree in accordance with it, if one of the parties to such agreement object"

[910] The agreement of the 19th May was as follows —

"In consideration of your releasing me from arrest in execution of the decree in rent suit No 22 of 1893 of the Second Subordinate Judge of Hooghly, I do hereby agree—(1) to execute in your favour within three days from date a proper document as you might require disclaiming all interest in the properties in Sylhet, the subject-matter of suit No. 82 of 1893, in the Court of the Subordinate Judge of Sylhet, and undertaking not to interfere in any way with your management and peaceable possession of all your zemindaries in Sylhet, the subject-matter of the said suit or otherwise, (2) to consent to a decree for account in the suit now pending in the High Court, Original Side (being suit No. 397 of

1893) within a week from date; and (3) to withdraw within three days from date my application in the execution proceeding No. 9 of 1894 in suit No. 22 of 1893, in the said Subordinate Judge's Court at Hooghly under section 258 of the Civil Procedure Code, to have an alleged settlement recorded.

"I do also agree not to take any steps to disturb the decree of the Subordinate Judge of Sylhet in the said suit No. 82 of 1893, and dated the 26th March last, as well as to abandon my rights, if any, under the said alleged settlement put forward by me in the said application of mine under section 251 of the Civil Procedure Code, in the Court of the Second Subordinate Judge of Hooghly."

Mr. *Hill* (with him Mr. *St. John Stephen*) for the appellant.—Section 375 does not apply to this case, but is limited to cases where all parties consent that the compromise shall be recorded. The section refers to a purely ministerial act. Other sections of the Code show that where the parties are seeking in any way to regulate or affect the procedure in a case, provision is made for a judicial inquiry into the existence of the arrangement. For instance, in section 150 there is a provision for parties who desire to control the procedure. In section 151 there is provision made for a judicial inquiry as to the *factum* of the agreement. By section 523 the parties are given an opportunity of showing why the agreement should not be filed, again indicating that there is a judicial inquiry. So, with regard to payment into Court, before the Court can record anything, provision is made under section 379 that an acceptance of such an amount is not only in part satisfaction of the claim, but there must be a written admission stating the fact, and the statement must be filed.

In the case of payment to a decree-holder out of Court by section 258 the judgment-debtor may certify such payment, yet before the payment or adjustment can be recorded, provision is made for notice on the plaintiff to show cause against it.

[911] No similar provision for any inquiry into the *factum* of the agreement is made under section 375, therefore if the agreement be not admitted when the Court is asked to record it, the Court must try the question whether such an agreement was come to, under other sections of the Code. The cases cited show that other High Courts adopt that view; and that has been the practice of the Calcutta Court also

Again, other sections of the Code limit the issues to matters arising in the suit; and the Court cannot, at the instance of either party, inquire into matters outside the scope of the suit But the present agreement relates, not only to matters in the suit, but also to the execution of a decree in another suit in the Hooghly Court. It was on such a ground that the Court refused to record a similar agreement under section 375—see *Fajalch Ali Miah* v. *Kumaruddin Bhuya* (I L.R, 13 Cal, 170).

However that may be, on a trial of the question as to the *factum* of the agreement, and as to the relief sought thereon, every ground of defence which would be open to a party denying the agreement would be open to the appellant in this case. [The decision in *Harasundari Debi* v. *Dukhinessur Malia* (I.L.R., 11 Cal., 250) was also relied on.]

Mr. *Woodroffe* and Mr. *Dunne* for the respondent —It is incorrect to say that recording the agreement under section 375 is a purely ministerial act, for in doing so the Court exercises its judicial functions The construction sought to be put upon the section by the appellant is too limited, and there is nothing in the section itself to warrant such a construction. If the Court is satisfied that the suit was adjusted, wholly or in part, by any lawful agreement, it is bound to record the agreement, even if some of the parties do not consent. The section says nothing about a judicial inquiry; it merely gives a peremptory direction that the Court *shall* record the compromise. With the

exception of the decision in *Harasundari Debi* v. *Dukhinessur Malia* (I.L.R., 11 Cal., 250) the authorities in all the Courts have been consistently against the contention now put forward. Counsel relied on the cases referred **[912]** to in the order of reference and on *Karuppan* v. *Ramasami* (I.L.R., 8 Mad., 482) and *Appasami Nayakan* v. *Varadachari* (I.L R, 19 Mad., 419).

The following **judgments** were delivered by the Full Bench :—

Maclean, C.J —The question for our decision is, "whether, when the parties to a suit, have by an agreement adjusted the subject-matter of the suit the Court can or cannot, by an order made in the suit, order such agreement to be recorded and make a decree in accordance with it, if one of the parties to such agreement object." Although the question does not specifically refer to section 375 of the Code of Civil Procedure, it is clear from the terms of the reference, and it was admitted, that the question really submitted is whether the Court can make the order under that particular section.

It appears that there has been much litigation between the plaintiff and the defendant in the suit, both in the Criminal and Civil Courts, and ultimately they entered into the agreement, dated the 19th May 1894. By this agreement the defendant agreed (amongst other matters) "to consent to a decree for an account in the suit now pending in the High Court, Original Side (being suit No 397 of 1893) within a week from date," that is, from the date of the agreement, *viz.*, the 19th May 1894. The suit No. 397 is the present suit. The agreement referred to other matters, and so far as the plaintiff is concerned the agreement has been performed on his part. On the 11th June 1894 the defendant instituted an action to have that agreement set aside on the ground of duress and pressure That suit came on for hearing in due course, and the agreement was held to be valid and binding by Mr Justice SALE, whose decision has recently been affirmed on appeal by this Court. It must be taken, therefore, for the present purpose, that the defendant has entered into a valid agreement —by valid agreement I mean lawful agreement— and has agreed to consent to a decree for an account in the present suit.

Under these circumstances the plaintiff asks under section 375 of the Code to have the agreement recorded and a decree made for an account in accordance with the clause of the agreement which I have read.

[913] Mr Justice SALE made the decree as asked, and an appeal was subsequently presented to this Court which has led to the present reference. The appellant contends that, even when there has been an agreement, as in the present case, to adjust the suit, the Court can only act under section 375 upon that agreement if both parties consent, and that if they do not consent, the agreement can only be enforced by a fresh suit for specific performance.

If this view be sound it would practically reduce section 375 to a nullity. The case is clearly within the language of section 375, which says nothing about the agreement being recorded, or the Court passing the decree, only with the consent of the parties at the time.

By this agreement the defendant has already agreed to consent to a decree for an account, and to say that section 375 can only apply, if, after that consent and in addition to it, the parties must again consent or continue to consent before the agreement can be recorded, or the decree made, would, to my mind, have the effect of introducing entirely new words, and an entirely fresh element, into the section, and for which I can find no warrant. It was strongly urged before us that if the section were held to apply, save by consent of both parties, the defendant would be in a worse position than if he were a defendant in a fresh suit for specific performance, as in the latter case he would have a right of appeal, and in the former none owing to the words in section 375 "and such decree shall be final." It may well be that the Legislature

considered that if the parties adjusted their suit by agreement, and a decree was passed in accordance therewith, an end should then and there be put to the litigation and that no appeal should lie. But I do not think these words, even if they have the effect for which the appellant contends, can qualify, in the manner necessary to enable the appellant to succeed, the previous words of the section, which appear to me to be plain and clear.

I may point out that no preliminary objection to the appeal lying was taken by the respondents in the present case, and that in the case of *Harasundari Debi* v. *Dukhinnessur Malia* (I. L. R., 11 Cal., 250) it was distinctly held that an appeal would lie.

[914] It was urged that the agreement referred to matters other than the settlement of this suit, and that the Court cannot separate them, and consequently cannot make a decree in this suit, but must drive the parties to a further and separate litigation. In this particular case there is practically no such difficulty; the plaintiff has done all he had to do, and all the rest of the agreement has to be performed by the defendant. But in any case before making any decree on the footing of the agreement, the Court would necessarily provide that if anything were to be done by the plaintiff it should be done. In other words, *qua* the agreement, the Court would see that justice was done between the parties. The Court has equally the power of doing justice on an application to enforce the agreement in the particular suit, as it would have in the case of a new suit.

In my opinion, therefore, the view urged by the appellant is inconsistent with the language of the section, read as it ought to be read, in its natural and ordinary sense, and cannot prevail. The section is a salutary and a useful one. Its object is that, when the parties have by agreement adjusted their differences, effect shall be given to that agreement by the Court in the suit itself as rapidly and with as little expense as is practicable, in lieu of the Court relegating the parties to a fresh suit and to fresh litigation creating, as it necessarily would, further expense and further delay. The language of the section is strong, the agreement "shall" be recorded, and the Court "shall" pass the decree.

In the case of *Scully* v. *Lord Dundonald* (L. R., 8 Ch. Div., 669) Lord Justice COTTON said: "The plaintiff's claim has been established, not by trial of the action, but by agreement between the parties, and it would be unfortunate if we were obliged to say that the action must go on to decide what has already been settled by the parties." Those words are very pertinent to the present case.

My view of the construction of the section is, in accordance with what I might almost call a current of decisions, which I need not enumerate, as they have all been cited during the argument, in the High Courts of Madras and Bombay, as with several decisions of various Judges sitting as Judges of first instance in this Court. The only authority against this view is that of the [915] case I have referred to, *Harasundari Debi* v. *Dukhinessur Malia* (I. L. R, 11 Cal., 250.)

In that case I am by no means satisfied from the report that there was a concluded and binding agreement; it was apparently contingent upon the sanction of the Court, and before that sanction was obtained certain of the parties withdrew. Here we have a clear, definite and lawful agreement held by two Courts to be binding on the defendant But be that as it may, I am quite unable, for the reasons I have given as to the construction of section 375, to concur in the judgment in that case, which is quite at variance with the other cases to which I have referred. I answer the question in the affirmative.

O'Kinealy, J.—In June 1893 the respondent brought a suit on the Original Side of this Court against the appellant, basing it on an agreement

entered into by the parties on the 15th July 1891 for an account of all his dealings with the estate in suit, for delivery of all papers, books, accounts, etc., relating to the estate, and for payment of all sums found due from him. There was also a prayor in the plaint in that suit that the appellant may be restrained by injunction from interfering with or in any way obstructing the management of the estate by the respondent. The suit was based, as I have said before, on an agreement, dated the 15th July 1891.

In answer the defendant objected to the jurisdiction of the Court, and denied that he at any time had acted as manager to the plaintiff or was liable to account. It appears, however, that subsequently, while the suit was pending, the defendant entered into an agreement with the plaintiff, which is dated 19th May 1894, and which is as follows :—(Reads agreement, *ante p.* 910).

This is an agreement consisting of several clauses. It appears from the order of reference that on the 11th June 1894 the defendant instituted a suit to have this agreement set aside on the ground of duress and undue influence, and upon the hearing of that suit it was held, both by the first Court and by the Court of appeal, that the agreement was valid and binding.

The Judge, who decided the present suit, said that immediately on the case being opened, the Counsel for the plaintiff applied [916] under section 375 of the Code to have the agreement of the 19th May 1894 recorded in the suit, and a decree made in accordance with clause 2 of that agreement. The Counsel for the appellant, the defendant in the Court below, admitted execution of the agreement, but refused his consent to have a decree drawn up in terms of section 375. Furthermore, he raised contentions in regard to the jurisdiction of the Court and the period of limitation applicable. These objections being set aside, the Judge proceeded to enter up a decree under section 375 of the Code of Civil Procedure. In his judgment he referred to the decision of a Divisional Bench of this Court— *Harasundari Debi* v. *Dukhinessur Malia* (I. L. R., 11 Cal., 250); and he also referred to some cases decided by the Bombay and Madras High Courts, in which a different view was taken of section 375. He pointed out that a different interpretation of the section from that arrived at in *Harasundari Debi* v. *Dukhinessur Malia* (I. L. R., 11 Cal., 250) had been adopted by various Judges sitting on the Original Side of this Court and declared that the practice of the Court had been governed in accordance therewith. He stated that on inquiry he had ascertained that on different occasions Judges of this Court had directed a preliminary issue to be tried as to the fact of an agreement sought to be recorded under section 375, where such agreement had been denied, and he referred to the recent case of *Chogemull* v. *Kuppur Chand* (unreported), in which that procedure was followed. He also referred to the case of *Krishna Bibi* v. *Debi Pershad Agarwallah* (unreported), in which the question was thoroughly argued and decided, and he recited the opinion that was expressed on that occasion. Under these circumstances the Judge has taken clause 2 out of the clauses of the agreement entered into between the parties, one of which was to be performed by the opposite party, and without discussing its meaning has on motion given specific performance of what is only a part of the agreement. He has further declared that in accordance with the law of this country a decree should be entered up under section 375 of the Code of Civil Procedure —a decree which is final and against which an appeal does not lie.

The defendant appealed, and the Judges before whom the appeal came have referred to us the following question :—

[917] "Whether, when the parties to a suit have by an agreement adjusted the subject-matter of the suit, the Court can, or cannot, by an order

made in the suit, order such agreement to be recorded and make a decree in accordance with it, if one of the parties to such agreement object."

From the statement made in the order of reference it would appear that their Lordships were of opinion that by the agreement, dated the 19th May 1894, the defendant consented to a decree for an account in the suit now pending on the Original Side of this Court (being suit No. 397 of 1893) within a week from date, that is, from the 19th May 1894. The suit No. 397 is the present suit. This is quite correct, but subject to the qualification that it was an agreement not merely to consent to a decree, but an agreement in which it was also declared that several other things should be done, and it was not found that the opposite party had performed his portion or even agreed to perform. In paragraph 4 of the reference it is stated that the point is to be decided under section 375 of the Code of Civil Procedure, whether the Judge in the Court below was justified in having the agreement brought in and recorded, and in making a decree for an account in accordance with paragraph 2 of the above agreement. This is subject to the same qualification to which I have just referred, namely, that it was not a single agreement in regard to the suit, but an agreement for many things to be done.

The Judges referring this question agreed in the view adopted by the Court below; they disagreed with the decision reported in *Harasundari Debi* v. *Dukhinessur Maha* (I. L. R., 11 Cal., 250), and referred the question to a Full Bench.

It will be noticed that the question referred to the Full Bench does not in so many words refer to section 375 of the Code of Civil Procedure, and it was argued at the bar that it was unnecessary to decide any question in regard to this section so far as this suit is concerned. Looking, however, at paragraph 4 of the reference I think we must take two points into consideration: first, whether the judgment in this case is a judgment under section 375 of the Code, and, secondly, if it is not such a judgment whether it can be supported on any other grounds.

[918] In order to narrow the issue which was raised in this case, it is necessary to review the position which it assumes before us. The real question to be tried is this: Where in a suit for account on a *kabuliyat*, an agreement to consent to a decree for account is brought in, and the defendant objects to the jurisdiction of the Court and pleads limitation, and admitting execution of the agreement refuses to consent to a decree upon it under section 375, whether the Court can, under that section or any other law in force, decree specific performance of one clause of the agreement, and, furthermore, decree it in such a manner as to make the decree final and not open to appeal. That is the point which arises in this case and nothing else. For I conceive that no question of law could be decided by this Full Bench, unless the Judges considered that it arose in the suit.

In regard to the question referred to the Full Bench it was argued on behalf of the appellant that a final decree under section 375 cannot be made in a suit where there is any contest between the parties as to the agreement or the nature of it. It was further contended on behalf of the appellant that, even if this view of the section be incorrect, a Court acting under it is not empowered to break up the contract between the parties and give a decree upon a portion of it from which no appeal lies, leaving the remaining fragments of the agreement to be enforced or not enforced as the law directs. It was further contended on his behalf that this section had no application where the agreement provided for matters beyond the purview of the suit, and, in the latter case, the parties to the agreement should be left, as they were in similar cases by the High Court of Chancery, to settle the matters in a suit for specific performance.

In regard to the first portion of the argument the appellant asserted that in all cases under the Code, where any question of contest arises, there is a procedure set out by which that contest may be decided, and he referred to sections 150, 150*A*, 151, 153 and 157*A*, as instances. He also pointed out that under section 379, when satisfaction of a decree is entered up, it must be done in a certain manner. From this it was argued that as section 375 does not provide for any contest between the parties, a decree under that section cannot be made, unless the parties or their representatives apply in open Court **[919]** and submit to the terms of the agreement which should be entered up and recorded in a decree, and that there is a distinction between a consent decree on a compromise out of Court and a decree entered upon a compromise in Court—*Ram Sahai Singh* v. *Dhunookdharee Singh* (1 W. R., 266), *Aushootosh Chandra* v *Tarapiasanna Roy* (I L R., 10 Cal, 610). He submitted further that it gives no power to a Court to break up an agreement between the parties unless by consent at the time of judgment, and make a decree which would be final in respect of a portion of it, which in this case could not be done even in a suit for specific performance.

On the other side it was argued that there is no such limitation in the words of the section, that it applies equally well in cases of compromise out of Court or in Court, for litigants may at any time enter up a consent decree; that the Code must be construed as any other document—*Bank of England* v. *Vagliano Brothers* [L. R., (1891) A. C., 107], that the words "lawful agreement" show that the Court must have some means of determining whether an agreement is lawful or not, and that even when the engagement contains a number of items, whether they all refer to the suit or not, the Court can pick out any one of them and give a decree for it alone under section 375. It was further argued that even if section 375 did not apply to this case still under the equity procedure of this Court on the Original Side, the Court has the power to decide the case on motion.

It is conceded by both parties that the equitable jurisdiction of this Court on its Original Side is that of the High Court of Chancery in England. Neither party contends that the additional powers given to the Supreme Court of Judicature in 1873, or afterwards by Statute, has any application to this case, and this is of importance, because I think it will be seen that in most of the cases decided under section 375 the Judges were greatly influenced by the idea that the Courts in India, from the highest to the lowest, had all the powers of the Supreme Court of Judicature in England.

Section 375 of the Code, as is pointed out in *Harasundari Debi* v. *Dukhinessur Malia* (I. L. R., 11 Cal., 250), is only a modification of section **[920]** 98 of Act VIII of 1859. The relation of that section to the previous law and the old Regulations has been pointed out in the case of *Konnapalen Uthatchadayan Haji* v *Perotta Meloden Ramen Nambiar* (4 Mad. H. C., 422) which will be referred to hereafter.

Section 98 runs as follows: "If a suit shall be adjusted by mutual agreement or compromise, or if the defendant satisfy the plaintiff in respect to the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the suit shall be disposed of in accordance therewith. On the application of the plaintiff reciting the substance of such agreement, compromise or satisfaction, the Court, if satisfied that such agreement, compromise or satisfaction has been actually entered into or made, shall grant a certificate to the plaintiff authorizing him to receive back from the Collector the full amount of stamp-duty paid on the plaint, if the application shall have been presented before the settlement of issues, or half the amount if presented at any time after the settlement of issues and before any witness has been examined.

Provided, however, that no such certificate shall be granted, if the adjustment between the parties be such as to require a decree to pass on which process of execution can be taken out."

The latter portion of section 98 was modified by Act X of 1862, section 26, and by section 9 of Act XLII of 1860. Act X of 1862, section 26 runs as follows: "In modification of so much of section 98 of the Code of Civil Procedure as declares that on the application of the plaintiff reciting the substance of any agreement, compromise or satisfaction in accordance with which a suit is adjusted and disposed of, the Court, if satisfied that such agreement, compromise or satisfaction has been actually entered into or made, shall grant a certificate to the plaintiff, authorizing him to recover back from the Collector the full amount of the stamp-duty paid on the plaint, if the plaint shall have been presented before the settlement of issues, or half the amount if presented at any time after the settlement of issues and before any witness shall have been examined, it is enacted that if such application shall have been presented before the suit is called for the settlement of issues, or in suits in which [921] the summons to the defendant shall be for the final disposal of the suit, as directed in section 41 of the same Code, and in section 9 of Act XLII of 1860 (for the establishment of Courts of Small Causes beyond the local limits of the jurisdiction of the Supreme Courts established by Royal Charter) before the hearing of the suit has commenced, the Court, if satisfied that such agreement, compromise or satisfaction has been actually entered into or made, shall grant a certificate to the plaintiff authorizing him to receive back from the Collector half the amount of the stamp-duty paid on the plaint. Provided that no such certificate shall be granted if the adjustment between the parties be such as to require a decree to pass, on which process of execution can be taken out, or in any appealed suit"

The first question necessary to decide is what was the view which the Judges took of section 98 of Act VIII of 1859. Did it apply to agreements out of Court or in Court; whether it covered a contest or not; whether it justified, as has been contended in the present case, the Court in entering up a decree under that section, on one clause of an agreement which related to several matters, some of which were and some were not connected with the suit in question; what was the practice in entering up a decree.

The earliest decision I can find on this point is the case of *Bishtoo Chunder Roy Chowdhry* v. *Parbutty Debia* (Marsh., 274). In that case both parties filed, according to the well-known practice of the Courts in the Mofussil, petitions of compromise, and the only question was as to the amount of stamp duty to be refunded. The decision is of little importance except as a guide to what was then the practice—See *Luchmun Ram* v. *Watson & Co.* [W. R. Gap. No. (1864) 146].

The next case is that in 1 Madras High Court Reports, 127. In that, too, the compromise effected was after suit brought and in open Court.

Following this is the decision in the case of *Konnapalen Uthatchadayan Haji* v. *Perotta Meloden Ramen Nambiar* (4 Mad. H. C., 422), to which I have already referred. That was a decision of BITTLESTON and INNES, JJ., one, if not both, having been Judges of the Supreme [922] Court. Their interpretation of the section was as follows: "That section provides that, if a suit shall be adjusted by mutual agreement or compromise, such agreement or compromise shall be recorded, and the suit shall be disposed of in accordance therewith, and the question is whether this suit was adjusted by mutual agreement or compromise, so that it could be disposed of in accordance therewith. We think that what is meant by this language is, that the parties should agree upon some terms respecting the subject-matter of the suit which are capable of being

embodied in a decree whereby the suit would be disposed of. In the present case there certainly was no such agreement, but only an agreement that, if the defendants should do certain things, a decree should be passed in favour of one party, and if they should fail to do those things then in favour of the other party, so that what decree should be passed would depend upon the result of an inquiry, whether subsequently to the agreement certain acts had or had not been performed. The suit was not adjusted by the agreement, and the decree which was passed was admittedly not a decree by consent. It was a decree passed against the strong objection and protest of the third defendant, the present appellant, and we think that having been given without any investigation of the merits and not in accordance with any procedure sanctioned by law, it must be set aside, and the case restored to the file of the Principal Sudder Amin for investigation on the merits."

In this case the compromise was filed in Court.

This decision was considered in 1879 by the Madras High Court in the case of *Vasudeva Shanbog* v. *Naraina Pai* (I. L R., 2 Mad., 356), and the view taken in it was confirmed. In that case the Judges said:—

"After the Code of Civil Procedure became law, the Regulation (III) of 1802 was repealed by Act X of 1861; and, alluding to this fact, the High Court ruled that the sections relating to the settlement of suits by oath, when the parties mutually consent to that mode of settlement, being repealed, the Courts no longer possess the power of following that procedure, though there is nothing to [923] prevent the Courts, if they have the means, from facilitating a settlement of this nature by the parties by satisfying themselves that the necessary conditions are fulfilled. The proper procedure under this proviso was to examine the parties concerned after the oath is taken, to see that if the consent, originally expressed conditionally, was still adhered to, and then to pass a judgment by consent; but if the consent was then withdrawn, the Courts had no alternative, as held in *Konnapalen Uthatchadayan Haji* v. *Peiotta Meloden Ramen Nambiar* (4 Mad., H.C., 422), but to dispose of the case in the regular way."

The same decision was followed in *Muhammad Zahur* v. *Cheda Lal* (I. L. R., 14 All., 141). In that case the Judges decided that no decree could be entered up under section 375 of the present Code, where something else had to be done, such as examining a witness.

This too explains the remark of their Lordships of the Judicial Committee of Her Majesty in Council in the case of *Abdool Ali* v. *Mozuffer Hossein Chowdhry* (16 W. R., P. C., 26), in which they say: "If there really had been an honest compromise made, the practice of the Courts is quite plain as to how that compromise ought to have been carried out; it ought to have been carried out by proper deeds and filed in Court, particularly where infants were concerned, so as to have had the assent of the Court at the time instead of its being totally concealed from them."

In short, the whole course of decisions under section 98, Act VIII of 1859, show without dissent that a compromise should under the proper practice be made by two deeds called a *razinama* and *satinama* and recorded in Court. But when parties did not enter into any such documents, but appeared in Court and consented to a compromise, the Judge could record it and give a decree thereon, though this was irregular. Further still, if the consent was withdrawn or something required to be done by the Court, the suit must be decided as a contentious suit. Further still, if the agreement contained terms giving relief in the alternative or referred to matters outside the suit, it did not fall within the section. I may add that the last view has been taken by a Division Bench of this Court in the case of *Fajaleh Ali Meah* v. *Kamaruddin Bhuya* (I. L. R., 13 Cal., 170) that section 375 of the present Code refers

[924] only to a compromise which adjusts a suit wholly or in part, and not to one which goes beyond the suit. If this view be correct, it is clear that the compromise in the present case cannot be enforced under section 375 of the present Code.

And the reasons for these decisions are, I think, obvious. Act VIII of 1859 was an Act to simplify the procedure of the Civil Courts in the Mofussil, and did not apply to Courts established by Royal Charter, so Judges, considering that no change in the law was intended, followed the decision of the Sudder Dewani of 1851 in regard to compromises in Courts where agreements could not be enforced by motion. It was not till the High Court was established that Act VIII of 1859 affected the Original Side of this Court, and even then section 98 did not apply—*Barrow* v. *Pollock* (1 Hyde, 149).

In the case referred to, *Mehadi Ali* v. *Kunwar Ram Chunder* (unreported) four Judges of the Sudder Dewani decided as follows: "We are of opinion that, at any time before deeds of adjustment, withdrawal of claim, or the like which may have been filed in a Court by petition, have been brought before the Court for its order and decree in the case, a plaintiff is at full liberty on his own responsibility to recall any application which may have been made by the petition for the passing of a judgment by the Court in pursuance of such deeds, and to move the Court for an investigation of the merits of the suit. Any application preferred by a plaintiff can be withdrawn by him before the Court has taken it up and passed an order on it. It is the duty of a Court to investigate and decide on plaints laid before it, and it cannot refuse to perform that duty and hold the plaintiff bound by an arrangement which has never been completely carried out by sanction of the Court, and which for the purposes of the suit he repudiates. It is a distinct question whether the plaintiff can obtain any benefit from a decree should he gain one in his suit. Another suit may be brought against him by the adverse party to stay the execution of such a decree as well even under different circumstances, as to enforce damages against him on the ground of his being legally liable under agreements into which he may have entered. But this is matter separate from the plaintiff's right to have at [925] his own option an inquiry and award on his original plaint. Nothing can deprive him of that right, but his own act of withdrawal perfected by his acknowledgment of it in the face of the Court, and by the Court's sanction and adoption of it."

Act VIII of 1859 was repealed by Act X of 1877. It is described as an Act to consolidate and amend the laws relating to the procedure of the Court of Civil Jurisdiction. Section 98 of Act VIII of 1859 became section 375 of Act X. It ran as follows: "If a suit be adjusted by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final." This Act was repealed by Act XIV of 1882, in which section 375 runs as follows: "If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final so far as it relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction."

A comparison of these sections with section 98 of Act VIII will show how small is the difference between them, and even that difference does not refer to procedure but only to the scope of the section.

I do not feel any difficulty in dealing with the case of the *Bank of England* v. *Vagliano* [L. R., (1891) A. C., 107]. In the middle of page 145 of the report Lord HERSCHELL says that he is far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of a provision of doubtful import, or where words have acquired a technical meaning. This latter remark, I think, applies to the word "compromise" under section 98 of Act VIII of 1859. Nor does it seem to me that any argument can be based on the words "lawful agreement."

[926] This was the law even before Act VIII of 1859 was in existence, as may be seen from the case of *Gregory* v. *Cochrane* (2 Moore, 181).

I will now turn to the cases referred to by the Judge in the Court below. Two classes quite distinct in their nature appear to have arisen—one where an agreement is set up and there is a defence which goes to show that the suit as laid in the plaint should be dismissed; the other, like the present case, where an agreement is brought into Court and performance is given of it in whole or in part.

The judgment in *Fajaleh Ali Miah* v. *Kamaruddin Bhuya* (I. L. R., 13 Cal., 170) appears to show that the Judge in the Court below is under a mistake in supposing that WILSON, J., ever held that one clause of the agreement, such as there is in this suit, could be brought in and specifically performed under section 375. Nor does the decision of Mr. Justice TREVELYAN support the present judgment. In a suit for partition, the parties agreed to divide the property in a certain way, one of them receded from the agreement, and Mr. Justice TREVELYAN, though considering the decision in *Ruttonsey Lalji* v. *Poori Bai* (I. L. R., 7 Bom, 304) good law, decided the case on the authority of *Pryor* v. *Gribble* (L. R., 10 Ch. App., 534). I concur in that decision. The case of *Chogemull* v. *Kuppur Chand* (unreported), I understand from Counsel at the bar, was settled out of Court. With reference to the Court-minute which porports to be an expression of the opinion of the Judge in the case of *Krishna Bibi* v. *Debi Pershad Agrwallah* (unreported) I am not aware what was the result of that case or whether any decree was entered up. I am inclined to think, although with some hesitation, that a Court-minute of the Judge's opinion is not a judgment. Neither the decree nor the nature of the suit is given

I now turn to the cases in the other Courts. The first case relied on is to be found in *Ruttonsey Lalji* v. *Poori Bai* (I.L.R., 7 Bom., 304).

In that case the suit was brought to restrain the defendants from building a projected house in such a way as to interfere with the plaintiff's enjoyment of light and air. While the suit was pending a compromise was entered into outside the Court between the plaintiff and the first defendant in regard to the suit, and also in [927] regard to the rights of the parties to a lane close by. When the decree was to be entered up, the plaintiff declined. A rule was taken out calling upon the plaintiff to show cause why the compromise should not be entered up under section 375 of the Code of Civil Procedure, and on the rule coming on for hearing the Judge said that he had not been able to find any instance of the application of this section. He dealt with it as a case of first impression, and looking to the powers given by Statute to the Supreme Court of Judicature in England, he thought that section 375 should be interpreted largely, the result of which would be to give the Mofussil Courts in this country even greater powers than the High Court of Judicature in England possessed. With great respect to the Judge I think the statutory powers given to the Supreme Court of Judicature in England is not a safe basis on which to interpret section 375 of the Code. No Advocate in this Court would argue it. One thing also seems to have been forgotten in that case, namely,

that whether an agreement is enforced by suit or by motion in England, the result is not the same as in this country. If section 375 applies to any contested matter, the result is that the decree is final and the losing party has no relief. The history of this section was not discussed, and the Judge thought it was the outcome of the Act of 1873 in England, whereas I think it was an application of the very limited powers given to the Mofussil Courts to the Original Side of the High Court.

Let me put this point in another way. So long as the Supreme Court existed, an applicant could not appeal to Act VIII of 1859, for that Act was only an Act to simplify the procedure of the Civil Courts in the Mofussil and had no application to the Supreme Court. The High Court in administering the equitable jurisdiction of the Supreme Court possesses no more powers than those of the Supreme Court, and can do no more than that Court could. It cannot appeal to Act VIII of 1859. When by the Act of 1877 the modified section of Act VIII of 1859 was made applicable to the High Court, the Court exercising the equitable jurisdiction of the Supreme Court could not appeal to it any more than the Supreme Court could. The two systems of procedure were separate and perfectly distinct. The High Court could proceed on one or the other, but could not mix them up.

[928] The next case is that of *The Goculdas Bulabdas Manufacturing Company* v. *Scott* (I.L.R., 16 Bom., 202). In that case the same line of argument was followed. Several decisions under the statutory powers given to the Supreme Court of Judicature in 1873 were referred to, and it was considered that the Legislature in this country had given all the Courts in India larger powers than the Legislature in England had given to the Supreme Court, and that the Court could enforce by motion an agreement entered into out of Court and give a decree under section 375 from which there lay no appeal. Following those decisions the Bombay High Court in the case of *Samibai* v. *Premji Pragji* (I. L. R., 20 Bom., 304) decided that section 375 applied to a suit where the case had been submitted to arbitration and an award arrived at. I confess that I should have some difficulty in holding that an agreement and a judicial decision such as an award falls within the terms of section 375

I now turn to the decisions of the Madras Court. In the case of *Karuppan* v. *Ramasami* (I. L. R., 8 Mad., 482), the plaintiff sued the defendants to compel them to execute a conveyance of certain lands. The defendants pleaded that the matter in dispute had been settled by agreement executed by the plaintiff to the effect that he transferred the lands to the defendants and undertook to have the suit dismissed on a petition for withdrawal. The Munsif held that as the defendants had performed their part of the agreement, the plaintiff must be held by the agreement, and dismissed the suit. The District Judge reversed the decree on the ground that as both parties did not consent in Court, it could not be looked upon as a compromise. The High Court, following the case of *Ruttonsey Lalji* v. *Poori Bai* (I. L R., 7 Bom., 304), held that the Judge should try whether the engagement should be entered up and then apply section 375 of the Code. In that case the defendants set up a document destructive of the cause of action set forth by the plaintiff, and I can see no connection between that suit and the present, but, as at present advised, I do not think it was a case under section 375.

A much more important case is that of *Appasami* v. *Manikam* (I. L. R., 9 Mad., 103) decided by the same Judges. In that case their Lordships **[929]** dissented from the view taken in the case reported in *Harasundari Debi* v. *Dukhinessur Malia* (I. L. R., 11 Cal., 250), and considered that such portion of the judgment as referred to section 375 was an *obiter dictum* as the case could

have been decided on other grounds. I am not aware of any authority, except this case, which says that where several reasons are given in a judgment for disposal of a suit, and each and every one of those reasons supports the decree, a Judge can pick out any one of those reasons more than others and say it is an *obiter dictum*. Since the decision of Her Majesty in Council in the case of *Run Bahadur Singh* v. *Lucho Koer* (I. L. R., 11 Cal., 301 : L. R., 12 I. A., 23) it appears to me difficult to support any such contention. ' Their Lordships then seek to deal with the case very much on the lines of the Bombay case. They point out that the English Courts have certain powers, and say that, in their opinion, section 375 has given larger powers to the Courts in this country. Their Lordships refer to the fact that section 375 is a modification of section 98 of Act VIII of 1859; but I cannot find that any reference has been made in their judgment to the numerous cases decided under that section or to the history of it.

The next case is that of *Venkatappa Nayanim* v. *Thimma Nayanim* (I. L. R., 18 Mad., 410). In that case a suit was instituted for partition of a zemindari and an agreement was filed providing for the settlement of the dispute and many other things. The first Court decided the case under section 375. In the High Court the Judges approved of the decision arrived at in the case of *Ruttonsey Lalji* v. *Poori Bai* and divided the case into two parts allowing the appeal as to so much of the agreement as did not refer to the suit but not as to the other portion. Their Lordships disagreed with the ruling of WILSON, J., in *Fajaleh Ali Miah* v. *Kamaruddin Bhuya* (I. L. R., 13 Cal., 170).

I have already pointed out what the invariable practice was under section 98 of Act VIII of 1859. Not one of the cases decided either by the Madras or Bombay High Court has dealt with that question. The grounds of decision in those cases were greatly based upon the powers given by Statute to the English Courts. They do not seem to have realised that originally the section only [930] applied to Mofussil Courts where motions were unknown, and they do not take notice of the fact that, although the Supreme Court of Judicature could enforce an agreement by way of motion, still it was not bound to do so, and that if it did so by way of motion the judgment would not be final. According to the interpretation they have put upon section 375, the Judge has in a contested case no option but to give a decree, and that decree is final. I regret to say that I am not prepared to agree in that conclusion. It appears to me that their Lordships have combined two distinct forms of procedure which have come down from different Courts and created a third which never existed in any Court. In my opinion section 375 does not apply to such a case.

The reference, however, is not expressly confined to a discussion as to whether the Court can enter up such a decree under section 375 of the Code. It is to the effect that whether, when parties to a suit have by an agreement adjusted the subject-matter of the suit, the Court can or cannot, by an order made in the suit, order such agreement to be recorded and make a decree in accordance with it, if one of the parties to such agreement objects. I think that question depends upon the powers given to this Court under the Letters Patent. There are several cases both in this High Court and the High Court in Madras, decided by Judges who were Judges of the Supreme Court, in which it has been held that where the Code does not provide for a matter arising in a suit the Court must adapt the procedure of Courts of Equity, and that, in the present case, means that they must follow the procedure of the High Court of Chancery in England, *Suroop Chunder Hazra* v. *Troyloko Nath Roy* (9 W. R., 230); *Clark* v. *Ruthnavaloo Chetti* (2 Mad. H. C., 296); *Kistnasamy Pillai* v. *Municipal Commissioners for Madras* (4 Mad. H. C., 120).

The power of that Court is set out in the judgment of JAMES, L. J., in *Pryor* v. *Gribble* (L. R., 10 Ch. App., 534), and amounts to this, that as a matter of practice where the agreement is simply in regard to the subject of the suit and nothing more, the Court would enforce it by motion.

My answer then to the question is: *1st.*—That this is not a [931] case under section 375 of the Civil Procedure Code at all. *2nd.*—That the High Court on its Original Side exercising the equitable jurisdiction of the High Court of Chancery would not, on a contested motion, give a decree of this nature

Trevelyan, J.— I agree with the judgment delivered by the Chief Justice.

Beverley, J.—Assuming that the question referred to the Full Bench is restricted to the case of an order which purports to be made under section 375 of the Code, I am of opinion that the question should be answered in the negative.

With all due respect to the learned Judges of this Court and of the High Courts of Madras and Bombay, who have taken a contrary view, I am inclined to think that the case of *Harasundari Debi* v. *Dukhinnessur Malia* (I. L. R., 11 Cal., 250) was rightly decided.

Section 375, in my opinion, applies only to a case in which the adjustment or satisfaction is made in Court, and cannot and ought not to be extended so as to specifically perform agreements made out of Court.

Apart from the considerations which have been discussed in the judgment of Mr. Justice O'KINEALY (a judgment in which I fully concur) it seems to me that there are three main reasons why this view of the section is to be preferred.

(1). In the first place the section makes no provisions for any inquiry in a case in which one of the parties resiles from an agreement which he has made out of Court. Assuming that the section applies to such a case, if the agreement is brought into Court, the Court must under the strict language of the section record it as a matter of course and make a final decree upon it. It seems to me to follow that the section was not intended to apply to cases in which an inquiry would be admittedly necessary.

(2). In the next place the agreement made out of Court may refer (as in the present case) to other matters besides that of the adjustment of the suit, and it is difficult to believe that the Legislature ever intended such an agreement to be specifically performed by a final decree in respect to one of its provisions, [932] while the parties were left to enforce the other provisions by a separate suit.

(3). Lastly the fact that the decree to be made upon the adjustment is to be final shows to my mind that the Legislature contemplated that the parties to the adjustment should be assenting parties to the decree at the time it is made

The word "adjusted" in this section means in my opinion *adjusted in Court*. If the intention was that an agreement made out of Court might be brought into Court to be converted into a final decree, the language of the section would I conceive have been worded very differently It would then have run in some such form as this :—

"If the parties agree that a suit shall be adjusted, etc" The use of the words "if a suit be adjusted" convey to my mind the idea that the adjustment must be by consent at the time of the decree.

Banerjee, J.—The question referred to us for decision is, "whether when the parties to a suit have by an agreement adjusted the subject-matter of the suit the Court can, or cannot, by an order made in the suit, order such agreement to be recorded and make a decree in accordance with it, if one

of the parties to such agreement object." The question is asked evidently with reference to section 375 of the Code of Civil Procedure, and the answer to it in my opinion should be this, that the Court can under section 375 of the Code of Civil Procedure order the agreement to be recorded and make a decree in accordance therewith, if after hearing the objection raised it disallows the same.

Examining the language of the section, as we must in the first instance do in construing it (see *Norendra Nath Sircar* v. *Kamalbasini Dasi*, I. L. R., 23 Cal., 563), I find it very difficult to take this case out of its scope. The question put to the Full Bench assumes that the suit has been adjusted by a lawful agreement, and if that is so, the case comes within the section unless there is anything in the context or in reason to show that the section is not intended to apply to any case in which one of the parties to the agreement objects to its being recorded. Mr. *Hill* for the appellant contends that there are reasons suggested by the letter of the section as **[933]** well as by its spirit why the section should be limited in its application to cases in which both parties consent to the agreement being recorded. The reasons urged by him may be shortly stated thus :—

In the first place, the section only provides that the agreement, compromise or satisfaction shall be recorded, but it contains no provision such as we find in certain analogous sections of the Code, namely, sections 150, 151 and 523 for notice to parties or determination of these objections, and this shows that section 375 was intended to apply only to cases where all parties consent to the agreement, compromise or satisfaction being recorded.

In the second place, the section directs the Court to pass a decree in accordance with the agreement so far as it relates to the subject-matter of the suit, thus indicating that in making the decree the Court may have to split the agreement into parts and give effect to only one of such parts, namely, that which relates to the subject-matter of the suit, a mode of dealing with agreements which is neither usual nor just; and this shews that the section is intended to be limited to cases in which all parties consent to the decree being made.

In the third place, the section makes the decree passed in accordance with a compromise final, and this shews that a decree under this section is intended to be made only when all parties consent. For if it were otherwise, the determination of the objections raised by the non-consenting party, which may involve difficult and intricate questions of fact and law, would not have been made final.

In the fourth and last place, if this section were to have the operation contended for by the respondent, the party who is sought to be bound by the agreement will lose the benefit of the discretion which the Court might have exercised in his favour in not decreeing specific performance, if a suit for specific performance of the agreement had been brought.

These points have been considered to some extent in *Harasundari Debi* v. *Dukhinessur Malia* (I. L. R., 11 Cal., 250) cited for the appellant, and very fully in *Goculdas Bulabdas Manufacturing Co.* v. *Scott* (I. L. R., 16 Bom., 202) relied upon by the respondent.

[934] I do not think that much weight should be attached to the first mentioned reason. If the absence of any provision in the section for the determination of objections suggests an inference that the section is intended to apply only to cases where no objection is raised, the strength of the inference must be very slight, seeing that there is room for a contrary inference, namely, that where the Court is directed to pass a certain order, it has by implication power to determine all necessary matters to enable it to pass that order. And

in the present instance the strength of the inference sought to be raised is wholly counter-balanced by the fact that the Court must in any case determine at least one question, namely, whether the agreement or compromise is lawful.

The second reason is no doubt entitled to more consideration. Where an agreement or compromise involves many and complicated matters, some only of which relate to the suit which is sought to be disposed of in accordance with it, and one of the parties does not consent to a decree being made upon it, the Court may have to perform a difficult and delicate task in passing a decree under section 375. But is the difficulty of the task a reason why it should not be performed? And is the difficulty removed by requiring the party seeking to enforce the agreement to bring a fresh suit? No doubt in such fresh suit the Court may deal with the entire agreement, but so may it do in the suit which is sought to be determined in accordance with the agreement; and if it finds that the agreement is such that it will be inequitable to deal separately with that part of it which relates to the suit, while other parts of it remain to be performed by the opposite side, it may either refuse to make a decree in the suit on the ground that the suit has not been actually adjusted, but there has been only an agreement to adjust it, or it may make a conditional decree relating to the subject-matter of the suit to be carried into execution only upon the other side performing his part of the agreement. The second reason too does not therefore stand in the way of our adopting the view I take.

Nor is the third reason of any greater effect in controlling the scope of the section. Finality under section 375 attaches to [936] the decree as pointed out by TELANG, J., in the case of *Gokuldas Bulabdas Manufacturing Co.* v. *Scott* (I. L. R., 16 Bom., 202), only so far as it is in accordance with the agreement, compromise or satisfaction, an appeal being allowed so far as questions such as whether there has been any agreement, compromise or satisfaction, whether the same is lawful or not, and whether the decree is in accordance therewith or not are concerned, upon the same principle as that upon which appeals have been allowed in cases in which decrees are made under section 522 — see *Joy Prokash Lall* v. *Sheo Golam Singh* (I. L. R., 11 Cal., 37).

With reference to the fourth and last reason relied upon by Mr. *Hill*, in addition to what has been said by TELANG, J., in *Gokuldas Gulabdas Manufacturing Co.* v. *Scott* (I. L. R., 16 Bom., 202), I may observe that the Legislature might have thought it unnecessary to leave the enforcement of an agreement by which a pending suit is adjusted in the discretion of the Court in the same way as the granting of a decree for specific performance of an ordinary agreement is left, for this simple reason that an agreement to adjust a pending suit is less likely to be entered into without full realisation of its consequences and without legal advice than any other agreement.

While thus the main reasons urged in favour of the limited construction of section 375 are insufficient and inconclusive, the reasons in support of the opposite view appear to me to be far more cogent. I have already observed that the language of the section is entirely in favour of that view. If the object of section 375 had been simply to authorize the Court to make decrees by consent of parties, the Legislature could very easily have said so in a few plain words, instead of employing what in that view was mere periphrasis, and omitting altogether to use the words "by consent of parties." Again, while provision is made in the Code for the adjustment or satisfaction of a decree made out of Court, being recorded by the Court at the instance of either party, notwithstanding that the other party may not consent (see section 258), there would be no provision for recording the adjustment of a suit before decree if

section [936] 375 is to receive the limited construction put on it by the appellant. This, I think, would be an unreasonable view. It is said that there can be nothing wrong in this, as the party seeking to enforce the agreement or compromise can always bring a separate suit for that purpose. But what is the advantage gained by that procedure? The pending suit will have to be stayed until the suit brought for enforcement of the compromise is disposed of, and then if the latter suit is decreed, the former will have to be decreed separately in terms of the compromise. The construction I adopt leads to the same result and avoids multiplicity of suits.

That construction has been invariably adopted by the High Courts of Bombay and Madras as the cases cited in the referring order show, and also by this Court on the Original Side as is shown by the unreported cases cited in the argument.

Upon reason and authority, therefore, I think the construction contended for by the respondent is correct, and I would respectfully dissent from the decision in *Harasundari* v. *Dukhinessur Malia* (I. L. R., 11 Cal., 250) so far as it takes the contrary view.

Attorneys for the Appellant: Messrs. *Sen & Co.*

Attorney for the Respondent. Babu *N. C. Roy*.

H W.

NOTES

[I The Court has power to inquire and determine whether there has been a compromise —(1910) 6 I C 857 (All), (1903) 31 Cal, 357 8 C.W N, 197, (1912) 15 Bom. L R 340

See also (1901) 5 C.W N, 877.

As regards the analogous case of arbitration, see also (1911) 21 M.L.J., 990; (1898) 25 Cal, 757

The C P.C. 1908, O 23, r 3 gives effect to decisions like this by substituting these words, "*where it is proved to the satisfaction of the Court that a suit has been adjusted*", etc.

II. "The cases in (1902) 26 Bom, 76, (1897) 24 Cal., 908, (1901) 24 Mad., 316 are clear authorities for the proposition that a private reference to arbitration in a pending suit followed by a lawful award is a lawful agreement, compromise and adjustment under sec. 375, and effect ought to be given to such an adjustment in the suit so far as the award relates to the suit. There are certain remarks in the nature of *obiter dicta* by BEAMAN, J., in (1909) 33 Bom, 69. 10 Bom. L R., 366 tending to throw doubts on the validity of the reasoning in the above three decisions, but we need only remark that we are unable to take the view that the reasoning of the learned Judge has displaced their authority. Whether a mere agreement to refer to arbitration will in itself be an adjustment under Section 375 so that a *decree* might be passed under the section referring the suit to arbitration as per the agreement (as distinguished from a mere order of reference under section 506 C.P.C., 1882, on application of the party) is a doubtful question though the Privy Council has accepted such a decree as a proper decree and as putting an end to the suit (see 33 All, 743; and also the observations of HILL, J, in (1903) 30 Cal, 218) but it is unnecessary to go into that point in this case where an award has followed the reference" —(1912) 23 M.L J, 290]

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PRIVY COUNCIL.

The 10th March and 7th April, 1897.

PRESENT

LORDS WATSON, HOBHOUSE AND DAVEY, AND SIR R. COUCH.

Modhu Sudan Singh... . .Plaintiff

versus

E. G. Rooke .. .. .Defendant.

[On appeal from the High Court at Fort William in Bengal.]

Landlord and Tenant—Recognition of an under tenure by the Zemindar—Result of his receiving rent in respect of it—Deposit of rent by tenure-holder under Bengal Tenancy Act (VIII of 1885), section 61, and acceptance by Zemindar—Hindu widow, Lease granted by, while in possession of widow's estate.

A widow in possession of her widow's estate in a zemindari made a grant of a *putni* tenure under it to a lessee at a rent In this suit brought by the reversionary heir, on her death, with the object of having the grant set aside as invalid as against him, the *putni* lease was not proved to have been made with authority or from necessity justifying the alienation by the widow.

Held, that the *putni* was on the death of the widow only voidable, and not of itself void; so that the plaintiff, the next inheritor of the zemindari, might then elect to treat it as valid.

The plaintiff had done so He had accepted rent in respect of the tenure, as that tenure was specified in a petition which accompanied the *putnidar's* deposit of the rent in a Court, under the Bengal Tenancy Act (VIII of 1885), section 61 This was *primâ facie* an admission that the *putni* was still subsisting In the absence of evidence to put a different construction upon the plaintiff's act, and to negative its effect, there was a sufficient *primâ facie* case of an election to affirm the validity of the *putni*.

APPEAL from a decree (17th August 1894) of the High Court, reversing a decree (25th February 1893) of the Subordinate Judge of Burdwan.

[2] The plaintiff, now appellant, was the zemindar of the Pandra raj estate in Manbhoom, which he inherited as collateral heir to Raja Sagar Narain Singh, who died in 1847, leaving a widow, Rani Hingun Kumari, upon whose death in 1881 the plaintiff inherited the zemindari. The defendant, Mr. Rooke, was holder of a *putni* tenure in two villages granted to him by the widow on the 26th January 1864, at a rent of Rs. 475 a year, and for a premium of Rs. 2,525 Both the Courts below had found this grant to have been made by the widow without authority, or legal necessity. The first Court, for this reason, had set aside the grant, and decreed the claim for *khas* possession in favour of the plaintiff. The High Court, on appeal, had, however, decided that the suit must be dismissed, as the defendant had become tenant to the plaintiff from year to year to the end of each year, and no notice had been given terminating the relation between the parties.

The question on this appeal was whether by reason of the plaintiff's having taken out of Court and accepted rent from the defendant for the year 1887-1890, the plaintiff had recognized and admitted the *putni* lease, so as to disentitle himself to contest its validity.

The succession to the Pandra estate was regulated by the customary law, whereby the eldest son in the eldest branch succeeded, excluding others.

Their Lordships' judgment states all the facts of this case.

The widow was engaged in litigation from 1849 to 1853 against her late husband's brothers, resulting in her obtaining a decree for her widow's estate in half the zemindari. The present appellant on succeeding to the zemindari defended the suit –*Periag Singh* v. *Modhusudan Singh*, decided in 1888 by the High Court in favour of the present appellant, who maintained his title in proceedings which lasted from March 1882 to April 1887. In that case the Court considered whether Pandra was by custom an impartible zemindari, and whether it was by custom inheritable according to lineal primogeniture, deciding in the affirmative. A Receiver had been appointed during the litigation.

The respondent on the 10th September 1890, under the [3] Bengal Tenancy Act (VIII of 1885), section 61, paid Rs. 1,043 into Court as rent for the Bengali years 1295 and 1296 with cesses from 1294, stating in his petition that the rent had not been received, but acceptance of it had been refused by the zemindar. This sum was taken out of Court by the appellant on the 24th September following. The petitions in this matter are set forth in the judgment on this appeal.

On the 11th March 1892 the appellant's plaint was filed for possession of the two villages held by Rooke under the grant from Rani Hingan Kumari, and for two years' mesne profits. His plaint referred to the suit brought by Periag Singh, stating that until the final decision of the High Court he was not aware of the particulars connected with the villages now in dispute, and that when he attempted to take possession of them he was prevented by the defendant who claimed title under the *putni*. The plaint also contained an account of the deposit and withdrawal above stated, averring that the plaintiff had not thereby admitted any right of the defendant.

The defendant filed a written statement, in which he denied the plaintiff's title as reversionary heir, asserted that Rani Hingan Kumari had an absolute estate, and not merely that of a Hindu widow, and, in the alternative, that she had executed the *putni* under circumstances of necessity which made it binding on the estate. He also alleged that he had received no sufficient notice to quit, and relied on the receipt of rent by the Receiver and the plaintiff as barring the suit by estoppel.

The issues raised all these defences.

On the 25th February 1893, the Subordinate Judge of Burdwan decreed in favour of the plaintiff. In his judgment he found that the plaintiff was the true heir to the estate; that Rani Hingan had no greater right than that of an ordinary Hindu widow; that there was no evidence of any facts which would make the *putni* binding on her successor, and that it was invalid as against the plaintiff. He also found that the plaintiff had not recognised or ratified the *putni* by taking out the deposit. As regards the question of notice he held it to be immaterial.

On an appeal by the defendant to the High Court, a Division Bench (CHANDRA MADHUB GHOSE and GORDON, JJ.) reversed the [4] decree of the Subordinate Judge. In giving their reasons they referred to the receipt of the rent deposited by the defendant as due in respect of the *putni* in September 1889; and referred to the previous payment by the Receiver though recognition of the *putni* was beyond his power. They stated that there was nothing on the record explaining on the part of the plaintiff the circumstances under which he had received the rent; deciding that this receipt operated as a recognition of the defendant's right as tenant constituting in him some kind of tenancy which would require a notice to quit before it could be determined. As to the legal effect of the recognition of a tenant by receipt of rent, they referred to *Betts* v. *Jamie Shaik* [(1875), 23 W. R., 271], *Bunwari Lal Roy* v. *Mahima Chandra Knuall* [(1870) 4 B. L. R., Ap., 86], *Chatuni Singh* v. *Makund Lal* [(1881) I. L. R., 7 Cal., 710], *Kali Krishna Tagore* v *Golam Ali* [(1886) I.L.R., 13 Cal., 248], *Sonet Koer* v. *Himmut Bahadoor* [(1876) I.L R., 1 Cal, 391. L R, 3 I A., 92], *Drobomoyi Gupta* v. *Davis* [(1887) I. L. R., 15 Cal, 323], *Unhamma Devi* v. *Vaikunta Hegde* [(1893) I. L. R., 17 Mad, 218]. They said that in all these cases it seemed to have been held that the receipt of rent from a person, "after his lease had expired," operated as a recognition of his right as a tenant, and constituted in him some kind of tenancy.

In their view, and according to the plaintiff's case, the defendant's *putni* came to an end with the life of Rani Hingan Kumari. But the Receiver who was in charge of the estate, and afterwards the plaintiff himself, for several years received rent from the defendant After such receipt of rent, the defendant could not be treated as a trespasser The recognition of the defendant's tenancy was at least a recognition of a tenancy from year to year. The plaintiff was bound to show that by having given due notice he had determined that tenancy. He had not done so, and his cause of action was not complete. Reference was made to *Doe d. Lord* v. *Crago* [(1848) 6 C. B., 90] and the judgment concluded thus:—

[5] "In the present case, the plaintiff has not proved the circumstances under which he received the rent deposited by the defendant, and in the absence of any such proof, we should think that the plaintiff meant to treat the defendant as a tenant upon the property No doubt, the tenancy was not, in its inception, a tenancy from year to year, but we should think that, after the expiry of the lease, upon the death of the life-tenant Rani Hingan Kumari, it was quite competent to the plaintiff either to treat the tenancy as having come to an end, or to treat the defendant as a tenant of the property, and we are of opinion that the combined acts of the Receiver and the plaintiff are such as to constitute in the defendant some kind of tenancy, at least a tenancy from year to year, which required a legal determination before the plaintiff could be entitled to eject As already mentioned, the defendant, in the circumstances which have transpired, could not be regarded as a trespasser, and he could not certainly be called upon, for the reasons which have been so fully explained by NORMAN, J., in the case of *Bunwari Lal Roy* v *Mahima Chundra Knuall* (4 B. L. R., Ap., 86), to quit the property in the middle of the year. And in this connection we might refer

to section 106 of the Transfer of Property Act (IV of 1882), which requires six months' notice to be given expiring with the end of the year of the tenancy.

"For these reasons we are of opinion that the suit must fail upon the ground that, upon the date of the suit, the plaintiff had no valid cause of action.

"In the view that we have just expressed, it is unnecessary to express any opinion upon any other questions that have been raised in this case; but if we were called upon to decide the question whether the *putni* granted by Rani Hingan Kumari is valid and binding upon the plaintiff, or whether it has been ratified by him, we should be prepared to say that the defendant has not proved, the onus being entirely upon him, that the Rani was justified in granting the *putni* in question, that there was no ratification of the *putni* by the plaintiff, and it is not therefore binding upon him.

"The result is, that the suit must be dismissed and this appeal allowed; but, under the circumstances of the case, without any costs."

The plaintiff having appealed, Mr. *M. Crackanthorpe*, Q.C., and Mr. *J. D. Mayne*, for the appellant, argued that the decree of the High Court was not sound in law, and that the decree of the original Court should be restored. Neither of the Courts below had attributed to the appellant's act of withdrawing the money deposited under Act VIII of 1885, the effect of having been a recognition of the *putni* tenure. The High Court had considered that act to have been a recognition of a tenancy from year to year. The deposits, however, had been made expressly in **[6]** reference to the *putni* lease, and because, as stated in the petition, the respondent had refused to accept rent from the appellant, or to give him *dakhilas*. The appellant had taken the money out of Court without doing any act that would prevent his afterwards claiming his right to have the *putni* lease set aside, for the reason that he was entitled to take that money out of Court as payment due to him for the use and occupation of his land by the respondent. The drawing the money by the appellant should be considered as having taken place in pursuance of the latter right. There were no facts before the High Court which would have justified it in finding that the appellant had recognized the *putni* lease. Nor was there any ground for finding that the respondent was in possession as tenant from year to year. There had been a demand of immediate possession, the appellant's right having accrued on the death of the widow, and his cause of action was complete. Reference was made to the Transfer of Property Act (IV of 1882), section 106; *Doe d. Lord* v. *Crago* [(1848) 6 C. B., 90]; *Dugald* v. *McCarthy* [(1893) L. R., 1 Q. B., 736].

Mr. *C. W. Arathoon*, for the respondent, argued that the High Court was right in dismissing the suit, but submitted that there was evidence of ratification by the appellant of the *putni* in his act on the 24th September 1890 in accepting the rent. Upon this ground the suit might have been dismissed. The cause of action was, however, not complete when this suit was commenced, no legal notice to quit having been given, whether the *putni* was to be supported or not; and either according to the view that the *putni* subsisted or that the defendant was tenant on the terms found by the High Court, the suit could not succeed. The petition filed by the defendant on the 11th September 1890 showed that the rent was paid into Court from a tenant claiming to hold a *putni* right. This rent having been accepted, ratification should have been held to have taken place.

Mr. *M. Crackanthorpe*, Q.C., replied.

Afterwards, on the 7th April, their Lordships' **judgment** was delivered by

Sir R. Couch.—The suit in this case was instituted to recover possession of two villages part of the zemindari of the **[7]** Pandra Raj in the district of Manbhoom. The appellant is the heir of Raja Sagur Narain Singh, the

former owner of it, who died in May 1847, leaving his widow Rani Hingan Kumari and two brothers. The right of the widow to succeed him was disputed by the brothers, and she had to bring a suit to recover possession of an 8 annas share of the zemindari. In this she was successful, and, having obtained possession of the estate, she remained in possession of it till her death in December 1881. The appellant then took possession, and in March 1882 a suit was instituted against him by the younger of the brothers claiming as the heir of Raja Sagur Narain Singh. It was dismissed by the District Court in April 1887, and this decree was confirmed by the High Court on the 25th June 1889. In July 1882 a Receiver was appointed to take charge of the estate, and he continued to be in charge of it until the 3rd of May 1887, when he was discharged.

On the 26th January 1864, the widow granted a *putni* lease or settlement of the two villages to the respondent at an annual rent of Rs. 475, and upon receipt of a bonus of Rs. 2,525. The appellant in his suit asked to have this *putni* set aside on the ground that the widow had no legal reason or necessity for making it. This was the subject of one of the issues which has been found in the appellant's favour by the District Court and the High Court. The question upon which the Courts have differed arises from the receipt of rent by the appellant after the widow's death. For three years the rent was paid to the Receiver. The important payment is of the rent due for the native years 1295 and 1296 (1887-1890) after he was discharged.

On the 10th of September 1890 the respondent presented a petition in the Court of the Munsif of Ranigunge under Act VIII of 1885 in a rent suit in which the respondent is called "First Party" and the appellant "Second Party." It is as follows: "The representation of Mr. E. G. Rooke of Jore Janoki * * * is this: That I am in possession on *putni* right of *mouzah* Naharjore and *mouzah* Ainkura in *thana* Assensole, *purgunnah* Pandra, under the said second party at an annual rent of Rs. 475. My officer repeatedly went to pay the aforesaid rent for the years 1295 and 1296, amounting to Rs. 950 [8] and Rs. 93 cesses from the year 1294 to the year 1296, in all Rs. 1,043, into the *mal catcheri* of the said second party at Poddardihi in due time, but the rent was not received and *dakhilas* were refused. Therefore I deposit the said rent in Court, praying that it may be credited in the name of the second party, and that orders may be passed to serve a notice on him." On the 21st of September the Raja executed a *vakalutnama* by which he appointed four pleaders by name in order to file a petition and other papers and argue the case on his behalf in the rent suit and authorised them to sign his name and file petitions, etc., and take vouchers for monies in deposit. And on the 24th the following petition was filed in the rent suit--"The representation of the second party in the above case is this: My tenant, the said first party, has deposited Rs. 1,043 rent due to me. The said first party has not deposited interest, etc., and I shall take steps for the same hereafter. A voucher for Rs. 1,043 in deposit may be given for the present." None of the pleaders was called to explain how the money came to be drawn out, or to prove that there had been a mistake in doing it. There is no evidence in the case upon this matter but these documents.

In considering their effect it must be observed that the *putni* was not void; it was only voidable; the Raja might elect to assent to it and treat it as valid. Its validity depended upon the circumstances in which it was made. The learned Judges of the High Court appear to have fallen into the error of treating the *putni* as if it absolutely came to an end at the death of the widow. After referring to six or seven cases in the Indian Courts they say: "In all

these cases it seems to have been held that the receipt of rent from a person after his lease has expired operates as a recognition of his right as a tenant and constitutes in him some kind of tenancy which would require a notice to determine." Also they speak of the expiry of the lease upon the death of the life-tenant. And they hold that a receipt of rent was at least a recognition of a tenancy from year to year which required a notice to quit. The real question does not appear to have been considered by them or properly by the Subordinate Judge, who says that in the petition for the withdrawal of the rent deposit the status of the plaintiff as *putnidar* was not recognized, but [9] takes no notice of the petition depositing the money. The taking rent which was in that petition stated to be due under the *putni* was *prima facie* an admission that the *putni* was still subsisting, an election by the Raja to treat it as valid If it could have been shown that the receipt of the rent ought not to have that effect evidence bearing upon that point ought to have been adduced by the Raja. In the absence of such evidence their Lordships think there is a sufficient *prima facie* case of an election by the Raja to affirm the validity of the *putni*, and they will humbly advise Her Majesty to dismiss the appeal and to affirm the decree of the High Court which in their opinion is right, although not for the reasons given by the Court. The appellant will pay the costs of this appeal. *Appeal dismissed.*

Solicitors for the Appellant · Messrs. *Broughton, Nocton & Broughton.*

Solicitors for the Respondent . Messrs. *T L Wilson & Co.*

C. B.

NOTES.

[I. EXPLANATION BY THE PRIVY COUNCIL—

In discussing the question of limitation, the Privy Council gave this explanation of their decision in this case —

As regards the Article of Limitation to be applied, the question "is not answered by merely saying that the *ijara* was voidable only and not void In the case before this Board cited by the learned judge (25 Cal , 1) the question was whether the acceptance of rent payable under the *patni* and other circumstances afforded evidence of an election by the Raja to confirm the *patni* and treat it as valid If it was *ipso facto* void it could not of course be confirmed, and the acceptance of rent would be evidence only of the creation of a new tenancy. A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property This is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir It is true that the appellants prayed by their plaint, a declaration that the *ijara* was inoperative as against them, as leading up to their prayer for delivery to them of *khas* possession But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the defendants to plead and (if they could) prove the circumstances, which they relied on, for showing that the *ijara* or any derivative dealings with the property were not in fact voidable, but were binding on the reversionary heirs. Their Lordships are of opinion that the article in the Schedule to the Limitation Act applicable to this case is Article 141 "—per Lord DAVEY in *Bijoy Gopal* v. *Krishna Mahishi*, **(1907) 34 Cal , 329 P C** , reversing (1903) 30 Cal , 990, see also (1905) 33 Cal., 257.

See also (1901) 8 C W N , 802 ; (1905) 33 Cal , 257 where the decision was similar.

For the analogous case as between grantor and grantee, in respect of a grant for life, see (1899) 27 Cal., 156.

II. VOIDABILITY—

1. This was applied in (1901) 28 Cal., 532 5 C.W.N , 279.

2. As regards election, see also (1908) 13 C W N., 201· 8 C.L.J., 458 ; 27 Cal., 156; 34 Cal., 329.

3. It was inferred from 25 Cal., 1 and 34 Cal , 329 that the reversioner's right of election is not personal to him and that a transferee from him can exercise the right :—(1912) 16 I. C., 634 (Cal.).]

4. Being voidable, at the election of the reversioner, the alienee can recover possession from a stranger without being required to prove legal necessity, until the reversioner decides to avoid it :—(1914) 18 C.W.N., 940, see also (1914) 26 M.L.J., 600.

5. In (1910) 35 Mad., 177. 20 M.L.J., 371 it was held that the alienation by the manager of a joint Hindu family, when in excess of powers, is *void* and not merely *voidable* as is the case when the alienation is by the widow ; and so, it could not be ratified, as in the latter case · (1904) 31 Cal., 698.]

[25 Cal. 9]

PRIVY COUNCIL.

The 7th and 16th May, and 7th April, 1897.

PRESENT·

LORD WATSON, LORD DAVEY AND SIR R COUCH.

Aga Mahomed Jaffer Bindanim. ....Defendant

and

Koolsom Beebee and others... ....Plaintiffs

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and Koolsom Beebee and others .. . .Plaintiffs

versus

Aga Mahomed Jaffer Bindanim...... . ...Defendant.

[On appeal from the Court of the Recorder of Rangoon]

Mahomedan law Will—Right of childless widow—Administration of the estate of a Shiah Mahomedan under his will—Alleged gift—Claims as between his childless widow and the estate—Rights of the widow - Legacies chargeable on one-third only of the estate

A Mahomedan of the Shiah sect, dying without issue, left a widow She as his childless widow was entitled to one fourth of his estate other than land

In the administration of his estate the following matters arose, and were decided —

The handing over, with formal words of gift by the testator to the widow, of deposit receipts, with intent afterwards to transfer the money into her name at the Bank, which transfer was not effected, would not constitute a gift

[10] A commission of three per cent on the proceeds of the sale of the testator's property, directed by his will, was bequeathed to the executor This was by way of remuneration, but was in no sense a debt. As a legacy it was payable only out of one third of the estate which passed by the will.

A Mahomedan widow is not entitled to maintenance out of the estate of her late husband, in addition to what she is entitled to by inheritance, or under his will—Hedaya, Book IV, chap. 15, section 3 ; Baillie's Mahomedan Law, Imamia, p 170, referred to

No contract could be implied that this widow should pay an occupation rent on account of her *having continued* to occupy a house belonging to the testator's estate, for eleven months after his death. Her occupation was referable to her position and no notice was given to her that rent would be charged

A Mahomedan childless widow is not by Shiah law entitled to share in the value of land forming the site of buildings that belonged to her husband's estate Her one-fourth includes, as was admitted, a share in the proceeds of sale of the buildings The text quoted in Book VII, chap. IV., p. 293 of Baillie's Mahomedan Law, Imamia, is not to be construed as referring only to agricultural land

APPEAL and cross-appeal from a decree (14th September 1893) of the Recorder of Rangoon.

The suit, commenced on the 30th March 1891, was for the construction of the will, and for the distribution of the estate, of Hadji Hoosain Bindanim, who, at his death, on the 20th February 1890, owned land, with buildings on some of his land, and other property, in Rangoon. He had no issue but left a

widow, Koolsom Beebee (the plaintiff-respondent in the principal appeal and cross-appellant in the other), and some collateral relations, children of a deceased half-brother, among whom was the defendant-appellant, Aga Mahomed Jaffer Bindanim, whom the deceased by his will appointed his sole executor. Probate to this executor was delivered on the 21st March 1890

The principal dispositions made by the will appear in their Lordships' judgment.

The suit was originally brought by one Abdul Razak against the executor, with whom the widow was made a co-defendant. The widow filed in her defence a written statement of her claims against the estate. The suit of the then plaintiff was dismissed on the 5th February 1892, and this was affirmed on appeal on the 10th March 1894 in *Abdul Razak* v. *Aga Mahomed Jaffer* [11] *Bindanim* [(1893) I. L. R., 21 Cal., 666: L. R., 21 I. A., 56]. Before that final order she was, on her own petition, made a plaintiff instead of a defendant.

On the 14th September 1892 the executor filed his accounts. To these the widow objected, and on the 5th December following she filed a petition stating, as plaintiff, all her claims and contentions, which were to the same effect as in her former written statement. She stated that the bequests in the will of her husband, as a Shiah Mahomedan, could only be valid so far as they could be payable out of one-third of his estate; that she was entitled to sums amounting to Rs. 30,000 held in fixed deposit by a Bank on her late husband's account, they having been assigned by him to her as a gift; that she was entitled to have her one-fourth share, as widow, assessed upon the value of land on which houses belonging to the estate were built, as well as on the houses, which latter had been admitted to be subject to her share; that she was entitled to maintenance for one year from her husband's death; that she had been wrongly debited with rent as due from her to her husband's estate on account of her having occupied a house of his till it had been sold—a period of eleven months.

On the 21st November 1892, the Recorder gave judgment on the widow's claim relating to her right to share in the proceeds of the sale of the land as follows: –

"The plaintiff in this case is the childless widow of a Mahomedan belonging to the Shiah sect, and I have to decide now whether she is entitled to a share in the land on which certain houses belonging to her husband's estate are built. It is admitted that she is entitled to one-fourth of the pure personalty and to one-fourth of the value of the houses apart from the land. The authorities seem to me to make it perfectly clear that she is not entitled to share in the land. The law is thus stated by Baillie, Imamia, p. 295: 'Where the wife has had a child by the deceased she inherits out of all that he has left; and if there was no child she takes nothing out of the deceased's land, but her share of the value of the household effects and buildings is to be given to her. It has been said, however, that she is to be excluded from nothing except the mansions and dwellings; while Moortuza (may God be pleased with him) has expressed a third opinion to the effect that the land should be valued and her share of the value assigned to her. But the first opinion is that which appears to be best founded on traditional authority.' The correctness of this translation was impeached in *Asloo* v. *Umdutunnissa* [(1873) 20 W. R., 297], and another translation [12] was made by the Court interpreter, the material portion of which is this: 'If there be no child she inherits nothing of the land, but her share of the value of goods and buildings will be given to her.' AMEER ALI, J., in "The Personal Law of the Mahomedans," says: 'But when she has no child, or when a child was born to her, but died before the decease of her husband, then she is entitled to a fourth share in the personal estate only including household effects, trees, buildings, etc.' She takes no interest in the real estate. And in the Tagore

Lectures, 1874, the rule is thus stated : 'If there is no such child she takes nothing out of the deceased's land (*arz*), but her share of the household effects (*alat*) and buildings is to be given to her.' I think, therefore, that the widow is not entitled to share in the land."

On the 24th January 1893 the Recorder gave judgment restricting the source of the three per cent. commission bequeathed to the executor (on the ground that it was no debt, but a legacy) to a one-third part of the testator's estate. He added :—

"The law is perfectly clear that a Mahomedan cannot by a testamentary disposition deprive his lawful heirs of their share in the inheritance, nor dispose of more than one-third of his estate. It was argued that the *khoom* is a debt, and that an executor is entitled to sell as much of the estate as is necessary in order to defray debts. But the answer to this argument appears to me to be this that if a Shiah died intestate or leaving a will without a provision as to *khooms* there would be no one who could legally enforce the payment of money on this account, and I find in Mr. Justice AMEER ALI'S recent work on Mahomedan Law the statement that a bequest is lawful for, among other objects, '*Koum*' so that he does not treat it as a debt."*

Upon the question whether this widow was entitled to one year's maintenance, in addition to her share by law, the Recorder on the same date adjudged her to be so entitled on the authority of the passage in the Koran translated by Mr. Justice AMEER ALI in his work on the "Personal Law of the Mahomedans," Vol. II, 1894, containing the law relating to "Succession and Status," where it is said that several jurists have, in consequence of that passage, held that a widow has a right to maintenance, independently of any share that she may obtain in the property left by her husband.

As to whether this widow had been properly charged by the executor for the use and occupation by her of her late husband's house after his death till the sale of it under his will, the Recorder [13] found no authority for holding that an heir was so chargeable; and he therefore answered the question in the negative.

On the 2nd March 1893, after taking evidence as to the alleged gift of the money deposited in the Bank, the Recorder found against the gift having been made, both because he disbelieved the evidence and because he held "that the mere possession of the receipts was not enough to enable the plaintiff to exercise the right of property over the money in the Bank." He was of opinion that, even assuming the plaintiff's statement to be true, she could not succeed : and upon the facts, also, he could not find that the gift was made.

On the same date the Recorder made a decree for an account to be taken on the basis of the previous decisions. The executor filed his account on the 10th July following according to the above principles. On the 24th July, then next, the widow filed further objections, upon which the Recorder, delivering another judgment, gave his opinion that the "only way of ascertaining the share of the rents is by ascertaining the value of the land, and of the houses, separately, and apportioning the amount received as rent ; and this has been done." He added :—

"As regards the moneys invested it is admitted that the widow would not have been entitled to share in the immoveable properties if they had remained unsold, and I do not think that she can be allowed to share in the proceeds."

"The final decree, dated the 14th September 1893, so far as it related to the points disputed in this appeal, was as follows : —

"It is ordered and declared that : 1. The plaintiff is not entitled to share in the land on which the testator's houses stood, but her share in such house property is a one-fourth share

* The word *khoom* is given in Wilson's Glossary of Indian Terms as vernacular for *khaum*, meaning people, tribe, &c.

of the value of the buildings on such land. 2. The directions in the will of the deceased that the executor shall be allowed to charge three per cent. commission, and that he shall deduct one-fifth for *khooms*, are only valid as bequests out of one-third of the testator's estate. 3. The plaintiff is not entitled to the amounts of the fixed deposits. 4. The plaintiff is entitled to share in the income arising from the rents of houses until her share has been fully paid to her 5 The plaintiff is entitled to be paid maintenance out of the estate of the testator, at the rate of Rs 150 a month for twelve months. 6. The executor is not entitled to charge the plaintiff for the use and occupation of one of the testator's houses after his death."

From this decree both parties appealed

[14] Mr. *J. D. Mayne* for the executor, appellant.—In reference to the commission of three per cent. payable under the will to the executor, the decision of the Recorder should have been that the whole estate was chargeable with this money. It was a remuneration directed to be paid by the will on account of the duties to be discharged by the executor, and it should not have been dealt with as a legacy of which payment was to be made out of one-third only of the testator's estate The one-fifth share allotted for *khooms* by the will should also be taken as payable out of the whole estate. This might be regarded as a direction for the management of the estate, and the commission also. Next to be disputed was the allotment to the widow of Rs. 1,800, as money for a year's maintenance, over and above her share as one of the heirs. It was a rule founded on principle that a widow should have no maintenance after her husband's death The main authority was to be found in the Hedaya (as translated by Hamilton), Book IV, chapter 15, section 3, where it was plainly declared that maintenance is not due to a woman after her husband's decease according to law, forasmuch as the husband's right in his property ceases on his decease. Reference was also made to Baillie's Mahomedan Law, Imamia (1869), at pp 170, 171. The contention was that the widow took only her share by inheritance, or under the will, by Mahomedan Law.

The Court below had also erred in its judgment that the widow was not to be charged rent for the months during which she had remained in occupation of the premises of which a sale had been directed by the will. At the death of the testator the property passed to his heirs, and if the widow remained in possession of what had become their house, the executor was right in charging her with an occupation rent. There were no grounds for the widow's cross appeal. The Court below had been right in rejecting the claim to a gift effected by the handing over of the deposit receipts.

That Court had also been right in deciding that the childless widow of a Shiah Mahomedan could take no interest by inheritance in any land that had been her husband's.

Mr. *J. H. A. Branson*, for the widow, respondent and cross-appellant. –The widow's right, according to Mahomedan Law, [15] was to inherit a one-fourth share of the estate of her husband, as a share fixed under all circumstances; and this could not be reduced by any directions in the will of her husband. Her right to that share arose immediately on the death of her husband, and she was entitled to all profits to the amount of her share Her right to a proper maintenance for twelve months after her husband's death was supported by the text quoted in the "Personal Law of the Mahomedans," 1894, by Mr. Justice AMEER ALI, which text was the highest authority He referred to chapter X relating to the "rights and duties of the married parties," section 1, p. 369. The passage from the Koran was: "Such of you as shall die and leave your wives ought to bequeath to them a year's maintenance." This was understood by several jurists, as stated by

Mr. Justice AMEER ALI, to be a maintenance independent of any share she might obtain.

Next, the widow was not chargeable with the occupation rent, and the Recorder's judgment on both this and the above points should be maintained. In her cross-appeal, however, she contended that the Recorder's decision was wrong in declaring her disentitled to the fixed deposits, and to a share in the land on which the houses belonging to the estate had been built. As to the latter claim, the authority cited by the Recorder from Baillie's Imamia might refer to land not built upon The opinions which negatived the widow's right to a share in the land of her husband might refer, on a proper construction of them, to land other than the sites of houses, and not refer to land which went with a building, as part of the whole tenement It was difficult to see how the value of the house separately from that of the ground could be estimated unless a ground rent had been fixed He referred to the passage quoted in Baillie's Imamia Law, Book VII, chap IV, from the Shura-yul Islam, discussed and re-translated in *Asloo* v *Umdutunnissa* [(1873) 20 W. R., 297].

Mr *J D Mayne* replied, contending that in the calculation of the widow's share, it was necessary to deduct both the proceeds of the land sold, and the rental value of the sites of all rent paying houses belonging to the estate

Afterwards on the 7th April, their Lordships' judgment was delivered by

[16] Lord Davey.—This appeal and cross appeal from the Court of the Recorder of Rangoon deal with questions which have arisen in the administration of the estate of Hadji Hoosain Bindanim, a Mahomedan of the Shiah sect The testator died in February 1890, leaving one widow Koolsom Beebee (respondent in the principal appeal and appellant in the cross appeal) and no children

The contents of the will so far as material may be shortly stated The testator appointed his nephew Aga Mahomed Jaffer Bindanim (the appellant in the principal appeal) his sole executor and trustee, and directed him to sell his property and deduct from the proceeds of sale all costs and charges and a commission of three per cent He devoted one fifth part of the remainder (called *khooms*) and a sum of Rs 3,000 to religious purposes, and directed his executor and trustee to divide the remainder, after deduction of the said sum of Rs 3,000 and Rs 2,500 due to his wife Koolsom Beebee for dower, into three equal shares and to retain a one third share and divide the remaining shares between his heirs who were his said wife and brother Aga Abdul Hadee Bindanim in the shares and proportions in which they would be entitled to the same according to Mahomedan law, and made a particular provision of the reserved one-third share The testator declared that his executor and trustee should have power to charge a commission of three per cent on the proceeds of sale of his property real and personal and cash

Part of the testator's property consisted of land with buildings on it

Several questions were raised on taking the accounts of the executor, four of which are submitted for decision in these appeals —

1st—Whether the commission of three per cent to the executor and trustee is payable out of the entire estate or only out of the one-third which alone the testator could bequeath by his will?

2nd.—Whether the widow was entitled to maintenance for any and what period after the testator's death?

3rd.—Whether she ought to be charged with an occupation rent for the time during which she continued to reside in the testator's house after his death?

[17] *4th*. Whether the widow can by Shiah law take any share by inheritance in the land on which the buildings stand as well as in the value of the buildings.

The widow also claimed adversely to the estate to be entitled to a sum of Rs. 30,000 owing to the testator on deposit notes of the Bank of Bengal which she alleged the testator had given to her on the Monday preceding the Friday on which he died.

To deal with the last-mentioned question first. The deposit notes signed by the agent of the Bank are in the form of receipts from the testator of the sum mentioned in them as a deposit bearing interest at the rate mentioned to remain till notice of twelve months on either side expires. They contain in the margin the words "not transferable," and are not in a form which would entitle the bearer of the notes to the debts created thereby as transferee thereof. The respondent Koolsom Beebee in her evidence stated that on the day in question the testator being then indisposed (but not apparently in contemplation of his early death) handed her the notes with certain formalities, and added "after taking a bath I will go to the Bank and transfer the papers to your name." Her story to this extent is confirmed by two witnesses who said they were present. The testator never did transfer the notes in the Bank, or do any act to complete Koolsom Beebee's title.

The learned Recorder has expressed doubts as to the truth of the story told by Koolsom Beebee and her witnesses, but he has also held that even if her evidence be accepted the gift was incomplete, and that she is not therefore entitled to the money on deposit.

As their Lordships entirely agree with the Recorder on the latter point, it is unnecessary for them to express any opinion on the value of the evidence. It is quite clear that the effect of handing the notes was not to transfer the debts or to give the widow the dominion over them or enable her to recover the money secured by the notes. At most the evidence shows an intention to make such a transfer, but the gift is incomplete and no legal effect can be given to it. There is no question here of a *donatio mortis causâ* in the English sense, even if such a mode of passing property were known to the Mahomedan law.

[18] Their Lordships also agree with the learned Recorder that the executor's commission can be paid only out of the one-third part of the testator's estate which passed by his will. It is given no doubt by way of remuneration, but it is a gratuitous bequest and nothing more than a legacy to the executor, and certainly not in any sense a debt.

The learned Recorder has decided that the widow is entitled to maintenance at the rate of Rs. 150 per mensem for one year after the testator's death, and he has done so on the authority of a passage of the Koran quoted by Mr. Justice AMEER ALI in his work on the Personal Law of Mahomedans, on which the text writer makes the observation that several jurists have held that a wife has a right to be maintained out of her husband's estate for a year independently of any share she may obtain in the property left by him. Unfortunately the writer does not give any references in support of his statement, and Counsel have not been able to furnish their Lordships with any. On the other hand, the Hedaya (Book IV., Ch. XV, sec. III) says expressly: "Maintenance is not due to a woman after her husband's decease," and gives reasons for so holding. The Imamia (Baillie, p. 170) after saying that it would seem that after the death of her husband the widow has no right to a residence except in the single case of her being pregnant, says: "A widow has no right to maintenance, even though she be pregnant."

Their Lordships on these authorities must hold that a Mahomedan widow is not entitled to maintenance out of her husband's estate in addition to what she is entitled to by inheritance or under his will. They do not care to speculate on the mode in which the text quoted from the Koran, which is to be found, Sura II. vv. 241-2, is to be reconciled with the law as laid down in the Hedaya and by the author of the passage quoted from Baillie's Imamia. But it would be wrong for the Court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority.

The executor in his accounts charged the widow with an occupation rent for the period of eleven months during which she continued to occupy the testator's house after his death. She [19] objected to the charge on the ground that she had never contracted to pay a rent, and the learned Recorder has decided in her favour. Their Lordships do not disagree with the Recorder. It is quite true that when one occupies the house of another with his permission there is *prima facie* an implied contract to pay an occupation rent. But this implication may be rebutted by showing the circumstances under which possession was taken, *e.g.*, that the house was lent to the occupier, or that he was a caretaker. In this case the widow's occupation is referable to the previous occupation by her husband and herself, and as one of the heirs and one of the residuary legatees she had an interest in the house (apart from the land). No notice appears to have been given her that she would be charged a rent, and their Lordships think that in the circumstances of the case they cannot imply a contract on her part to pay a rent, but they must treat her as having occupied the house until sale on behalf of herself and the other parties interested as caretakers.

There only remains the question raised on the widow's behalf that she is entitled to share in the land on which the buildings stand as well as in the value of the buildings themselves. The argument urged by Mr. *Branson* was that the text from Baillie's Imamia, p. 295, quoted by the learned Recorder refers only to agricultural land, and that a childless widow is, according to the proper construction of that text entitled by Shiah Law to share in land forming the site of buildings. The argument is characterized by novelty and boldness. It is unsupported by any authority, and is contrary to the accepted doctrine on the subject. Their Lordships have no hesitation in agreeing with the learned Recorder in rejecting it.

Their Lordships, therefore, will humbly advise Her Majesty that the final decree of the learned Recorder dated the 11th September 1893 be reversed so far as it decrees "7. That the plaintiff Koolsom Beebee is entitled to be paid maintenance out of the estate at the rate of Rs. 150 per month for twelve months," and instead thereof it be declared "that the plaintiff Koolsom Beebee is not entitled to maintenance out of the estate after the date of the testator's death," and in other respects that the decree be affirmed. As the appeal of the appel-[20]lant Aga Mahomed Jaffer Bindanim has partly failed and partly succeeded there will be no order as to the costs of that appeal. The appellant Koolsom Beebee must pay to Aga Mahomed Jaffer Bindanim the costs of her appeal. The other respondents in each appeal have not appeared and there are no costs.

Decree affirmed with a variation.

Solicitors for the Appellant, Aga Mahomed Jaffer Bindanim: Messrs. *Bramall, White & Sanders.*

Solicitors for Koolsom Beebee: Messrs. *Hopgoods & Dowson.*

C. B.

NOTES.

[I INTERPRETATION OF MAHOMEDAN LAW TEXTS —

The exposition of jurists who are regarded as authoritative should be followed —(1905) 10 C W N , 449

In '*Mahomedan jurisprudence*,' I Edn (1911) p 45, Mr Abdur Rahim makes these remarks on the passage —'But it would be wrong for the Court *on a point of this kind* to put their own construction on the Quran in opposition to express ruling of commentators of such great antiquity and high authority ' He says " It was apparently not brought to the notice of the Committee that the verse of the Quran which was relied on had been repealed by another verse ' Also, he observes on the italicised words —" The significance of the Board's emphasis 'on a point of this kind has to be understood not only with reference to what has just been mentioned, but also to what it had laid down previously, with reference to the application of rules relating to certain forms of disposition of property in the Muhammadan Law. The extreme limit to which deference to the opinions of Muhammadan jurists has been carried in determining the Muhammadan Law governing a question relating to family relations is illustrated in a case reported in 12 W R , 460 where divorce pronounced upon compulsion from threats was held to be effective * * As to the mode in which Muhammadan law is to be applied in questions relating to alienation of property, there seems to be a gradually increasing tendency on the part of the Courts, and notably of the Privy Council, to assert a greater freedom of interpretation ' citing 2 Cal , 184 , 11 All 460 , 35 Cal,, 1 , 25 All , 236 , 22 Cal , 619

II MAINTENANCE —

The widow (unlike a divorced wife) has no right to maintenance out of her husband's estate during *iddat* apart from what she may be entitled to as deferred dower or under the law of inheritance —This is regarded by Sir ROLAND K WILSON as applicable equally to Sunnis, citing texts, *Wilson's Anglo Muhammadan Law*, III Edn , (1908) p 185

III AGRICULTURAL LANDS —

Sir ROLAND K WILSON in his Anglo Muhammadan Law (1908) III Edn p 438 says, 'In the last case (25 Cal 9) it was unsuccessfully contended that the text from Baillie referred only to agricultural land not to the sites of buildings It would seem to follow from this that a childless widow governed by Shiah Law cannot retain possession of her husband's agricultural lands until her claim for dower is satisfied, unless she has obtained possession lawfully, on some other grounds than that of heirship but the contrary was incidentally assumed in (1907) 35 Cal , 120

IV TRANSFER OF CHOSE IN ACTION —

See also (1913) 18 C W N 494 (1911) 36 All , 507 21 I C 385 10 C W N , 449]

[25 Cal 20]

The 7th July, 1897

PRESENT

THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD JAMES OF HERFORD, SIR RICHARD COUCH AND MR WAY

Muhammad Yusuf-ud-Din (Petitioner) . . Appellant

versus

The Queen-Empress . . Respondent

[On appeal from the Chief Court of the Punjab]

Jurisdiction of Criminal Court —Criminal Jurisdiction along the Railway through Indian Independent States —Locality of crime—Illegal arrest on lands occupied by the Hyderabad State Railway

The authority for the exercise of criminal jurisdiction by the Government of India upon lands within the limits of the Hyderabad State Railway is derived from a grant to that Government in 1887 by His Highness the Nizam as ruler of the territory. The railway lands remain part of his dominions.

The grant of civil and criminal jurisdiction contained in the correspondence of that year between the Nizam's Minister and the Resident at Hyderabad is expressed to be " along the line of railway as is the case on other lines running through Independent States."

This jurisdiction, notwithstanding any words in the Notification of the Government of India of the 22nd March 1888 (which could not of itself give any authority, or add to that granted by the Nizam), does not justify the arrest on the lands of the Hyderabad State Railway of a subject of the Nizam under the warrant of the Magistrate of a District in British India, on a charge of a criminal offence committed in British India, and unconnected with the Hyderabad Railway administration.

The mere presence of the accused on the railway lands, over which criminal jurisdiction had been granted as above, was no legal ground for his arrest under the warrant of the Court in British India, his offence, if committed at all, not having been committed on those lands, and not having been connected with the railway.

[21] APPEAL from an order (17th February 1896) of the Chief Court as a Court of Criminal Revision.

The question raised on this appeal was whether or not the jurisdiction conferred by His Highness the Nizam of Hyderabad upon the Government of India along the line of the Hyderabad State Railway had been exceeded by the arrest of one of his subjects, on the lands of that railway, under a warrant of the Magistrate of a District in British India, upon the charge of having committed a criminal offence within that Magistrate's District.

The appellant, Sayad Muhammad Yusuf-ud-din, a Hyderabad subject, and a *talukdar*, or District Officer, in the service of the Nizam, was arrested on the 28th November 1895, under a warrant of the Magistrate of Simla in the Punjab, on a charge of having abetted at Simla the offer of an illegal gratification to a public servant, the Record-keeper of the Foreign Department of the Government of India, contrary to sections 116/161 of the Indian Penal Code.

Of the substantive attempt to bribe Mr. Schorn on the 12th and 13th June 1895, the attempt not having succeeded, one Gopalchunder was convicted by the District Magistrate of Simla, Captain Beadon, on the 8th July 1895 In the course of that trial it appeared that Gopalchunder, who kept an hotel at Simla, had acted at the request of a person, then staying in the hotel, known as a Sirdar of Hyderabad

On the 18th September 1895 the District Magistrate, on application made from Hyderabad, signed and issued to the Resident at Hyderabad a warrant for the arrest of the appellant In issuing this instead of a summons, the Magistrate recorded his reason, in conformity with section 90 of the Criminal Procedure Code (that being one of the reasons there specified), and he added the following note:-

"*N.B.*—In handing this warrant over to the Thagi and Dakaiti Department, I have explained that it cannot be executed outside British India, except through a Political Agent. If the accused is in Foreign Territory, the Resident who applies for the warrant, and is Political Agent for Hyderabad, must decide whether he can be made over to the British Courts under the Extradition Law."

[22] The warrant on reaching Hyderabad was endorsed by the second Assistant Resident to the Magistrate Superintendent of Railway Police, and by him endorsed for execution by the chief constable of Railway Police, who executed it by the arrest of the appellant within the limits of the Hyderabad State Railway at one of the stations, on the 28th November 1895. On the 30th of the same month the accused was released and held to bail to appear to the charge at Simla. This he did on the 11th December. The case was adjourned, and in the end fixed for hearing at Amballa, an order having been made, upon consent, by the Chief Court, transferring the case to that District, where it was postponed. Meantime, on the 22nd January 1896, the appellant petitioned the Chief Court to cancel the warrant under which he had been arrested, and the order for its issue. Among other grounds, he alleged that the issue of this warrant by the Simla Magistrate for execution in Hyderabad

territory was contrary to law, and that his arrest in that territory was illegal. His petition was that the proceedings taken should be set aside, and that further proceedings should be stayed, pending the orders of the Court. On the 17th February 1896 this petition was dismissed by the Chief Court, FRIZELLE and P. C. CHATTERJI, JJ.; and against this order of dismissal the present appeal was afterwards preferred.

On the 7th April following the charge against the appellant came on to be heard by Captain Parsons, Magistrate of the Amballa District, the accused being present. A commission was issued for the examination of some witnesses at Hyderabad, and their examination took place. But on the 11th May 1896 the proceedings in the Amballa Court were stayed, the accused, on a petition preferred by him to Her Majesty in Council, having obtained special leave to appeal.

The following is the material part of the Government Notification of the 22nd March 1888, published in the *Gazette of India* of the 24th *idem*, upon which the judgment of the Chief Court proceeded, without other evidence before them showing the jurisdiction granted by the Nizam :—

"Fort William, 22nd March, 1888. Whereas His Highness the Nizam of Hyderabad has granted to the British Government full jurisdiction within the [23] lands which are occupied, or may hereafter be occupied, by His Highness the Nizam's Guaranteed State Railways Company, by the Great Indian Peninsular Railway, by the Madras Railway, and by the Southern Mahratta Railway respectively (including the lands occupied as stations, outbuildings, and for other railway purposes); in exercise of this jurisdiction, and of the powers conferred by sections 4 and 5 of 'The Foreign Jurisdiction and Extradition Act, 1879' and of all other powers enabling him in this behalf, the Governor-General in Council is pleased to issue the following orders :—

"Part 1. The provisions, so far as they may be applicable and as amended for the time being by subsequent enactments of the Acts mentioned below, are hereby extended to the aforesaid lands, namely, Act XLV of 1860 (the Indian Penal Code), Act V of 1861 (for the Regulation of the Police), Act VI of 1864 (the Whipping Act), Act I of 1871 (the Cattle Trespass Act), Act X of 1882 (the Code of Criminal Procedure) &c., &c.

"Part 2. For the purpose of the exercise of criminal jurisdiction within the aforesaid lands, the Governor-General in Council is pleased to make the following arrangements: 1. There shall be a Railway Magistrate who shall be the second Assistant to the Resident at Hyderabad. 2. The Railway Magistrate shall have the powers of a District Magistrate as described in the Code of Criminal Procedure."

Act XXI of 1879, called "The Foreign Jurisdiction and Extradition Act, 1879," referred to in the above, contains in chapter II the following :—

"Powers of British officers in places beyond British India. Section 4. The Governor-General in Council may exercise any power or jurisdiction which he for the time being has within any country or place beyond the limits of British India and may delegate the same to any servant of the British Indian Government in such manner and to such extent as the Governor-General in Council from time to time thinks fit: Section 5. A Notification in the *Gazette of India* of the exercise by the Governor-General in Council of any such power or jurisdiction, and of the delegation thereof by him to any person or class of persons, and of the Rules of Procedure or other conditions to which such persons are to conform, and of the local area within which their powers are to be exercised, shall be conclusive proof of the truth of the matters stated in the Notification."

Section 6 relates to the appointment, powers and jurisdiction of Justices of the Peace. Section 7 confirms the powers of existing officials as to jurisdiction under this Act, which in that section extends the criminal law of British India to British subjects, European and native, out of British India, subject as to procedure to such modifications as the Governor-General in Council from time to time may direct.

[24] At the making of the order of the 17th February 1896 by the Chief Court, after dealing with objections on behalf of the petitioner to the legality of the criminal proceedings at Simla, FRIZELLE, J., said:—

"The main ground of this petition is that the Magistrate of Simla had no jurisdiction to issue a warrant of arrest for execution in the Hyderabad State for an offence committed at Simla against sections 116 and 161 of the Penal Code by a subject of the Hyderabad State, contrary to the Extradition Treaty with His Highness the Nizam, which exempts the subjects of His Highness from surrender; and that it never should have been executed. This objection would have had more force had the warrant been issued for execution, or been executed, at a place in the Hyderabad State over which the British Government has no jurisdiction. But it was executed at a place over which full jurisdiction is possessed by the British Government under the Notification already quoted, and to which the whole of the Criminal Procedure Code was extended by that Notification, and in my opinion a warrant so executed was as legal as if it had been executed in any district in British India. If it had been executed or intended to be executed in Hyderabad territory, in which no such jurisdiction had been ceded, I think exception might have been more properly taken than, as the case stands, to both its issue and execution. But it was not carried out, or apparently issued with a view to its being carried out, at a place within the Nizam's jurisdiction. It was addressed to the Resident of Hyderabad, and its manner of execution expressly left to him. He, it may be observed, has under the Notification jurisdiction for all purposes connected with the administration of criminal justice within the limits therein specified."

The Judge further said:—

"Had there been an addition to sections 1 and 82 of the Criminal Procedure Code that this Act extended to the whole of British India, and any territory over which jurisdiction was ceded under section 4 of Act XXI of 1879 (under which the Notification was issued), and that a warrant of arrest may be executed at any place in British India, or any place over which jurisdiction had been ceded under the last-mentioned Act, the case would have been perfectly clear. To my mind the Notification had exactly the same purport and effect as if this addition had been made to the Criminal Procedure Code. It expressly extended the whole of that Code to the lands specified, and this involved the extension of the limits mentioned in section 82 and made section 83 applicable, under which the District Magistrate of Simla could have sent the warrant to the Railway Magistrate of Hyderabad. The latter Magistrate was bound to treat the warrant in the same way as any other Magistrate, subject to the Procedure Code, would have been bound to treat it, and did accordingly execute it in the manner laid down in section 83.

[25] "That the petitioner is a subject of the Hyderabad State does not affect the matter. Full jurisdiction in the place where he was arrested was ceded over Hyderabad subjects as well as British subjects. The Notification contained no exception or reservation, and petitioner was, within those limits, equally liable to arrest as he would have been at Simla itself, or in any other district in British India."

CHATTERJI, J., who concurred said in the course of his judgment:

"The petitioner must be presumed, for the purposes of this case, to be a subject of His Highness the Nizam, as stated in his affidavit, there being no averment to the contrary, but his alleged offence was committed at Simla, and is triable there, and there is no question of his exemption from the jurisdiction of the Simla Court on the ground of his being a foreign subject."

The Judge further said:—

"It was admitted by the learned Counsel for the petitioner that the jurisdiction exercised by the Governor-General in Council over the lines of railway extended to all classes of persons found within their limits, whether subjects of the British Government or of the Hyderabad State. Indeed this seems perfectly clear from the preamble to the Foreign Jurisdiction and Extradition Act, 1879, as well as from the terms of the Notification above

quoted. The contentions of the petitioner against the warrant are divisible into two heads—(1) illegality of the warrant as issued from the Simla Court; (2) illegality of its execution within the line of railway in the Hyderabad territory.

"The legality of the warrant is attacked on the grounds—(1) that it was intended to be executed in foreign territory, as shown by its being directed to the Resident at Hyderabad, and its description of the petitioner; and (2) that the Code of Criminal Procedure gives no authority to British Indian Magistrates to issue warrants executable outside British India. In my opinion the conclusion does not seem to follow from the premises."

He further said :—

"In so far, therefore, as the argument proceeded upon the provisions of the Code of Criminal Procedure or on general principles, it does not appear to be sound: but it is not necessary to discuss this part of it any further, as the warrant does not appear to have been intended by the District Magistrate of Simla to be executed outside British India. The mere fact that it was addressed to the Resident at Hyderabad does not prove that it was so intended. On the contrary, Captain Beadon's order, dated 18th September 1895, clearly shows that he was fully aware of the provisions of section 82. His views about extradition may be mistaken, but they are not sufficient to shew that he asked for the execution of the warrant contrary to law.

"Executions of warrants of British Courts within the railway lines in Hyderabad territory, and of warrants of the Railway Magistrate of such [26] territory in British India, must be of constant occurrence, for the object of acquiring the British jurisdiction within the railway limits is to obviate the dangers and inconveniences of the difference and clashing of jurisdictions. A contention like the present, though possibly not yet raised, can be raised in scores of cases, and, if it is correct, must nullify the whole arrangement, and leave matters where they were before the special jurisdiction was acquired."

In conclusion, the Judge summarized his reasons as follows :—

"The Notification extends the provisions of the Code of Criminal Procedure to the territory occupied by the railways, 'so far as they may be applicable.' These provisions have, therefore, to be applied with modifications suited to the circumstances and conditions under which such territory is administered. Bearing in mind the object in acquiring jurisdiction over these tracts, and in order to give effect to it and to avoid the inconveniences which would necessarily result from adopting a different construction, we must, I think, read sections 1 and 82 of the Code as in force there, as if words specifying such lands were inserted after the words 'British India' in those sections, and the word 'warrant' in Chapter VI, understood to include warrants issued by Criminal Courts in British India as well as by such Courts within the lines of railway. If this construction is correct, as I hold it is, the warrant in this instance could be and was lawfully executed at Lingampally."

Pursuant to leave obtained by him as above mentioned, the accused appealed to Her Majesty in Council.

While his appeal was pending, copies of a correspondence between the Governments of India and of Hyderabad were added in a supplemental record, showing the grant of civil and criminal jurisdiction made by the Nizam in 1887. The letters included one of the 10th September 1887, from the Nizam's Minister to the Resident, stating that His Highness acceded to the request of the Government of India that such a jurisdiction should be granted, "as is the case on other lines running through Independent States." The contents of this are stated in their Lordships' judgment.

Mr. *H. H. Asquith*, Q. C., and Mr. *J. H. A. Branson*, for the Appellant.—The arrest was illegal for want of jurisdiction in the Court which issued the warrant, and for absence of lawful authority to execute it at the place of the arrest. The Simla Magistrate had no jurisdiction to order the execution of the

warrant in Hyderabad territory. The accused was not a British subject, nor was he resident in British India. He was a subject of the Nizam, within whose territories he was when arrested.

[27] That the place of arrest was a station on the Hyderabad State Railway within the lands occupied by the Railway, as referred to in the Notification of the 22nd March 1888, did not render the arrest any the more lawful This was the appellant's case

The judgment of the Chief Court was erroneous in holding that the sections of the Code of Criminal Procedure enacted for British India relating to the warrant of arrest and its execution, had obtained force, in virtue of a grant of criminal jurisdiction from the Nizam to the Government of India over the railway lands in Hyderabad territory, as much as if those lands were a district in British India No jurisdiction so extensive as to render possible such a state of things had been granted by the Nizam The authority which he had, in fact, granted was contained in the letter from the Nizam's Minister to the Resident of the 10th September 1887, which showed the jurisdiction of the British Indian Magistrate to be exerciseable for the maintenance of order along the lines of railway in Hyderabad, as in other Independent States, upon the lines running through them In so far as the Notification exceeded the terms of that grant it had no effect The railway station where the arrest was made was, no doubt, within the limits specified in the Notification But the lands occupied by the Railway Company were not in any sense British territory The plan of cession of territory for the purpose of administering justice on the lines of railway in Independent States at one time followed, had been abandoned as inexpedient, and the grant of a jurisdiction, civil and criminal, over the lands comprised within railway limits, had been made at the request of the Indian Government This, however was not a general jurisdiction for the repression of crime in India, but for maintaining order in connection with railways in Independent States The Notification purported to extend the provisions of the Code of Criminal Procedure "so far as they may be applicable" to railway lands in Hyderabad It was submitted that they could not be applied for the purpose of arresting an offender in the circumstances of the accused The argument however, for him did not rest only on the construction of these words The character of the offence charged, taken in connection with the place of its commission, if committed at all, showed that the [28] criminal jurisdiction along the line, as granted by the Nizam, could have no application to this offence That criminal jurisdiction comprehended only offences that had a local, or some other, connection with the Hyderabad State Railway, its good order and regulation a connection that did not exist in the present case The Notification purported to extend the provisions of the Code of Criminal Procedure "so far as they may be applicable to railway lands in Hyderabad It was submitted that they could not be applied for the purpose of arresting an offender in the circumstances of the accused The argument, however did not rest only on the construction of these words The character of the offence charged, taken in connection with the place of its commission, if committed at all, showed that this jurisdiction, as granted by the Nizam, could have no application It was applicable only to offences that had local, or some other, connection with the good order and regulation of the Hyderabad State Railway, a connection that did not exist in this case.

Mr. *A. Cohen*, Q C, and Mr *J D Mayne* submitted the following as their principal points—The jurisdiction over the railway lands depended, not upon any legislation, but upon powers acquired by agreement with the

State through which the railway was made, the Government of India, in the exercise of the rights of the Crown delegated to them, accepting the authority conferred by the Nizam. There were several kinds of extra-territorial jurisdiction exercised by the Governor-General of India in Council over lands in Independent Indian States. Some of these were referred to in the Act XXI of 1879. The Indian railways, especially in the west and central parts of India where Indian States and British Indian territory were interlaced, had been found to require the exercise of this jurisdiction, to secure the administration of justice. Different jurisdictions at short intervals a along line of railway could not have worked effectively to repress crime and maintain order. Therefore it had been conceded that there should be one jurisdiction only, which should be that of the paramount Power. This, at one time, as stated already had been secured in some States by obtaining an actual cession of territory. The same result was now generally secured by obtaining only a grant of civil and criminal jurisdic-[29] tion over the lands comprised in the railway. There was no difference on this point between the Hyderabad State Railway and railways in other Indian States, from which, as would be found, by reference to " Aitchison's Treaties, etc., " a considerable number of grants had been obtained by the Government of India.

The question here was how far the grant made by the Nizam went in regard to criminal procedure. Reference was made to the official letter, from the Nizam's Minister to the Resident, dated 10th September 1887. After that grant of jurisdiction, the Notification of the 22nd March 1888 was published by the Government of India in the *Gazette*. From that time this jurisdiction, as well in Hyderabad as on other States, had been exercised on the understanding that the railway lands along the lines were, for all purposes of criminal process, in the same relation to the judicial system of the Government of India as if they formed part of the territories under the administration of that Government. The jurisdiction has been used for executing on railway lands the process of the British Indian Codes with a complete understanding between the two Governments. Taking the proceedings in their order, they were legal before the Simla Magistrate who acted correctly in issuing the warrant. Next came the arrest in an exceptional part of foreign territory, where the warrant of a British Indian Court was permitted to have force by the grant of criminal jurisdiction to the Indian Government. If there had been irregularity, when the accused appeared, as he had done, on the 11th December 1895, in the Simla Court, no ground for staying the proceedings against him was afforded.

Again, it was apparent that the Chief Court Judges, upon whom an Act of the Indian Legislature was binding, had no choice but to comply with section 5 of the Foreign Jurisdiction and Extradition Act XXI of 1879, which required them to accept the Notification as conclusive. However, the contention for the respondent now was that the letter of the 10th September 1887 had conceded sufficient powers to justify this arrest. The Government of India had the right under this grant to entrust the exercise of the jurisdiction on railway lands to such officers to be carried out in such manner, and with such procedure as [30] that Government might consider suitable, employing such officers as it might choose for the purpose. Lastly, the Chief Court had been right in holding that the jurisdiction granted by the Nizam was not limited to persons of any one nationality, and that it included his own subjects.

Reference was made to the Foreign Jurisdiction and Extradition Act, 1879, and to the Statute of 1890, the 53 and 54 Vic., Chap. 37.

Counsel for the appellant was not called upon to reply.

Their Lordships' **judgment** was then delivered by—

Lord Halsbury (Lord Chancellor).—In this case their Lordships are called upon to pronounce their opinion as to whether the arrest of Yusuf-ud-din, a native of the Nizam's State, was lawfully executed by a warrant issued by a Magistrate at Simla.

The alleged offence for which the accused was arrested was the abetment in British territory of the offence which we may call compendiously bribery. Their Lordships have nothing to do with the question whether or not, if the accused had been found within British territory, he could have been lawfully tried and convicted of that offence, because the question reserved for their Lordships here to consider is whether or not the arrest of the man, while he was at the station on a railway which is locally situated within the dominions of the Nizam, was a lawful arrest; nor, except for the purpose of his particular case, have their Lordships anything to do with the consequences of that arrest being lawful or otherwise The one question which they have to determine is whether the arrest was lawful.

Now, the offence which was charged against the accused was an offence committed, if committed at all, in British India, and subject to what is said hereafter, their Lordships are of opinion that the territory on which the railway is locally built has been, and has continued to be, part of the dominions of the Nizam. It is important to observe this, because crime is in its essential nature local, and if the accused had been arrested in British territory there is no doubt that the British authorities would have ample jurisdiction to try and punish him for crime. But their **[31]** Lordships are of opinion that the railway territory has never become part of British India, and is still part of the dominions of the Nizam. The authority, therefore, to execute any criminal process must be derived in some way or another from the Sovereign of that territory, and the only authority relied on here is the authority given in the correspondence, which constitutes the cession by the Nizam of jurisdiction to the British Government. It is important to observe that the Notification upon which the learned Judges in India appear to have relied could itself give no such authority. Even if in more extensive terms than in fact are included in the Notification it had purported to give jurisdiction, as the stream can rise no higher than its source, that Notification can only give authority to the extent to which the Sovereign of the territory (the Nizam) has permitted the British Government to make that Notification. Their Lordships are not prepared to differ from the construction which has been placed by the learned Judges in India on the Notification, if the Notification was itself the source of authority, but the Notification is not the source of authority. The authority, of which this is only the Notification, is derived from the Sovereign Power of the Nizam himself. It becomes therefore necessary, as there is no express treaty and no words which in themselves precisely define the amount of jurisdiction intended to be conveyed by the Nizam, to revert to the correspondence which passed between those representing the two Governments—to see in the first place what was asked for and what was ultimately conceded.

Now, the authority which was asked for was the authority to exercise civil and criminal jurisdiction over the railway lands and premises , and if there is one thing manifest in the course of the correspondence more than another, it is that the Nizam jealously refused anything in the nature of a cession of territory such as would confer by itself local jurisdiction. It is the one thing which all through the correspondence appears to have been refused. The result is that one must look and see what was ultimately conceded, and when one comes to look at that which was asked for and that which was granted it seems

to be very plainly set forth in the additional papers, which their Lordships understand not to have [32] been placed in the hands of the Chief Court, whose judgment is appealed from.

On the 28th March 1887 the British Resident stated that the thing desired by the Government of India was sufficient power "over the railways" to enable a Magistrate and Police Officer, recently appointed with the Nizam's assent, to perform their duties; that at present their action was irregular because the Nizam had never formally transferred to the Government of India "full jurisdiction over the railways," and that "a few laws of British India which are necessary for the ordinary administration of criminal and civil justice should be regularly applied to the railways." Upon these grounds he suggested a transfer of "full criminal and civil jurisdiction over the railway lands."

He pointed out that the thing asked involved no sort or degree of encroachment on the Nizam's prerogative or independence; that it was only doing formally what had been done practically ever since the commencement of the railway, and what had been done by every other Native Chief as railways were made. He ended by writing: "The jurisdiction is not *assumed* by the British Government in its own right, but is conceded by His Highness of his own free will for the sake of legal and administrative convenience over an area limited by the railway fences in which the difficulties that may occur are likely to be occasioned by Europeans."

The Nizam's Minister demurred even to this limited proposal lest it should encroach on his Sovereignty, and he made a counter-proposal to pass by his own authority such British Indian laws as are necessary for the ordinary administration of civil and criminal justice.

These objections were met by the Resident by pointing out that he had not asked for the cession of any territory, and that the Nizam could hardly intend to assert "that the grant of the means for carrying on a small piece of administration in a more legal and efficient mode than has hitherto been found possible, can possibly be viewed as a 'commencement of annexation of large tracts in His Highness's dominions' by the English Government." And he concluded thus: "I hope that this letter will serve to 'clear the air' a little about what really is only a matter of administrative convenience, and is absolutely free of any such [33] far-reaching consequences or designs as the draft letter would seem to prognosticate from it."

The concluding letter, No. 21 of the additional papers, is from the Nizam's Minister: "In reply to your letter, dated the 6th instant, I beg to state that His Highness's Government is willing to accede to the wishes of the Government of India regarding the civil and criminal jurisdiction along the line of railway as is the case on other lines running through Independent States." If that is the only jurisdiction which is given, and there is no evidence of any other jurisdiction whatsoever given by treaty or usage or otherwise, it is manifest that the jurisdiction conferred is a criminal and civil jurisdiction "along the line of railway as is the case on other lines running through Independent States." The only question therefore that remains is whether the act complained of in this case was one which can in any sense be regarded as coming within the jurisdiction "along the line of railway." It is not suggested that the particular offence charged was committed on the railway, or that it was in any way connected with the administration of the railway. What is suggested is that in another part of India (at Simla) an offence was committed in British territory, and because the appellant was physically present on a portion of that line of railway over which jurisdiction is given for the purpose of criminal and civil jurisdiction, he was open to criminal procedure for an offence committed

elsewhere. Their Lordships are of opinion that there is no foundation for any such claim, that the arrest was illegal, and that the petition therefore ought to have been granted, and that the judgment of the Chief Court of the Punjab ought accordingly to be reversed. Their Lordships will therefore recommend to Her Majesty that the warrant and arrest and proceedings thereon should be set aside. There will be no order as to costs

Appeal allowed.

Solicitors for the Appellant: Messrs. *Morgan, Price & Mewburn.*
Solicitors for the Respondent: *The Solicitor, India Office.*
C. B.

NOTES.

[In (1905) 33 Cal., 219 the Privy Council, as in this case examined the circumstances of the case, to ascertain the nature and extent of jurisdiction in *Kathiawar*.

As regards the necessity for extradition see also (1903) 25 Mad 607 (Mysore), (1911) P.R., 1 Cr., (Bharatpur).]

[34] APPELLATE CIVIL.

The 16th July, 1897.

PRESENT:

MR. JUSTICE MACPHERSON AND MR JUSTICE AMEER ALI

Mathura Mohun Lahiri and others ....Plaintiffs

versus

Uma Sundari Debi and others. . . ..Defendants *

Second appeal—Bengal Tenancy Act (VIII of 1885), sections 104, 106, 108—Special Judge under the Bengal Tenancy Act—Appeal from the decision of the Special Judge

Under the terms of section 108 of the Bengal Tenancy Act (VIII of 1885), a second appeal lies from the decision of the Special Judge on questions with regard to the prevailing standard of measurement, area of lands in the possession of tenants, and the liability of the tenants to pay rent on account of any excess lands in their possession.

Babu *Saroda Charan Mitter* and Babu *Mukund Nath Roy* for the Appellants.
Babu *Promotho Nath Sen* for the Respondents.

THE **judgment** of the High Court (**Macpherson** and **Ameer Ali, JJ.**) was as follows :—

This is an appeal against the decision of the Special Judge under section 108 of the Tenancy Act, and a preliminary objection is taken that no appeal lies, as the proceeding in which the decision was given was one under section 104, and not a proceeding in which a dispute within the meaning of section 106 was decided. It appears that in the course of a proceeding for the preparation of a record of rights, the landlords applied for a settlement of the rent. alleging *inter alia* that the tenants were holding land in excess of what they paid rent for, and that the rod of 18 inches to the cubit was the standard rod of measurement.

The defendants put in written statements, alleging that the standard rod was one of 20 inches to the cubit. They denied that they held any excess land, and stated that they held their holding at a consolidated rent.

* Appeal from Appellate Decree No. 2239 of 1895, against the decree of K. N. Roy, Esq., Officiating District Judge of Pubna and Bogra, dated the 30th of August 1895, affirming the decree of Moulvi Abdul Mahammad, Settlement Officer of Pubna, dated the 29th of April 1895.

The Settlement Officer proceeded to deal with these allegations of the parties treating the application of the landlords as a plaint [35] and the proceeding as one in which the landlords were plaintiffs and the tenants defendants. Issues were framed, three of which were (1) as to the prevailing standard of measurement; (2) as to whether the defendants held their holdings at a consolidated rent; and (3) as to whether the excess land, if any, could be assessed. He dealt with and decided those issues, and then there was an appeal by the plaintiff to the Special Judge, in which the correctness of his decisions was questioned.

It is difficult to say, having regard to the confused terms of sections 104 to 106, under what precise section the proceeding was held. There are cases in this Court in which it was held that there could be no dispute, and no decision of a dispute, under section 106 until the draft record was prepared, as, until then, there was no entry with reference to which a dispute could be said to arise. These cases were made the subject of a reference to a Full Bench, and it was substantially decided that the exact point of time at which the dispute arose was immaterial, and that a dispute within the meaning of section 106 might arise with reference to an entry which the Settlement Officer proposed to make in the draft record of right, although no such record had been prepared [(1897) *Dengu Kazi* v. *Nobin Kissori Chowdhrani* (I. L. R., 24 Cal., 462)]. In this case we find the landlords on one side, and the tenants on the other, making certain conflicting allegations as to the area of the land, the standard of measurement, and the liability of the tenants to pay any rent on account of the alleged excess area, and we find the Settlement Officer laying down issues on those points and deciding them. It would, we think, be difficult to conceive anything more nearly approaching a dispute and the decision of a dispute to which section 106 would be applicable. The appeal does not raise any question as to what the fair and equitable rent is, but it does raise questions as to matters which must be decided before the Settlement Officer could settle the amount of rent payable, and we must hold that under the terms of section 108 a second appeal does lie on those questions from the decision of the Special Judge.

Turning to the appeal itself, the objection of the appellants, who are the landlords and the plaintiffs in the proceeding, is that the Special Judge has not decided but ought to have decided the [36] length of the measure used in measurement, whether the defendants hold excess land, and whether they are liable to pay rent for the same. The Settlement Officer, we may add, decided that the measure was one of 18 inches to the cubit, but that the plaintiffs had failed to prove that the defendants were in possession of any land in excess of what they had been paying rent for, and he also found that they held at a consolidated rent. The Special Judge declined to go into those questions, considering that they were not properly raised in the plaint of the plaintiffs, which did not state what the original area of the holding of the tenants was, and the excess area in respect of which they wanted additional rent. The landlords in their original application under section 104 distinctly asserted that the tenants had been found by the survey then made with the measure of 18 inches to the cubit to be in possession of excess lands which ought to be assessed with the rent. If it was necessary to get from them any particulars as to the original area of the holdings or other matters, this might have been done, or if additional evidence was required it might have been called for.

The questions were raised, put in issue, and decided by the Settlement Officer; they were the material questions, and the Special Judge was bound, we think, to decide them one way or the other. We, therefore, set aside his

decision in so far as it relates to the matters referred to above, and the case must go back in order that he may dispose of them The costs will abide the result.

B. D. B. —— *Case remanded.*

NOTES

[As regards appealability, this was followed in (1903) 31 Cal , 380 , (1907) 5 C L J , 538 ; (1912) 16 C L J., 182 15 I C 332 See also the Full Bench decision in (1909) 13 C W N , 1149 10 C.L J , 343

In (1899) 26 Cal , 556 a decision as to the length of the standard of measurement to be used was not within sec 106 Bengal Tenancy Act 1885]

[25 Cal 36]

The 13th July, 1897

PRESENT

MR JUSTICE BANERJEE AND MR JUSTICE STEVENS

Shama Churn Mitter and others Plaintiffs

versus

Wooma Churn Haldar Defendant

Landlord and tenant —Notice to quit —Bengal Tenancy Act (VIII of 1885)— Suit for ejectment —Notice including some land of which the defendant is found to be not in possession

A notice to quit is not bad in law simply because of a small error in the statement in such notice of the area of the land in consequence of which [37] it included some land which the defendant was found not to hold under the plaintiff

THE facts of the case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgment of the High Court

Babu *Taruck Nath Palit* for the Appellants

Babu *Nilmadhub Bose* for the Respondent

The **Judgment** of the High Court (BANERJEE and STEVENS, JJ) was as follows —

Banerjee, J —This appeal arises out of a suit for ejectment upon a notice to quit The defence was limitation, denial of the plaintiffs right, denial of the notice, and a plea that a part of the land in dispute belonged to the defendant and had been held by him for twelve years, and that the defendant had acquired a right to the whole of the land in dispute by twelve years' adverse possession.

The first Court found for the plaintiffs upon all the questions raised, except one, namely, that as to the defendant's title by adverse possession to 1¾ cottahs of land out of the land in dispute, and it accordingly gave the plaintiffs a decree for the land in dispute excepting 1¾ cottahs

* Appeal from Appellate Decree No 1884 of 1895 against the decree of Babu Shyam Chand Dhur, Subordinate Judge of 24 Pergunnahs, dated the 8th of August 1895, reversing the decree of Babu Hur Mohun Bose, Munsif of Diamond Harbour, dated the 31st of August 1894.

Against this decree of the first Court the defendant preferred an appeal, and the plaintiffs a cross-appeal. The Lower Appellate Court has dismissed the plaintiffs' cross-appeal, holding that they have failed to make out their title to 1¾ cottahs in regard to which their claim had been disallowed by the first Court, and it has decreed the defendant's appeal on the sole ground that the notice is bad in law, that is to say, bad because it includes some land which the defendant is found not to hold under the plaintiffs.

In second appeal it is contended for the plaintiffs-appellants that the decision of the Lower Appellate Court, so far as it decreed the defendant's appeal, is wrong in law, and that the notice, notwithstanding the defect found in it, was not so bad as to disentitle the plaintiffs to maintain a suit in ejectment upon the basis thereof.

We are of opinion that the plaintiffs' contention is sound. The notice requires the defendant to give up possession of 1 bigha **[38]** and 5 chittacks of homestead land with tank, situate in the Bazar of Diamond Harbour, Pergunnah Mooragacha, Zillah 24-Pergunnahs, held under the plaintiffs as tenant-at-will. The notice does not set out the boundaries of the land. The only defect that has been found in the notice is that, whereas it states the area of the defendant's holding to be 1 bigha and 5 chittacks, the true area is 1¾ cottahs less. And the question is, whether that is a defect in the notice sufficient to justify our holding that the notice is bad in law. Considering that the error is only one in relation to the area, and is a very small error, and considering that the defendant never took any objection that he was misled by reason of this defect in the notice, we think it would be wrong to hold that a defect like this is sufficient to vitiate the notice. To hold that any trifling error in the statement of the area vitiates a notice to quit, would be to throw an unnecessary difficulty in the way of parties seeking ejectment upon service of notice, and to require them to measure their lands and to set out the areas with a degree of accuracy which the ordinary purposes of life do not render it necessary for them to observe. As was remarked by Mr. Justice PATTESON in *Doe d. Williams* v. *Smith* [(1836) 5 A. and E., 350] it is not required that a notice should be worded with the accuracy of a plea. The view we take is supported also by the cases of *Doe d. Cox* [(1803) 4 Esp. 185; 6 Revised Rep., 850] and *Doe, Lessee of Rodd* v. *Archer* [(1811) 14 East. 245; 12 Revised Rep., 509].

The judgment of the Lower Appellate Court is, upon the question of the validity of the notice, therefore, in our opinion, wrong in law, and must be set aside, and the case sent back to that Court in order that the other questions raised in the appeal of the defendant before that Court may be disposed of. Costs will abide the result.

S. C. G. *Appeal allowed, case remanded.*

[39] *The 20th July, 1897.*

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE STEVENS.

Ram Narain Joshy............Plaintiff

versus

Parmeswar Narain Mahta and others..... ......Defendants.*

High Court, Jurisdiction of—District Judge, Jurisdiction of—Appeal—Appeal withdrawn from the District Court—Civil Procedure Code (Act XIV of 1882), section 25.

An appeal, the subject-matter of which was over Rs. 5,000 in value, was wrongly presented and filed in the District Judge's Court, and was subsequently upon application by the appellant withdrawn by the High Court under section 25 of the Civil Procedure Code, and registered as an appeal to that Court. The order of withdrawal left it open to the respondent to raise objection on the score of want of jurisdiction of the District Court at the time of hearing of the appeal.

Held, that when an appeal is transferred under section 25 of the Civil Procedure Code it must be heard subject to all the objections which could be taken before the Court from which it has been transferred. The High Court, therefore, had no jurisdiction to hear the appeal.

Peary Lall Mozoomdar v. *Komal Kishore Dassia* [(1880) I.L.R., 6 Cal., 30] and *Ledgard* v. *Bull* [(1886) I.L.R., 9 All, 191 L. R., 13 I. A., 131], referred to.

THE facts material to this report sufficiently appear from the judgment of the High Court. The only question argued was whether the appeal could be heard by the High Court.

Mr. *Jackson* and Babu *Lalmohan Das* for the Appellant.

Mr. *W. C. Bonnerjee*, Babu *Saligram Singh*, Babu *Lakshmi Narayan Singh* and Babu *Debendra Chandra Mallik* for the Respondents.

Mr. *Bonnerjee*, on behalf of the respondent, took a preliminary objection to the hearing of the appeal. He argued that the case transferred was the appeal to the District Judge, but the Judge had no jurisdiction to try the appeal. The High Court could not, therefore, hear the appeal -*Peary Lall Mozoomdar* v. *Komal Kishore Dassia* [(1880) I. L. R, 6 Cal., 30], *Ledgard* v. *Bull* [(1886) I. L. R, 9 All, 191: L. R., 13 I. A., 131].

[40] Mr. *Jackson* for the Appellant.—The case was not transferred; properly speaking the records were transmitted, and the appeal is one properly before this Court. The Judge in his order says that the appeal should be brought before the High Court; he should not have admitted it at all. The cases cited do not apply, and this Court has jurisdiction to hear the appeal. The learned Counsel then discussed the effect of the order of BEVERLEY and AMEER ALI, JJ., and cited *Aukhil Chunder Sen Roy* v. *Mohiny Mohun Dass* [(1879) 4 C.L.R., 491, (496)].

The **judgment** of the High Court (**Trevelyan** and **Stevens, JJ.**) was as follows:—

In this case an objection has been taken by the learned Counsel for the respondent to the hearing of the appeal. He contends that as the Court in which the appeal was originally filed had no jurisdiction, the value of the appeal being in excess of Rs. 5,000, this Court, in which the same appeal is, by virtue

* Appeal from Original Decree No. 304 of 1895 against the decree of Babu Chandra Kumar Roy, Officiating Subordinate Judge of Tirhoot, dated the 25th of June 1894.

of an order made under section 25 of the Civil Procedure Code, now pending, cannot hear it. It is with extreme regret that we find ourselves compelled to give effect to this objection

The facts shortly stated are these Two suits were decided at the same time by the Subordinate Judge of Mozufferpore This case, which was an appeal from the judgment in one of those suits, was filed on the 3rd of September 1894 in the Court of the District Judge of Tirhoot The appeal in the other suit was filed here, and has been heard by a Division Bench of this Court. When this appeal was filed in the District Judge's Court an officer of the Court made the following note " Filed value of claim is not mentioned in the memorandum, but it appears from the certified copy of the decree filed along with the memorandum that the value of claim amounts to Rs 9,855 Thus this appeal should be filed in the High Court" We may mention here that it is admitted by the learned Counsel for the appellant that as a matter of fact the subject of the dispute in this appeal was over Rs 5,000 in value, and that the appeal was filed in the wrong Court But he contends that it was so [41] filed in consequence of an error which we will refer to hereafter. On the 4th September 1894, that is a day after the appeal was filed, there was an order made by the District Judge in these words "Admit, as an application will be made for the transfer of this appeal to be tried along with the analogous appeal about to be filed in the High Court No date need be fixed" That order was signed by the District Judge and also by Pitamber Chatterjee, the pleader for the appellant, who signed the memorandum of appeal It does not, however, really matter, for the purpose of our decision, whether Pitamber Chatterjee, the pleader for the appellant, at that time knew that the value of the claim really was over Rs 5,000, and that the District Judge of Tirhoot had no jurisdiction in the matter because, as we shall presently point out, the question as to how far the mistake made by the appellant is capable of being remedied has already been dealt with by a Division Bench of this Court on an application in this particular appeal The next event which happened was that on the 10th January 1895, a Division Bench of this Court issued a rule at the instance of the appellant calling upon the respondent to show cause why this appeal should not be transferred to the file of this Court and be heard and disposed of by this Court with appeal from Original Decree No 275 of 1894 now pending in this Court and with which it is analogous The terms of the rule are in accordance with the prayer of the petition of the appellant The word "transfer" is used It has been said that if the terms of the Procedure Code had been strictly followed the word ought to have been "withdrawn." The application could have been made only under one section, namely, section 25 of the Civil Procedure Code, which authorises the High Court and the District Court to allow the parties to withdraw a suit whether pending in a Court of First Instance or in a Court of Appeal subordinate to such High Court or District Court, as the case may be, and try the suit itself or transfer it for trial to any other such subordinate Court competent to try the same It does not matter whether "transfer" was the proper word to use in the rule or not. The meaning of the rule is obvious It was a rule to show cause why an order should not be made under section 25 withdrawing the appeal from the lower [42] Court and empowering the High Court to try it This rule came on for hearing on the 9th August 1895 before a Division Bench consisting of PRINSEP and GHOSE, JJ They made the rule absolute, but in their judgment they left it open to the parties at the hearing of the appeal to raise the objection which was then raised before them, and which was to the effect that the District Judge had no jurisdiction to try the appeal. Thus the making of that rule

absolute has no effect upon the right of the respondent to raise this objection now.

One of the chief difficulties in this case arises from an application which was presented to this Court on the 16th September 1895, and was moved on the 25th November 1895. That application was based upon the fact that the appellant's Vakil, Babu Lalmohan Dass, for the first time on the 9th August 1895, when the rule came on for hearing, discovered that the appeal ought to have been valued at more than Rs. 5,000; and the petition goes on to submit that "the facts and circumstances stated above constitute sufficient cause for admitting the said appeal after the prescribed period," and asks "that the aforesaid memorandum of appeal (that is the one filed in the District Judge's Court) be admitted in this Court and be duly registered, or such further order made as to the Court may seem meet" That really, as far as we can see, is an application made under section 5 of the *Limitation Act* for the admission of the appeal after time, but with this difference, that instead of a fresh memorandum of appeal being put in, it is asked that the same memorandum of appeal be allowed to be used in this Court. Upon that application a rule was issued calling upon the other side to show cause why the memorandum of appeal should not be registered as an appeal to this Court. The rule came on for hearing on the 19th January 1897 before a Division Bench consisting of BEVERLEY and AMEER ALI, JJ. They discharged the rule. First of all they say in their judgment: "This is not an application for the admission of an appeal after time which is being presented in proper form to this Court There is no fresh memorandum of appeal now before us. What we are asked to do is to treat an appeal which was presented to the District Judge and which was called up for trial to this Court, as an appeal to this Court direct, [43] and that in the face of the order of the Division Bench which called up the appeal for hearing We are of opinion that we cannot do that. The appeal as presented to the District Judge has been called up to this Court, and is now an appeal to this Court numbered 304 of 1895, and we are at a loss to see how we can interfere in any way with the order made as regards that appeal." The learned Judges then consider that if they were to make an order in terms of the application, they would be interfering with the order which transferred to this Court an appeal pending in another Court. Their reason, as we understand it, was that there could not be on the file of the same Court two appeals from the same judgment, one on the footing that this Court had jurisdiction, and the other on the footing that the other Court had no jurisdiction. That, as far as we understand it, is what the learned Judges meant. They go on to say that even supposing that a fresh memorandum of appeal had been presented, they could not admit it because of the delay in its presentation, and they give other reasons, that is, they treat the application as if it were one under section 5 of the Limitation Act, and as if the memorandum of appeal was ready to be filed Whether the learned pleader offered to file a fresh memorandum of appeal it does not appear; but the learned Judges go into the question whether, if a fresh memorandum was filed, it was competent to them to admit the appeal, and, considering that no good reason was shown for the delay, they come to the conclusion that they could not admit it, and they discharge the rule. These are all the facts which are now before us.

On the appeal being called on, Mr *Bonnerjee* for the respondent contended that we have no power to hear it. There is no doubt that this Court can only hear appeals which are properly before it, and the only way in which appeals can be brought before it are by a memorandum of appeal being filed in this

Court in accordance with the provisions of the Civil Procedure Code, or when an appeal has been brought up to the file of this Court by an order made by this Court in the exercise of its powers under section 25 of the Civil Procedure Code. So far as section 25 is concerned, there can be no doubt that we cannot help the appellant. When a case is transferred to this Court under that section, it must be heard **[44]** subject to all the objections which could be taken if the case had been heard in the Court from which it has been transferred. The jurisdiction given by section 25 does not clothe this Court with greater powers than that which the lower Court had so far as the question of jurisdiction is concerned. If the lower Court had no jurisdiction to try the case, be the defect in jurisdiction with reference to the value or with reference to the situation of the property in dispute or with regard to any other matter which concerns jurisdiction, this Court could have no jurisdiction. Although the cases cited, namely, *Peary Lall Mozoomdar* v. *Komal Kishore Dassia* [(1880) I. L R., 6 Cal., 30], and the case of *Ledgard* v. *Bull* [(1886) I. L. R., 9 All., 191: L. R., 13 I. A., 134], are not on all fours with the present case, still we think that the reasons given there are applicable. If this Court could not try a suit which was transferred from a Court which had no jurisdiction to try it, it is difficult to see how it can hear an appeal transferred from a Court which had no jurisdiction to hear such appeal. It is admitted that the District Judge's Court had no jurisdiction to hear this appeal Therefore we think it follows that we cannot hear the appeal as an appeal which has been withdrawn from that Court and placed on the file of this Court by the order to which we have referred.

With regard to the other question it is contended that the appeal is now on the file of this Court, and we can hear it as an appeal to this Court. As we have pointed out we could only hear it as an appeal to this Court, if it had been filed here, and this has not been done. We think it is quite clear, having regard to what has taken place, that it would be incompetent to us to allow a memorandum of appeal to be filed now. It might happen in many cases that an Appellate Court, on finding that the parties have erred as to jurisdiction, would under section 5* of the Limitation Act allow the appeal to be filed. But here we are precluded from assenting to such an application, even if a memorandum of appeal had now been tendered to us. We may assume for the purposes of argument that the appellant is willing to tender a fresh memorandum of appeal As a matter of fact the learned Counsel for the **[45]** appellant says his client is willing to do so. The Division Bench of this Court in this case held that the 16th of September 1895 was a date too late for an application under section 5 of the Limitation Act. It, therefore, follows that the 20th of July 1897 is very much too late. No fresh fact has intervened. In our opinion the decision of the Division Bench is binding upon us. It is a decision really upon section 5 of the Limitation Act in the same case, where a Division Bench has declined to act under that section; it is not competent to any other Bench of this Court to act under it either at the hearing or at any other time. The only way in which that decision could be got rid of would

* [Sec. 5:—If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day that the Court re-opens:

Proviso where Court is closed when period expires.

Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.]

Proviso as to appeals and applications for review.

be by review or by appeal. An appeal does not lie to this Court and no application for a review has been made.

It has been contended that these observations of BEVERLEY and AMEER ALI, JJ., are mere *obiter dicta*. But they were observations directed expressly to the application made by the appellant; and although it may have been competent to the Court to stop short at the expression of its opinion to which we have first referred, still their decision on the other matters do not amount only to an *obiter dictum*. It is an express decision upon a matter which they were invited to decide by the appellant.

We conclude, as we began, by expressing our regret that we are obliged to give effect to the objection of Mr. *Bonnerjee* to the hearing of this appeal.

We are in the same position as the District Judge would have been if the appeal had not been withdrawn from his file. He had no jurisdiction; we must hold we have none.

The appeal is dismissed with costs.

Preliminary objection allowed. Appeal dismissed.

S. C. C.

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[46] *The 22nd July, 1897.*

PRESENT:

MR JUSTICE O'KINEALY AND MR. JUSTICE HILL.

Ram Narain Singh and another............Defendants

versus

Mina Koery............Plaintiff.*

Sale in execution of decrees—Civil Procedure Code (Act XIV of 1882), sections 15, 285—Sale in execution by inferior Court of property already under an attachment by a superior Court—Jurisdiction—Preferential right of purchasers in execution-sale—Concurrent execution of decrees.

A obtained a decree against *B* in the Court of the Munsif of Jamui, and in execution thereof attached *B*'s property on the 16th March 1891, the property was sold on the 20th April 1891 and purchased by *C* who obtained possession of it on the 3rd of August 1891, and then sold his interest to the plaintiff. At the same time the defendant *R* had a decree for costs against *B* and his heirs in the Court of the Subordinate Judge of Monghyr, and in execution thereof attached the same property on the 4th February 1891, and sold it on the 24th August 1891, *i.e.*, about four months after the sale of the property by the Munsif. The

* Appeal from Appellate Decree No. 1858 of 1895 against the decree of C. M. W. Brett, Esq., District Judge of Bhagalpore, dated the 15th of July 1895, affirming the decree of Babu Abinas Chunder Mitter, Subordinate Judge of Monghyr, dated the 14th of January 1895.

plaintiff sued for possession on the ground that, having purchased the property of *B* before the second sale by the Subordinate Judge, she was entitled to the property. The defendant contended that the sale by the Munsif of the property under attachment by a Court of a higher grade was absolutely void, and the Munsif had no jurisdiction to sell the property under section 285 * of the Civil Procedure Code

Held, that the sale by the Munsif was not without jurisdiction, and that it conveyed to the plaintiff a valid title to the property.

Section 285 of the Civil Procedure Code is merely a section for procedure to prevent different claims arising out of the attachment and sale of the same property by different Courts.

Bykant Nath Shaha v *Rajendra Narain Rai* [(1885) I L R, 12 Cal., 333], *Dwarka Nath Das* v *Banku Behari Bose* [(1891) I L R, 19 Cal, 651] and *Patel Naranji Morarji* v *Haridas Navalhan* [(1893) I L R, 18 Bom, 458] referred to

THE facts of this case sufficiently appear from the judgment

Babu *Umakali Mukerji* (for Babu *Saligram Singh*) and Babu *Mahabir Sahai* for the Appellants

[47] Babu *Saroda Charan Mitter* and Babu *Promotho Nath Sen* for the Respondent

The judgment of the High Court (**O'Kinealy** and **Hill, JJ.**) was as follows —

In this case the property in dispute was held in *zarpeshgi* by Ramdhan Singh, father of the defendants Sib Shewak Singh and Sadu Shewak Singh. In December 1874, Dhanpat Singh, the defendant No 17, purchased the right of the mortgagor, Koer Ganpat Singh, and he brought a suit against the *zarpeshgidars* in the Court of the Munsif of Jamui for arrears of rent, attached the property on the 16th March 1891, and sold it on the 20th of April of that year It was purchased by Puran Singh, who obtained possession of it on the 3rd August 1891, and then sold his interest to Rani Mina Koery, the plaintiff in this case At the same time one Raja Ram Narain had a decree for costs against the same Ramdhan Singh and his heirs in the Court of the Subordinate Judge of Monghyr, and in execution of it he attached the property on the 4th February 1891, and sold it on the 24th August 1891 The plaintiff sued for possession of the property on the ground that, having purchased at an auction sale the right of Ramdhan Singh and his heirs before the second sale, which took place in the Court of the Subordinate Judge of Monghyr, she was entitled to the property

It was urged in the Court below that under section 285 of the Code of Civil Procedure, the sale by the Munsif of the property under attachment by the Subordinate Judge, which was a Court of a higher grade, was absolutely void or in other words, that the Munsif had no jurisdiction to sell the property.

This question came before this Court in the case of *Bykant Nath Shaha* v. *Rajendra Narain Rai* [(1885) I L R, 12 Cal, 333] in which all the cases of the different High Courts were reviewed It was there pointed out that the object of that section was to prevent a confusion in the execution of decrees and where the execution sale has been held by an inferior Court at the instance of the decree-holder, the Court itself, the decree-holder, and the auction-purchaser

* [Sec 285 —Where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof, shall be the Court of highest grade, or, where there is no difference in grade between such Courts the Court under whose decree the property was first attached.]

Property attached in execution of decrees of several Courts

being without any information of any objection to the exercise of a jurisdiction [48] which that Court would ordinarily be competent to exercise, and the sale had been confirmed without any objection raised, it gives a valid title.

In the case of *Dwarka Nath Dass* v. *Banku Behari Bose* [(1891) I. L. R., 19 Cal., 651] the same property was attached by the Courts of the first and second Munsifs, and it was contended that the sale by the second Munsif was absolutely void, inasmuch as the property had been attached by the first Munsif. The Divisional Bench following the case of *Bykant Nath Shaha* v. *Rajendra Narain Rai* [(1885) I. L. R., 12 Cal, 333] decided that this was not so.

All these cases have been reviewed in the case of *Patel Naranji Morarji* v. *Haridas Navaliram* [(1893) I. L. R., 18 Bom., 458], and there it has been held that neither the language of the section, nor the object with which it may be supposed to have been introduced, made it necessary to hold that the sale by the second class Subordinate Judge was a nullity, when the property sold had been attached by a Court of a superior grade in execution of a decree before the actual sale took place.

So far as we can see section 285 is merely a section for procedure to prevent different claims arising out of the attachment and sale of the same property by different Courts. If we look at section 15 of the Code and consider the words regarding the Courts in which suits shall be instituted, we find that the words there are as strong, if not stronger, than the words of section 285, and yet that section from the very beginning has been held to be only a section regarding the procedure of the Courts and not affecting the jurisdiction.

We think the decision of the Court below is right and we dismiss the appeal with costs

B. D. B. — *Appeal dismissed.*

NOTES

[In the C.P.C 1908, sec 63, sub clause (2) it is provided that 'Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.'

This settles the previous conflict of case-law between decisions like (1898) 25 Cal, 46; (1907) 34 Cal., 836; (1898) 22 Bom, 88, (1895) 19 Bom, 127, (1894) 18 Bom, 458, (1899) 22 Mad., 295; (1900) 13 C P L.R, 145, and those like (1904) 26 All., 538, (1905) 27 All., 56; (1909) 31 All., 527 The Legislature adopted the former view in preference to that taken by the Allahabad High Court.]

[49] *The 12th July, 1897.*
PRESENT:
MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Gour Mohun Gouli and another............Defendants
versus
Dinonath Karmokar, after his death Ram Chunder Karmokar and others.................Plaintiffs.*

Declaratory decree, Suit for—Specific Relief Act (I of 1877), section 42—Suit for declaration that the defendant is a mere benamdar for the plaintiff—Limitation Act (XV of 1877), Schedule II, Articles 95 and 120—Code of Civil Procedure (Act XIV of 1882), section 244.

A suit brought by *A* to obtain a declaration that a decree originally obtained by *B* against *C* and another, which had been purchased in the name of *D*, had really been purchased by the plaintiff for his own benefit, the cause of action alleged being the wrongful execution of the decree by *D*, is not a suit for relief on the ground of fraud within article 95† of schedule II of the Limitation Act; but is governed by article 120 ‡ of that schedule. Under the circumstances the suit was held not to be barred by limitation.

Such a suit was held not to be barred by section 244, clause (c) of the Civil Procedure Code, as the question raised was not one arising between the parties to the suit in which the decree was passed, or their representatives, but one that arose between two parties each of whom claimed to be the representative of one of the parties to the suit, *viz.*, *B*, the party in whose favour the decree was passed.

Held, further, that inasmuch as it was not necessary to ask for an injunction, the suit was not barred by the proviso to section 42 § of the Specific Relief Act.

* Appeal from Appellate Decree No. 1859 of 1895, against the decree of Babu Beni Madhub Mitter, Subordinate Judge of Hooghly, dated the 14th of June 1895, affirming the decree of Babu Raj Krishna Banerjee, Munsif of Howrah, dated the 14th of September 1893.

† [Art. 95:—

Description of suit.	Period of limitation.	Time from which period begins to run.
To set aside a decree obtained by fraud, or for other relief on the ground of fraud.	Three years.	When the fraud becomes known to the party wronged.]

‡ [Art. 120:—

Suit for which no period of limitation is provided elsewhere in this schedule.	Six years.	When the right to sue accrues.]

§ [Sec. 42:—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief: (*Discretion of Court as to declarations of status or right.*)

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. (*Bar to such declaration.*)

Explanation.—A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.]

THE facts of the case for the purpose of this report are sufficiently stated in the judgment of the High Court.

Babu *Sharat Chunder Roy Chowdhry*, for the Appellants.

Babu *Mohendra Nath Roy*, for the Respondents.

The **judgment** of the High Court (BANERJEE and STEVENS, JJ.) was as follows:—

Banerjee, J.—This appeal arises out of a suit brought by one Dinonath Karmokar to obtain a declaration that a decree originally obtained by the defendant No. 4 against the defendants Nos. 2 and 3, which had been purchased in the name of defendant No. 1, had really been purchased by the plaintiff for his own benefit.

[50] The plaintiff, in his plaint, stated that execution had been taken out by him in the name of his *benamdar*, the defendant No. 1, but that subsequently a dispute having arisen between him and the defendant No. 1, the latter wrongfully, against his consent, took out execution in the year 1892, and that this was his cause of action for bringing the present suit.

There was a further relief asked for relating to certain immoveable property, but that was subsequently given up, and the suit proceeded only with reference to the first mentioned relief, namely, the relief by way of a declaration that the decree in question had been purchased by the plaintiff in the name of the defendant No. 1.

The defence was that the suit was barred by limitation, that it was barred also by section 244 of the Code of Civil Procedure, and that the defendant No. 1 was not a *benamdar* for the plaintiff.

The first Court found for the plaintiff upon all the questions raised in the case. Upon appeal by the defendant No. 1 or rather, I should say, by the purchasers of his interest, the objection under section 244 of the Code of Civil Procedure seems not to have been pressed, but an objection under section 42 of the Specific Relief Act was substituted in its place; and the other two objections—the one of limitation and the other on the merits raised in the first Court—were again urged before the Lower Appellate Court.

The learned Subordinate Judge decided all the three points, against the defendants-appellants, and confirmed the decree of the first Court.

In second appeal, it is contended for the defendants-appellants, *first*, that the Courts below were wrong in holding that the suit was not barred by limitation, whereas they ought to have held that it was so barred, *secondly*, that the Court of Appeal below ought to have held that the suit was barred by section 244 of the Code of Civil Procedure; and, *thirdly*, that the Court of Appeal below ought to have held that the suit was barred by the proviso to section 42 of the Specific Relief Act.

Upon the first point we are asked to hold that the suit is governed by article 95 of the second schedule of the Limitation Act, and that if that article applies, article 120 of that schedule which has been applied by the Lower Appellate Court cannot **[51]** have application. On the side of the respondents it is contended that article 95 does not apply to this case, and it is further contended, that, having regard to the facts found by the first Court, no question of limitation can arise in this case, as the suit was brought within three years from the date of the cause of action alleged in the plaint, that cause of action being the wrongful execution of the decree by the defendant No. 1 in the year 1892, the earlier execution proceedings being found by the Munsif to have been taken out really by the plaintiff, though in the name of his *benamdar*, the defendant No. 1.

The finding of the Munsif upon this question has not in any way been interfered with by the Lower Appellate Court; but then it is open to the appellants to contend that the Appellate Court has not confirmed the view of the first Court, it having overruled the plea of limitation on the ground that the suit was governed by article 120, and was not barred by limitation, as it was brought within six years of the date of the institution of the first execution proceedings.

If it was not clear that article 120 applied to the case, then perhaps it would have been necessary to send the case back to the Lower Appellate Court. But in our opinion the Lower Appellate Court was quite right in holding that the case was governed by article 120, because we think that article 95 of the second schedule of the Limitation Act, the only other article under which it has been contended, and it could possibly have been contended, that the case can come. has really no application to this case. Article 95 applies to a suit to set aside a decree obtained by fraud, or for other relief, on the ground of fraud. The present suit is not one to set aside a decree obtained by fraud The question is whether it is one for other relief on the ground of fraud.

We are clearly of opinion that this question ought to be answered in the negative.

As has been pointed out by the learned Vakil for the respondents, the plaintiff is entitled to the relief he asks for, namely, a declaration that he was the real purchaser of the decree, and that the defendant No. 1 was only a *benamdar* for him, quite irrespective of any fraud on the part of the defendant. This suit [52] cannot, therefore, be said to be one for relief on the ground of fraud. That being so, article 95 cannot have any application to this case. As that article does not apply, and as no other article expressly provides for this case, article 120 must apply to it.

We may here notice a case which was relied upon by the learned Vakil for the appellant, namely, the case of *Chunder Nath Chowdhry* v. *Tirthanund Thakoor* [(1878) I. L. R, 3 Cal, 504]. That case really goes against the appellant's contention; for it shows that article 95 does not apply to every case in which fraud enters as an element in the conduct of the defendant, but it is limited in its application to cases where relief is claimed on the sole ground of fraud.

As to the second contention, it is enough to say that the question raised in this case is not one arising between the parties to the suit in which the decree was passed, or their representatives, but is one that arises between two parties, each of whom claims to be the representative of one of the parties to the suit, namely, the party in whose favour the decree was passed.

That being so clause (*c*) of section 244 does not cover this case. And this appears clear upon a reference to the last paragraph of section 244, which relates to a case in which the question arises as to who is the representative of a party for the purpose of this section. In such a case as provided by the section the Court may either stay execution of the decree until the question has been determined by a separate suit, or may itself determine the question by an order under this section.

It is not suggested that the Court of execution was ever called upon to decide the question that is now raised, and therefore there can be no doubt that a separate suit would lie for the determination of that question.

As to the last point, the question was not raised in the first Court. If it had been raised in the first Court, and if the objection was well founded, the plaintiff could have amended the plaint by asking for an injunction which, it is suggested in the appellant's argument, the plaintiff ought to have asked for. It is true that the question was allowed to be raised by the Lower Appellate

[53] Court, but that Court decided the question against the defendants-appellants. If the objection had been well founded, we should have followed the course that was followed by the Bombay High Court in the case of *Sardar Singji* v. *Ganpat Singji* [(1889) I.L.R., 14 Bom., 395]. But we do not think it necessary to take that course for two reasons: In the first place, we do not think that the objection is well founded. We do not think that any injunction was necessary to be asked for in this case. The plaintiff's case is that he is the real purchaser of the decree, and that the defendant No. 1 was merely a *benamdar* for him. If he succeeds, as he has succeeded in the Court below, in obtaining a declaration that he is the real purchaser of the decree, no further proceedings can be taken in execution, and no multiplicity of proceedings can arise for the avoiding of which a prayer for an injunction might have been needed, because an application by him to the Court of execution to place him on the record as the real representative of the decree-holder, will have the effect of putting an end to all further proceedings antagonistic to him.

The learned Vakil for the appellant, in support of his contention that, in cases like this, a prayer for an injunction ought to be made, relied upon the case of *Kunhamed* v. *Kutti* [(1891) I. L. R., 14 Mad., 167]. That case was of a very different nature from the one now before us. There the plaintiff asked for a declaratory decree that a certain decree had been obtained against him by fraud, and it was held that the plaintiff ought to have prayed for a perpetual injunction restraining the decree-holder from executing his decree. In that case, the prayer for an injunction was necessary, because it was by an injunction only that the plaintiff could really protect himself from execution proceedings being taken against him by the decree-holder, who had obtained the decree by fraud. Here, as I have pointed out above, it was open to the decree-holder to put an end to all further execution proceedings by an application under section 232 of the Code of Civil Procedure.

But granting that there was any difficulty in obtaining a cessation of execution proceedings by an application for substitution under section 232 of the Code, there is a second reason why, as I said, it was unnecessary to remand the case after giving leave [54] to the plaintiff to amend the plaint. This is the position of affairs. The defendant did not raise any objection under section 42 of the Specific Relief Act in the first Court; if he had done that, the plaintiff might have prayed for such amendment of his plaint as was then necessary. As matters now stand, it appears on the appellant's own showing that the rights of the plaintiff have become vested in the defendant No. 2, one of the judgment-debtors under the decree, the purchase of which has given rise to this litigation.

If then it is declared that originally the plaintiff was the real purchaser of the decree, and not the defendant No. 1, the result would be this that the decree would now, in the course events have taken, be transferred to defendant No. 2, one of the judgment-debtors, and by section 232* of the Code of Civil Procedure, clause* (*b*) of the proviso, it cannot be executed against any of the other

* [Sec. 232:—If a decree be transferred by assignment in writing, or by operation of law, from the decree-holder to any other person, the transferee may apply for its execution to the Court which passed it, and, if that Court thinks fit, the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.

Application by transferee of decree.

Provided as follows:—

* * * *

(*b*) where a decree for money against several persons has been transferred to one of them, it shall not be executed against the others.]

judgment-debtors. Thus, even if the objection of the appellants had been well founded, having regard to the change in the circumstances, we do not think that there would have arisen any necessity for remanding the case after giving the respondents leave to amend their plaint. The grounds urged before us, therefore, all fail, and the appeal must be dismissed with costs.

S. C. G. *Appeal dismissed.*

NOTES.

[I. Consequential relief should be asked for :—(1907) 8 C.L.J. 485, see also (1911) P.R. 1.

II. As regards the scope of sec. 244, see also (1908) 31 All., 82; (1898) 21 Mad., 388; C.P.C., 1908, sec. 47.

III. Article 95, Schedule I of the Limitation Act, 1908 has no application where on the face of the plaint no equitable relief is claimed on the ground of fraud : —(1912) 37 Bom., 158.]

[25 Cal. 54]

ORIGINAL CIVIL.

The 19th May, 1897.

PRESENT :

MR. JUSTICE SALE.

Omrita Nath Mittor

versus

Administrator-General of Bengal.

Interest Act (XXXII of 1839), section 1 Certificate of the Administrator-General registering a debt—" Written instrument" —Administrator-General's Act (II of 1874), section 35- -Right of creditors to immediate payment in full if assets sufficient—" Rateable payment," Meaning of- Meaning of " shall be liable to pay "—Succession Act (X of 1865), section 282—Probate and Administration Act (V of 1881), section 104.

A certificate of the Administrator-General admitting a debt to be due is not such a " written instrument" as is contemplated by the Interest Act [55] (XXXII of 1839), because the amount mentioned therein is not payable by virtue of the certificate which merely purports to certify the registration of the amount of the admitted debt for the purpose of convenience in administering the estate.

In a suit by a creditor if his demand be uncontested or proved and the executor admits assets, the plaintiff is entitled at the hearing to an order for immediate payment without taking the accounts. The admission of assets for the payment of a debt is also an admission of assets for the purposes of the suit and extends to costs if the Court thinks fit to give them. There is nothing in section 35 of the Administrator-General's Act (II of 1874) which qualifies or restricts or otherwise interferes with the right of a creditor to demand immediate payment of his claim in full when the realizable assets in the hands of the Administrator-General are sufficient for the immediate payment of all claims in full. The " rateable payment " referred to in the above section, as well as in section 282 of the Succession Act (X of 1865), and in

* Original Civil Suit No. 845 of 1896.

section 104 * of the Probate and Administration Act (V of 1881), is rateable payment *out of the assets*; it is nowhere provided that it shall be made out of the nett income of the estate or any other specific part of the assets.

The language ("shall be liable to pay the costs)" used in clause 1 of section 35† of the Administrator-General's Act (II of 1874) shows that it was intended not to impose upon a creditor to whom the condition of exemption was inapplicable, an absolute obligation to pay the costs of the suit, but to leave a discretion to the Court to relieve him of the obligation if the circumstances of the case required it. *James* v. *Young* [(1884) L.R., 27 Ch. D., 622] referred to.

THE facts of the case appear fully from the judgment.

Mr. *Palit* and Mr. *J. G. Woodroffe* for the Plaintiff.

The *Advocate-General* (Sir *Charles G. Paul*) and Mr. *Henderson* for the Defendant.

Sale, J.—Kumar Indra Chundra Singh of Paikparah died on the 14th of May 1894, leaving a will whereof he appointed the Administrator-General of Bengal the executor, and leaving also a very large estate valued for the purposes of probate duty at over 38 lakhs of rupees. It appears that at the time of his death the testator was indebted to the extent of about 14 lakhs of rupees, a very large portion of this sum, viz., 12 lakhs, being due to Maharajah Doorga Churn Law, a secured creditor.

On the 30th June 1894 the Administrator-General obtained probate of the will of the testator and has since been engaged in the administration of his estate. On the 2nd October 1894 the [56] plaintiff gave notice to the Administrator-General of a claim against the estate for principal and interest due on a promissory note executed in his favour by the testator dated the 2nd April 1892. The principal sum secured by the note is Rs. 50,000 carrying interest at the rate of 7½ per cent. per annum. The plaintiff, however, claimed that, under an oral arrangement come to with the testator, he was entitled to interest at 9 per cent. A correspondence ensued between the plaintiff and the Administrator-General as to the rate of interest chargeable, and eventually an arrangement was come to, and, as appears from the Administrator-General's certificate dated the 8th June 1895, the plaintiff's claim was admitted and registered for the sum of Rs. 55,988-14-8 carrying interest on Rs. 50,000 at 8 per cent. per annum from the 1st June 1895.

The Administrator-General then, out of the income of the estate, as it was realized, proceeded to declare dividends in favour of the creditors who had registered their claims and tendered the proportion payable to the plaintiff in part satisfaction of his claim. The first of those dividends was declared on

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* [Sec. 104:—Save as aforesaid, no creditor is to have a right of priority over another. (Save as aforesaid, all debts to be paid equally and ratably.)

But the executor or administrator shall pay all such debts as he knows of, including his own, equally and ratably, as far as the assets of the deceased will extend.]

† [Sec. 35:—If any suit be brought by a creditor against any Administrator-General in his representative character, the plaintiff shall be liable to pay the costs of the suit down to and including the decree, unless upon proof by affidavit or otherwise that not less than one month previous to the institution of the suit he had applied in writing to the Administrator-General, stating the amount and other particulars of the claim, and supporting the same by such evidence as, under the circumstances of the case, the Administrator-General was reasonably entitled to require, and that the Administrator-General had refused or neglected to register the claim according to the practice of his office. (Creditors' suits against Administrator-General.)

If in any such suit judgment is pronounced in favour of the plaintiff, he shall, nevertheless, be only entitled to payment out of the assets of the deceased equally and rateably with the other creditors.]

the 30th June 1895, and the last on the 20th of January 1897, and the total sum thus set apart for payment of the plaintiff's debt and which the Administrator-General now holds for this purpose amounts to Rs. 52,144-14-7. The plaintiff declined to accept payment of his debt by instalments and claimed to be paid the whole amount due to him in one sum with interest on the entire principal sum. The Administrator-General, on the other hand, insisted that the plaintiff was bound to accept payment of his debt by instalments, and denied that the plaintiff was entitled to interest on the dividends tendered to him and set apart to his credit.

It appears that in the year 1895 the Administrator-General proposed to raise a sufficient sum to pay off the creditors of the estate by selling a portion of the estate; but the beneficiaries under the will of the testator were opposed to any scheme of payment which would necessitate either a sale of any portion of the estate or even a fresh charge being created for that purpose. In the course of that year two suits were instituted in this Court against the Administrator-General, one by Sreemutty Saraswati, the daughter, and the other by Sreemutty Mrinalini, [57] the widow, of the testator, praying for administration of the estate. In the one suit the plaintiff Saraswati asks that the Administrator-General may be restrained from raising a loan to pay off the creditors, while in the other suit the plaintiff Mrinalini seeks to restrain the Administrator-General from resorting to a sale of any portion of the estate for the purpose of satisfying the debts due thereon.

On the 6th of December 1895 the plaintiff gave notice in writing to the Administrator-General that he would claim interest at 8 per cent. on the sum of Rs. 55,988-14-8, being the sum admitted to be due to him by the certificate of the 8th of June 1895, including interest due on the principal sum up to the 1st of June 1895.

On the 7th of December 1896 the plaintiff instituted the present suit against the Administrator-General claiming payment of the following sums :—

(1) Rs 62,055-9-4, being the sum of Rs 55,988-14-8 representing the original registered claim, and a further sum of Rs. 6,066-10-8 representing interest at 8 per cent. per annum calculated on the principal amount of the debt from 1st June 1895 to the date of the institution of the suit,

(2) Rs. 599, being the interest at 8 per cent. calculated on the sum of Rs. 5,988-14-8 from the 6th of December 1895, and

(3) Rs. 300, representing the damages alleged to have been sustained by the plaintiff by reason of his having been put to proof of his original claim. The last of these claims has not been pressed and it is not necessary therefore to refer to it further.

As regards the claim to interest on the sum of Rs. 55,988-14-8 the plaintiff relies on the provisions of section 1 of the Interest Act (Act XXXII of 1839). It is suggested that the sum of Rs. 55,988-14-8 is a sum "payable by virtue of a written instrument" within the meaning of the section, inasmuch as it is the total sum admitted to be due by the certificate of the 8th June 1895. But in my opinion the certificate of the Administrator-General is not a "*written instrument*" such as is contemplated by the Act, because the amount mentioned therein is not payable by *virtue of the certificate* which merely purports to certify the [58] registration of the amount of the admitted debt for the purposes of convenience in administering the estate. In any case the sum claimed represents interest upon interest, and as such ought not I think to be allowed under the discretionary powers vested in the Court,

The main object of the suit is, however, to establish the plaintiff's right to immediate payment of his claim with interest on the entire principal sum from the 1st of June 1895.

The general principle applicable to a creditor's suit against an executor is clear. If the plaintiff's demand be uncontested or proved, and the executor admits assets, the plaintiff is entitled at the hearing to an immediate order for payment without taking the accounts, and, moreover, the admission of assets for the payment of a debt is also an admission of assets for the purposes of the suit, and extends to costs if the Court thinks fit to give them--Williams on Executors, 9th Edition, Vol. II, pp. 1892-93.

The term "assets," thus employed, has a wide signification, and means the property of a deceased person chargeable with and applicable to the payment of his debts An admission of assets in this sense therefore means an admission of the sufficiency of the realizable property of the deceased available for the immediate payment of his debts. An admission of assets may be made by the executor or proved against him in various ways: Seton on Judgments and Orders, 5th Edition, Vol. II, p. 1253. In the present case there is no question, but that the assets in the hands of the defendant are and have always been amply sufficient to pay in full all the debts of the deceased. Nor is it suggested that a sufficient portion of these assets could not immediately be realized and applied in satisfaction of the entire amount of the liabilities of the estate.

The difficulties that exist in the administration of the estate are created only by the beneficiaries who object to any portion of the estate being charged or sold for the immediate payment of the creditors' claims. But as between the beneficiaries and the creditors, the rights of the creditors to immediate payment, if the assets are sufficient for the purpose, are paramount. It is clear from the defendant's written statement that, though there were sufficient realizable assets in his hands for the payment in [59] full of all the creditors of the estate, the course he proposed to adopt in the administration of the estate was to pay the creditors rateably out of the surplus income of the estate.

In the 4th paragraph of the written statement the defendant states as follows:—

"Kumar Indra Chundra Singh in the plaint mentioned was at the time of his death heavily indebted—his debts amounting to nearly 14 lakhs of rupees, and the income of the estate not being sufficient to enable the defendant thereout to pay all the debts at once, he proposed to sell off a portion of the estate.

In the 6th paragraph there is this statement. "From time to time, the defendant out of the surplus income of the estate available for the payment of debts declared dividends rateably in respect of the creditors of the estate whose claims had been duly registered."

As regards the 8th paragraph of the written statement it would seem at first sight that it was denied that the realizable assets of the estate were sufficient for the immediate payment of the claims of all creditors in full. The paragraph runs thus:—

"It is not the fact that the defendant is in possession of ample means for the immediate discharge and satisfaction of the amount due to the plaintiff for principal and interest, and of all other claims against the said estate as alleged in the 12th paragraph of the said plaint. So far as funds belonging to the said estate have been available for the payment of debts, the defendant has always been ready and willing and has offered to make payments from

time to time by way of dividends as aforesaid to the plaintiff in respect of the amount due to him equally and rateably with the other creditors."

Comparing these allegations with those made previously and with what follows in a later paragraph, and with the allegations contained in the correspondence between the parties which has been read, it is quite clear, and it has not been otherwise suggested in argument, that the insufficiency referred to in the 8th paragraph is the insufficiency, not of the realizable assets, but of the annual surplus income. The equal and rateable payment which the defendant offered to make to the plaintiff, and which is referred to in this paragraph, is rateable payment out of the surplus income.

It is only necessary to refer to one other paragraph of the written statement.

[60] In the 12th paragraph the defendant says: "If this Court should be of opinion that the defendant is not bound to accept payment of the amount due to him by instalments or by way of dividends, the defendant states that by reason of the institution of the said administration suits he is unable to pay and discharge the amount so due to the plaintiff, but that he is willing to pay the same in the ordinary course of administration."

What I understand the defendant to convey by this paragraph is that his refusal to accede to the plaintiff's demand for immediate payment of his claim in full has been occasioned, not by the insufficiency of the realizable assets in his hands, but solely by the conduct of the beneficiaries who object to the debts being paid out of the corpus of the estate.

It has been shown that the annual nett income of the estate is very large, amounting to two lakhs of rupees or thereabouts, and this would be sufficient in the course of time to provide for the payment of all claims, and no doubt the Administrator-General was acting in the interests of the estate in endeavouring to pay off the claims by instalments out of surplus income, but the question is whether there is any legal warrant for thus postponing the rights of creditors. No real difficulty I apprehend exists or is created by reason of the institution of the two administration suits by beneficiaries. These suits have, I understand, been amalgamated and are now pending, but no order has been obtained restraining the defendant from raising a sufficient sum by sale of a portion of the assets for the purpose of paying off the creditors. Moreover, in the event of a decree for administration being made, the Court would, in the usual course, after proof of claims if a sufficient fund be not then available for payment of the debts in full, direct the required amount to be raised by a sale of a sufficient portion of the assets.

It is contended, however, that section 35 of the Administrator-General's Act has placed a restriction on the rights of creditors, and that the effect of the section is to give the Administrator-General the right to insist that creditors of estates in his hands shall accept payment of their claims by instalments out of nett income although there may be ample realizable assets available for immediate payment of all debts in full.

[61] The clause of the section relied on in support of this contention is as follows:—

"If in any such suit (*i.e.*, a creditor's suit against the Administrator-General) judgment is pronounced in favour of the plaintiff, he shall nevertheless be only entitled to payment out of the assets of the deceased equally and rateably with the other creditors."

A similar provision was contained in section 33 of the Administrator-General's Act of 1867. The right of creditors to rateable payment is also

defined in section 282 of the Succession Act and section 104 of the Probate and Administration Act.

Section 282 of the Succession Act provides: "Save as aforesaid (*i.e.*, as provided by section 281) no creditor is to have a right of priority over another, by reason that his debt is secured by an instrument under seal or any other account. But the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend."

Section 104 of the Probate and Administration Act is, excepting the omission of a clause which is immaterial for the present purpose, in precisely similar terms.

Now the "rateable payment" referred to in all these sections is rateable payment out of the assets. It is nowhere provided that rateable payment shall be made out of the nett income of the estate, or any other specific *part* of the assets. These sections deal with the creditors' rights as regards the general assets of their deceased debtor, and apart from any question of lien, the object is to prevent any one creditor obtaining an advantage over another in respect of the payment of his debt, and to provide for the payment of all claims proportionately out of the assets of the estate. The language of these sections shows that the Legislature was dealing with cases where the general assets or the realizable assets were or might be insufficient for the payment in full of the claims of all the creditors. It would be unnecessary and meaningless to provide for proportionate or rateable payment when the realizable assets are amply sufficient for the immediate payment in full of all claims, nor could in such a case the payment of one creditor in full in any way prejudice or postpone the [62] rights of other creditors There is, in my opinion, nothing in section 35 of the Administrator-General's Act which qualifies or restricts or otherwise interferes with the right of a creditor to demand immediate payment of his claim in full, when the realizable assets in the hands of the Administrator-General are sufficient for the immediate payment of all claims in full.

It could not have been intended by this Act any more than by the Succession Act or the Probate and Administration Act to give representatives of deceased persons the power, where assets are admittedly sufficient, to postpone indefinitely the payment of debts. It appears to me that my view of the section is in accordance with the authorities bearing on the question.

In *Hanmabalu Sannappa* v. *Cook* [(1883) 6 Mad., H. C., 346] property had been attached before judgment, and the Administrator-General before judgment took out letters of administration and was made a party to the suit in the place of the widow, the original defendant, and it was held under section 33 of Act XXIV of 1867 that under the decree obtained by the plaintiff he was only entitled to rank with other creditors. It does not appear in this case that there were any assets available for distribution amongst the general body of creditors beyond the fund which had been attached before judgment and which was admittedly insufficient to pay all the creditors in full.

In *Nilkomul Shaw* v. *Reed* [(1872) 12 B. L. R., 287], it was held that when a person obtains a decree against an executor or administrator he is entitled to have his decree satisfied out of the assets of the deceased, and that section 282 of the Indian Succession Act does not interfere with that right.

In the case of *Alliance Bank of Simla* v *Hoff* (which is unreported) execution was issued against the executor of a judgment-debtor for the full amount of the decree, although the testator's estate was not sufficient to pay the full amount of his debts.

The last case is that of *Remfry* v. *De Penning* [(1884) I. L. R., 10, Cal., 929,] where the defendant having died after judgment a rule was obtained **[63]** against the Administrator-General as representing his estate to show cause why the decree should not be executed against him. The course pursued in the case of *Alliance Bank of Simla* v. *Hoff* was followed, and it was observed by PIGOT, J., that "section 35 of the Administrator-General's Act is limited to the express purpose for which it was enacted, and there is nothing in that Act or in the Civil Procedure Code to change the position of the Administrator-General or to place him in a better position than an ordinary suitor."

It has been contended next that in any case the plaintiff must bear the costs of this suit, and reference is made to the 1st clause of section 35.

That clause provides that "if any suit be brought by a creditor against the Administrator-General in his representative character, the plaintiff *shall be liable* to pay the costs of the suit down to and including the decree, unless he is able to show that not less than one month previous to the institution of the suit he had applied to the Administrator-General to register his claim, and that the Administrator-General refused or neglected to do so."

Now, I think the clear object of a provision of this character is to prevent the costs of a suit being unnecessarily incurred by a creditor, who is desirous of proving his claim, and accordingly a creditor who institutes a suit without first submitting his claim to the Administrator-General as provided in that section, renders himself "liable to pay the costs of the suit down to and including the decree."

It is to be observed that what the section says is that a creditor is under certain circumstances to be liable to pay the costs of the suit, not that *he shall* pay the costs. In my opinion the language used shows that it was intended not to impose upon a creditor to whom the condition of exemption was inapplicable an absolute obligation to pay the costs of the suit, but to leave a discretion to the Court to relieve him of the obligation if the circumstances of the case required it.

So, where under section 136 of the Civil Procedure Code it is provided that under certain circumstances a party, if a plaintiff, shall be liable to have his case dismissed, or if a defendant to have his defence struck out, this Court has invariably exercised a **[64]** discretion as to whether the penalty shall in any given case be imposed or not.

And again in the case of *James* v. *Young* [(1884) L. R., 27 Ch. D., 652] NORTH, J., in considering the meaning to be attached to the words "*shall be liable to forfeiture*" occurring in a certain statutory enactment, made the following observations:—

"It is said that under that section, as soon as there is any default in working under the rules or any non-compliance with the rules, there is an absolute forfeiture, which cannot be got rid of, so that at the end of the five years the gales came to an end without the exercise of any discretion by the gaveller or any other person. But in the first place if the Legislature had intended that, I think it would have said so. Nothing would have been easier than to have said 'it *shall* be forfeited and come to an end.' I say nothing about the construction of those words if they had been there, but when the words are not *shall be forfeited* but *shall be liable to be forfeited*, it seems to me that what was intended was not that it should be an absolute forfeiture, but a liability to forfeiture which might or might not be enforced."

The present suit is in no sense an unnecessary one. The object of it is not to prove the plaintiff's claim, but to establish his right to immediate

payment of the entire sum with interest thereon, which right the defendant has refused to recognise This is not, therefore, a case where the penalty as to costs provided by the section should be enforced. The result is that there must be a decree in favour of the plaintiff for payment of the sum of Rs. 62,055-9-4, together with further interest at the rate of 8 per cent. on the principal sum of Rs. 50,000 from the date of institution of the suit to the date of the decree

The plaintiff is also entitled to the costs of this suit, which, together with the decretal amount, the defendant must pay out of the assets in his hands belonging to the estate of Kumar Indra Chandra Singh

The defendant may also retain his costs as between attorney and client out of the estate, both sets of costs to be taxed on scale No 2

Attorney for the Plaintiff Babu *Amar Nath Ghose*

Attorneys for the Defendant Messrs *Morgan & Co*

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[65] TESTAMENTARY JURISDICTION.

The 14th August, 1897.

PRESENT

MR JUSTICE SALE

In the goods of Courjon, Deceased

Will—Executor—Administrator-General's Act (II of 1874), sections 15, 26, 27, 29, 52, 54—Commission—Collection of assets, Meaning of

When a testator has omitted to appoint an executor under his will, the Court will appoint as executor the person whom it would appear from the tenor of the will the testator contemplated should be executor

In the goods of Punchard [(1872) L. R, 2 P & D 369] and *In the goods of Adamson* [(1875) L. R, 3 P & D 253], followed Under section 54 * of Act II of 1874 the Administrator-General is entitled to charge commission on the collection and distribution

* [Sec 54 —The Administrator General shall be entitled to reimburse himself for any payments made by him in respect of any estate in his charge which a private administrator of such estate might have lawfully made, but save as aforesaid, the commission to which the Administrator General of each of the said three Presidencies shall be entitled is intended to cover, not merely the expense and trouble of collecting the assets but also his trouble and responsibility in distributing them in due course of administration

What expenses &c commission is to cover

It is therefore enacted that one half of such commission shall be payable to and retained by such Administrator General upon the collection of the assets, and the other half thereof shall be payable to the Administrator-General who distributes any assets in the due course of administration, and may be retained by him upon such distribution

How payable

The amount of the commission lawfully retained by an Administrator-General upon the distribution of assets, shall be deemed a distribution in the due course of administration within the meaning of this Act

Commission retained to be deemed a distribution

Explanation.—The carrying of assets to separate accounts in the books of the Administrator General notified as hereinbefore provided, and the transfer of assets to the Official Trustee, shall each be deemed to be a distribution within the meaning of this section.]

of all assets. "Collection of assets" implies the doing of some act in connection with such assets.

Where part of the estate consisted of a zemindary of which the testator had granted a *putni* lease subject to payment of a fixed rental, and part of the zemindary had been acquired for public purposes, the compensation money being by arrangement divisible between the estate and the *putnidar* in certain proportions:

Held,—That the Administrator-General was entitled to charge commission on the rents actually collected by him, and on the amount apportioned to the estate, but not on the *corpus* of the Zemindary estate.

In the goods of Simpson [(1863) 1 Mad., H. C., 171] followed.

ON 20th January 1896 Eugene Courjon, of Chandernagore, died at Paris in the Republic of France, leaving a will, dated 31st May 1895, and two codicils, dated, respectively, 4th of June 1895 and 7th June 1895. By his will the testator appointed his niece Marie Isoline Domitilla Courjon universal legatee to enjoy the usufruct of the estate during her life-time and bequeathed to his nephew Charles Achille Edmond Courjon the *corpus* of the estate, together with the usufruct at the death of his niece; whereby the niece took a life-interest in the residuary estate of the testator, and his nephew took a vested interest in remainder to take effect in possession on the determination of the life-interest of the niece.

[66] In March 1896, his niece, the petitioner in this matter, being then in France, the Administrator-General of Bengal at the request of the testator's nephew applied for and obtained on 19th March 1896 letters of administration in a limited form to the estate of the deceased for the purpose of collecting the assets and paying the debts.

On 2nd May 1896 this grant to the Administrator-General was extended to enable him to pay the legacies mentioned in the will.

The petitioner now contended that according to the true construction of the will and codicils, the functions of executrix, *viz.*, the collection of assets and the payment of general and testamentary expenses and debts and of the legacies bequeathed by the said testator devolved upon her under the will and codicils, and that she was executrix according to the tenor thereof, and accordingly asked the Court to grant to her probate of the said will and codicils.

The assets of the estate within the jurisdiction of this Court at the date of the grant in limited form to the Administrator-General consisted of—

(1) An 8 annas share in certain property leased in perpetuity by the testator at a yearly rent of Rs. 45,000, the estimated value of which at 16 years' purchase was Rs. 7,20,000.

This was, however, subject to a mortgage of Rs. 3,50,000.

(2) Deposited in the Delhi and London Bank, Ld., a sum of Rs. 3,98,726-12-3.

The petitioner contended that the Administrator-General was only entitled to charge commission in respect of the said limited grant at the rate of 1½ per cent. upon the amount of his realization in cash, and that he was not entitled to charge upon the *corpus* or value of the 8 annas share in immoveable property.

The will and two codicils were as follows:—

" In my quality of Frenchman residing in France I am bound to make my testament according to the French laws. The holographic form being mostly used and the most expeditious I give it the preference—

"I undersigned Courjon (Eugene Joseph) have made my testament as follows:—

[67] " I appoint as my universal legatees: 1st—For the usufruct during her life-time and to the day of her death my niece Isoline Courjon.

"2nd—And for the real property to join to it the usufruct at the death of Isoline Courjon my nephew Charles Achille Edmond Courjon.

"I give and bequeath consequently to my niece Isoline the usufruct and enjoyment, and to my nephew Charles Achille Edmond Courjon the real property of all goods, chattels and immoveables, which will belong to me or will form part of my estate on the day of my death, as well in France as in foreign countries.

"The whole subject to the following private legacies:—

"I give and bequeath to Miss Anna Ferrec a life annuity of 6,000 fcs. (six thousand francs) payable quarterly on the 1st January, April, July and October of each year in Paris, or in such other chief town which it will please her to designate.

"I give and bequeath to Madame Horteuse Paillard a life annuity of 2,400 fcs. (two thousand four hundred francs) payable quarterly at the same periods.

"I give and bequeath to Charles Achille Edmond Courjon my nephew for his maintenance untransferable, non-distrainable, an annuity of Rs. 36,000 payable also quarterly at the same periods.

"In the event of the death of Mrs. Paillard prior to Miss Anna Ferrec the annuity of the latter will be increased by 2,400 fcs. (two thousand four hundred francs) and brought to 4,800 fcs. (four thousand eight hundred francs) yearly.

"I appropriate especially to the guarantee of the strict and regular payments of the annuities and pensions abovesaid the immoveable properties which I possess in British India, on which a second mortgage will be written as surety for the annuities or pensions according to the laws which apply to those immoveables.

"In the event of sale or expropriation or alienation by whatever means it be of those properties, a sufficient capital will have to be set aside out of the proceeds of such sales, expropriation or alienation to secure in rentes on the French Government the payment of the said annuity or pensions. The stocks thus acquired will have to be registered so as to ensure the execution of my will.

"I express a formal will that the annuities and pensions bequeathed as aforesaid by me shall be paid strictly on due dates, and that in case of delay the amount of each term due shall be increased by a sum equal to 24 per cent. (twent-four per cent.) of the term unpaid from the due date to the payment effective.

"I give and bequeath -

"To my assistant Ernest Berthet the sum of four thousand rupees (4,000 rupees).

"**[68]** To Madame Berthet his mother the sum of 2,000 rupees (two thousand rupees).

"To Ashruff Ali (*khansama*) my servant the sum of 1,000 rupees (one thousaud rupees).

"To my two servants Altapali and Shama the sum of 1,000 rupees (one thousand rupees) to be divided between them equally.

"I give and bequeath to Madame Horteuse Paillard residing at Baulagnesur Seine Grande Rue No. 101 the sum of rupees 8,000 (eight thousand rupees) and my dog Rajah.

"I give and bequeath to Miss Anna Ferrec the sum of 14,000 rupees (fourteen thousand rupees).

"All these legacies will be taken off first from the funds which I have in deposit in the Delhi and London Bank at Calcutta, and which amount actually to 50,000 rupees (fifty thousand rupees) plus the interest.

"I give and bequeath to Miss Anna Forrec one half of the rights, which may revert to me in the inheritance of Madame Fizeaux de la Martel, my sister (which rights amount to a total of about 50,000 fcs. (fifty thousand francs), excepting the jewellery belonging to that estate and the share which may belong to me in sums of which Miss Isoline Courjon my niece may be indebted towards that estate either of one's own account or on account of her father, as I intend to remit fully and entirely to my niece Isoline my share of what she may be owing to that estate.

"I give and bequeath to my niece Isoline the share accruing to me of the jewellery of the estate of Madame Fizeaux de la Martel. I bequeath to my watcher Leon Rabbufault the sum of 1,000 fcs. (one thousand francs) which will be paid to him by Miss Anna Ferrec as soon as she will be placed in possession of the advantages which I bestow on her by the present testament.

"I bequeath my two dogs Niran and Chailane to Miss Anna Ferrec. Finally I give and bequeath to Miss Anna Ferrec all the furniture, furnishing, moveable articles, carriages, pictures, jewels and works of art which may be found at the time of my death either at Paris in my apartment, Avenue de Jourville No. 26, or at Versailles Rue de la Bonne Aventure No. 4. In this legacy are not included the jewellery of the estate of Madame Fizeaux de la Martel, which moreover are not in my possession. All the costs and mutation dues or others occasioned by all the private legacies aforesaid (annuity, pensions, money, furniture) will be borne by my estate. The several legacies which I have made and to which I affect the money in Calcutta amounting to only 30,000 rupees (thirty thousand rupees), the sum which will remain added to the half share which I leave to my niece of my rights in the estate of my sister Madame Fizeaux de la Martel are more than sufficient to meet amply the charges.

[69] "If my brother Edmond Courjon, Zemindar d'Allinagov, does not nullify the renunciation which he made verbally in my favour of his rights in the estate of Madame Fizeaux de la Martel, I bequeath that share to Miss Isoline Courjon my niece.

"Finally I wish to declare that I possess in my house no values either in papers, either in money which may be seized as being a part of my goods; my only jewels are a ring emerald surrounded by four diamonds which I received from my brother Alfred Courjon deceased and a watch in *galutcha* (shark skin).

"I entrusted that ring to Miss Anna Ferrec who will have it remitted to my nephew Charles Achille Edmond Courjon, to whom I give it in remembrance of his father.

"I give him also the watch aforesaid. I revoke expressly all prior testaments. Made in Paris the thirty-first May One thousand eight hundred and ninety-five.

(Signed) Eugene Courjon."

1st CODICIL.

"As my lands, said zemindaries and my house at Chandernagore represent a value far superior to the mortgages by which they are each encumbered, I do not intend that my universal legatees will relieve those mortgages by prejudicing the legacies which I confer by my testament above.

"The sum which will remain in the Delhi and London Bank at Calcutta (after the payment of the private legacies) added to the proceeds of the rich

furniture which furnish my house at Chandernagore must exceed by far the mortgages which encumbers that house. Even if it be differently, such consideration will have no weight (considering the value of the house, itself) before the formal will which I express to indemnify my private legatees before my creditors who are already covered by their mortgages. For the payments to be made the order of classification which I give hereafter will be in consequence strictly observed.

"1*st*—Miss Anna Ferrec and Madame Horteuse Paillard must first receive their legacies of 14,000 rupees and 8,000 rupees each of them (fourteen thousand rupees and eight thousand rupees each of them), and that with the shortest delay possible.

"2*nd*—Mr. Ernest Berthet will then be indemnified.

"3*rd*—His mother.

"4*th*—My servants.

"My object being to place Miss Ferrec and Madame Paillard in a position to provide their personal requirements, also the care they must take of my poor dogs, I insist earnestly that they may be provided with the means to do so in the shortest delay.

"Further on will be found the list of my debts in France. Beside the **[70]** obligation I contracted towards Monsieur Paittevin whose Villa of the Rue de la Bonne Aventure No. 4 I rented for a period of three years, I have no others. The lease runs from the month of October 1894 to October 1897.

"On those three years the two last terms were enforced and paid in advance, and the two first have been paid on due date. My niece will therefore be debtor to Monsieur Paittevin of the sum of 5000 fcs. (five thousand francs) and for the dues of mutation on the private legacies which I have made. These debts which I impose on her will be easily met with the share which I leave for her in the estate of Madame Fizeaux de la Martel.

"The advantages very distinct which I confer to my niece are in the difference which exists between the amount of revenue of my lands and the several charges imposed on her as well for reason of the mortgages than of the annuities which she will have to serve to the three persons named in this testament. These advantages must increase as the legacies will become extinct.

"I declare, however, that in the event of Miss Ferrec not having received within the six months which will follow my death the 14,000 rupees (fourteen thousand rupees) to be taken out of the funds which I have in Calcutta, my house at Chandernagore and all the furniture it contains will devolve on her in full right as well as that half of my rights in the estate of my sister Madame Fizeaux de la Martel which I have at first destined to my niece Isoline and which I bequeath to her only under that express condition that she will comply with the wish which I express with regard Miss Ferrec and Madame Paillard. It depends altogether with my niece to avoid any diminution of her inheritance by complying loyally to my last will.

"I forbid my niece to dispose of my house and its contents before she is liberated towards Miss Ferrec and Madame Paillard.

"About six years ago my revenues being much delayed I was obliged to have recourse to my cousin Peter Joseph Dilanney, known by the nickname of Foxy, for a small loan of twelve thousand rupees, which were destined to complete the amount necessary for the purchase of a large property which I wished to acquire.

"It is necessary that my legatees should know that that loan did not succeed, and that the receipt which I have sent in anticipation was never returned to me, no doubt by forgetfulness.

* * * * *

"I maintain all the other dispositions of this will.

"Made and written with my own hand the present codicil at Paris on the fourth of June one thousand eight hundred ninety-five.

(Signed) Eugene Courjon."

2nd CODICIL.

"I want and order by the present codicil that the private legacy which I [71] made in favour of Miss Anna Ferrec by my will above dated thirty-first May one thousand eight hundred ninety-five, be paid in preference to all others.

"This refers to the donation in money as well as to the annuity.

"I declare that the above testament, dated thirty-first May one thousand eight hundred ninety-five, also the codicils following, were made and written with my own hand in double original, of which one has been deposited by myself in an iron chest belonging to Miss Ferrec (my iron chest being at Versailles) and the other entrusted to the kind care of my notary Monsieur Collin.

Paris the seventh June one thousand eight hundred ninety-five.

(Signed Eugene Courjon)."

The *Advocate General* (Sir *C. Paul*) for the petitioner.—There was no actual appointment made under the will of an executor. But according to the tenor of the will and codicils, especially the codicils, the niece of the testator must be regarded as the executrix. She is universal legatee with remainder to the nephew. The will was executed in France, and the testator claims to be a Frenchman. By French Law, section 109 of the Code Napoleon, she would be the executrix. That this was the testator's intention also appears from the terms of the will. She is entitled to have the grant to the Administrator-General revoked under section 26 of Act II of 1874 (Administrator-General's Act).

As regards the commission of the Administrator-General he is only entitled to charge on the rents he has received, but not on the *corpus* of the estate. *In the goods of Simpson*, (1863) 1 Mad. H. C., 171.

Mr. *Garth* for the Administrator-General.—The petitioner ought to have applied for revocation of the grant to the Administrator-General within six months under section 26 of the Administrator-General's Act II of 1874. Besides, there is not sufficient indication in the will that the testator intended her to be the executrix. As regards the commission of the Administrator-General he his entitled to commission at the usual rate on all sums which he has collected. He has reduced the *putni* lease into possession. Certain of the land in this 8 annas share was to be taken up by the Government, and he has fought this question, and arranged the amount of compensation to be taken in cash. In the case of *In the goods of Simpson*, (1863) 1 Mad. H. C., 171, the Administrator-General of Madras [72] was allowed commission at the rate of 2½ per cent. on all assests he had collected. Here the Administrator-General may be said to have collected the lease.

Sale, J.—It appears that at the request of a nephew of the testator the Administrator-General applied for and obtained letters of administration with a copy of the will and codicils of the testator annexed "limited" for the purpose of collecting the assets and paying the debts and charges of the interment

of the deceased. Subsequently he applied to the Court and obtained also authority to pay the legacies given by the will and codicils. This application for an extension of his authority was made at the request of the present petitioner, who, as universal legatee and executrix according to the tenor, is now applying that the letters of administration granted to the Administrator-General may be revoked, and that probate be granted to her. I think there are sufficient indications in the codicils that the testator intended that the petitioner should administer his estate, and accordingly on the authority of the cases *In the goods of Punchard*, (1872) L. R., 2 P. and D., 369, and *In the goods of Adamson*, (1875) L. R, 3 P. and D., 253, the petitioner is entitled to probate as executrix according to the tenor, and she is also entitled to an order for revocation of the letters of administration granted to the Administrator-General. It appears to me that the period of limitation created by the proviso to section 26 of the Administrator-General's Act does not apply to the circumstances of the application.

A question also arises as to the commission which the Administrator-General is entitled to charge. The grant of letters of administration to the Administrator-General, though limited, does not come within the provisions of section 18 of the Act. The question as to the commission payable is therefore governed not by that section but by sections 27 and 52 read together with section 54.

Section 27 provides that if any letters of administration granted to the Administrator-General be revoked, the Court may order the whole or any part of the commission which would [73] otherwise have been payable under the Act to be paid to or retained by the Administrator-General out of any assets belonging to the estate.

The rule laid down by section 52 is that the Administrator-General of each of the Presidencies shall be entitled to receive a commission at the following rates, respectively, namely, the Administrator-General of Bengal at the rate of 3 *per centum*, and the Administrator-General of Madras and Bombay, respectively, at the rate of 5 *per centum* upon the amount or value of the assets which they respectively collect and distribute in due course of administration. Section 54 provides that the commission to which the Administrator-General of each of the said three Presidencies shall be entitled is intended to cover, not merely the expense and trouble of collecting the assets, but also his trouble and responsibility in distributing them in due course of administration.

Accordingly, it is enacted "that one-half of such commission shall be payable to, and retained by, such Administrator-General upon the collection of the assets, and the other half thereof shall be payable to the Administrator-General, who distributes any assets in the due course of administration, and may be retained by him upon such distribution."

The term "assets" means and includes "property of a deceased person chargeable with and applicable to the payment of his debts and legacies." It would, therefore, include immoveable property. But the commission chargeable under this section is in respect of *the collection and distribution* of assets.

What then is meant by "collection of assets."

This question was considered by the Madras High Court in the case of *In the goods of Simpson*, (1863)1 Mad. H. C., 171. The view of SCOTLAND, C. J., was that the words "collection of assets" as used in sections 26 and 29 of the Administrator-General's Act (VII of 1855) did not necessarily mean realization by sale or by actual receipt or possession, yet, on the other hand, they implied the doing of some act in connection with the assets, whereby the

Administrator-General incurred trouble or expense or responsi- [74] bility. In the present case the testator was entitled to a certain zemindary property which he had leased in perpetuity. The lessee or *putnidar* is in possession, and has all the rights of ownership subject to the payment of a fixed rental. This rent was payable to and has been collected by the Administrator-General, and these collections are of course chargeable with commission. Moreover, a part of the zemindary estate has been acquired for public purposes, and the compensation money now in deposit in the Bank of Bengal is, under an arrangement made by the Administrator-General with the *putnidar*, divisible between the estate and the *putnidar* in certain proportions. The Administrator-General is, therefore, entitled to commission upon the amount apportioned to the estate. But as regards the rest or *corpus* of the zemindary property, the Administrator-General has not, it would appear, done any act which would constitute it an *asset* collected by him. Applying, therefore, the rule laid down by SCOTLAND, C.J., no commission is properly chargeable in respect of this portion of the estate. The deduction claimed in respect of probate duty will be dealt with by the Registrar in the usual way. There will be an order for revocation of the letters of administration granted to the Administrator-General and for the issue of probate to the petitioner as prayed. The Administrator-General may retain his commission out of the estate, subject to the directions already indicated, together with his costs of this application.

Attorney for the Petitioner: Mr. *C. W. Foley*.

Attorneys for the Administrator-General: Messrs. *Morgan & Co.*

C. E. G.

NOTES.

[As regards commission, see (1904) 31 Cal., 572; see also The Administrator-General's Act, 1913. As regards executors according to the tenor, see (1904) 6 Bom. L.R., 78; (1905) 1 N.L.R., 164]

[75] APPELLATE CIVIL.

The 26th July, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Goburdhone Saha and another............Plaintiffs

versus

Karuna Bewa and others............Principal Defendants, Nos. 1 to 4.*

Landlord and tenant—Notice to quit—Non-occupancy raiyat—Bengal Tenancy Act (VIII of 1885), sections 44 and 45—Suit for ejectment by a lessor against another holding over after expiry of his lease.

Certain land was let by the zemindar to the defendants on lease for a term of eight years. After the expiry of the lease the plaintiffs obtained a lease of the land, and, giving

* Appeal from Appellate Decree No. 1942 of 1895, against the decree of Babu Hemango Chunder Bose, Subordinate Judge of Jessore, dated the 30th of August 1895, affirming the decree of Babu Brojesh Chunder Sinha, Munsif of Magura, dated the 23rd of April 1895.

a month's notice to quit to the defendants, who had continued in possession after their lease expired, brought a suit to eject them.

Held, that the defendants could not be considered as trespassers, but that section 45 of the Bengal Tenancy Act applied to the case, and that the plaintiffs, not having complied with its provisions, the suit was rightly dismissed for want of proper notice to quit.

THE facts of the case are shortly these: The plaintiffs brought a suit on 6th Pous 1301 (20th December 1894) against the defendants for ejectment, on the allegation that the land in dispute was formerly *chakran* land of the landlord, and that he resumed it, and afterwards it was settled with the defendants Nos. 1 and 2 on the 15th Falgoon 1292 (26th February 1886) for a term of eight years; that after the expiration of the term, the landlord's agent let the said land to the plaintiffs on the 24th Sraban 1301 (8th August 1894); and that they were prevented by the defendants from taking possession of it. The plaintiffs served a notice on the defendants on the 15th Assin 1301 (13th September 1894), asking them to quit the land within one month. The defence, *inter alia*, was that the suit was not maintainable, as the notice was defective and not valid according to law. The Munsif dismissed the suit of the plaintiffs, holding that the notice was not a legal one, not being in accordance with the provisions of section 45 of the Bengal Tenancy Act. On appeal, the Subordinate Judge in upholding the decision of the Munsif said:—

[76] "In my opinion the view taken by the Munsif is correct. Supposing that the defendants held the lands as *chakran*, they no doubt held them on payment of rent from the latter end of the year 1292. If it be conceded that they were admitted to occupation as *raiyats* on 15th Falgoon 1292, they were undoubtedly non-occupancy *raiyats*, whose tenancy could be terminated only on one of the grounds mentioned in section 44 and not otherwise. There is no suggestion that clauses (*a*), (*b*) and (*d*) apply to this case; only clause (c) can apply: but then a notice to quit served not less than six months before the expiry of the year 1300 was an essential requisite, and it was also necessary that the suit should have been instituted within six months from the expiry of the year 1300. Neither of these conditions having been fulfilled in this case, the plaintiffs had no right to obtain *khas* possession by ejecting the defendants.

"It was, however, very strongly pressed in this Court that, as the zemindar had obtained *khas* possession after the expiry of the term, the case is not governed by sections 44 and 45 of the Tenancy Act. It is not necessary to determine what would have been the legal consequences of such possession because such a case was not set up in the Court below, and the defendants had not any opportunity of meeting such a case. In the plaint in one place we find only the statement that after the expiration of the term the lands became *khas*; meaning evidently that the lands became *khas* in the eye of the law, and not actually; and that this is the correct view is further evidenced by the fact that in the next paragraph the plaintiffs say that the defendants had no right to retain possession after the expiration of the term. So the case set up by the pleader of the appellants was not set up in the Court below; and the evidence that was read out to me does not prove that the zemindar had ever *khas* possession."

From this decision the plaintiffs appealed to the High Court.

Dr. *Rash Behari Ghose*, Babu *Amarendra Nath Chatterjee*, and Babu *Bidhu Bhusan Ganguli*, for the Appellants.

Babu *Boidya Nath Dutt* for the Respondents.

The following **judgments** were delivered by the Court (MACLEAN, C.J., and BANERJEE, J.):—

Maclean, C.J.—On the first question as to whether the land, possession of which is sought to be recovered in this suit, is *khamar* land or not, there was no issue framed as to that before the Munsif, nor was that question gone into

as a question of fact before the Subordinate Judge. Under these circumstances I think it is too late to raise it now.

Upon the other point, as to whether the case falls within sections 44 and 45 of the Bengal Tenancy Act, I see no reason to differ, notwithstanding the ingenious arguments and criticisms of [77] Dr. *Rash Behari Ghose* upon the language of those sections, from the conclusion at which the learned Subordinate Judge has arrived in the matter. I think that the construction that he has put upon these sections is sound and is the right one. I agree both in the conclusion at which he has arrived and in the reasons for that conclusion. I think the appeal fails and must be dismissed with costs.

Banerjee, J.—I am of the same opinion. I only wish to add a few words with reference to the second contention raised in the appeal, namely, that section 45 of the Bengal Tenancy Act does not apply to this case, because there is nothing to show that the defendants were tenants of the plaintiffs after the expiry of the term of their lease. It was argued that before section 45 could apply to the case, it must be shown that the defendants were non-occupancy *raiyats* of the plaintiffs, and this could not be the case unless it was shown that the plaintiffs acquiesced in the defendants' holding over upon the expiry of their lease. No doubt it is an intelligible view of things that a person who enters upon the land of another under a lease for a limited term should be treated as a trespasser the moment the lease expires, unless he obtains his lessor's consent to his holding over. But that does not appear to be the view which the Legislature has taken of the matter when it has provided, as it has done under section 45, that for the ejectment of a non-occupancy *raiyat* upon the expiration of the term of his lease, there must be a notice to quit, and not only a notice to quit, but a notice served on the *raiyat* not less than six months before the expiration of the term. That shows that in order that the landlord may give effect to the condition that the tenancy should come to an end on the expiry of the term, he must not only not acquiesce in the tenant's holding over, but before the time for such acquiescence can arrive, and whilst the term is yet outstanding, serve a notice on his tenant. The provisions of section 45, therefore, in my opinion, contain a sufficient answer to the argument advanced by the learned Vakil for the appellants.

S. C. G. *Appeal dismissed.*

NOTES.

[See also (1904) 31 Cal., 647 . 8 C.W.N 446.]

[78] PRIVY COUNCIL.

The 12th and 14th May and 3rd July, 1897.

PRESENT:

LORD HOBHOUSE, LORD MACNAGHTEN AND SIR R. COUCH.

Sham Chand Pal.........Defendant

versus

Protap Chandra Pal ....Plaintiff.

[On appeal from the High Court at Fort William in Bengal.]

Onus of proof—Deeds of gift between joint brothers of part of the family estate —Subsequent partition between them of the residue.

Two brothers, the only members of a joint Hindu family, executed and registered mutual deeds of gift to one another of their interests in specified portions of their family estate. In after years the younger brother sued the older for partition of the estate excepting so much of it as had already been the subject of the above gifts. The older defended on the ground that the deeds of gift had not been intended to operate, not representing any real transaction. To negative their effect, the burden of proving that the transaction was not real, but only a pretence, was laid upon the defendant, who failed to adduce that proof.

APPEAL from a decree (28th June 1894) of the High Court, reversing a decree (13th June 1892) of the Subordinate Judge of the Hughli District.

This suit was brought on the 11th April 1891 by the present respondent against his brother, now appellant, for a partition of the undivided property belonging to them both as a joint Hindu family. The plaint stated that the claim to partition did not include seven lots of house property in Calcutta, already dealt with by two deeds of gift, executed by the brothers to each other on the 30th August 1880, and registered. By one of these deeds (*dan-patro*) the plaintiff had given up to the defendant his interest in one of the seven houses, and by the other, the defendant had made over to the plaintiff his interest in the remaining six.

The defence of Sham Chand Pal in his written statement, admitting the execution and registration of the deeds of gift, but attempting to avoid their effect, is stated in their Lordships' judgment, as well as the purport of the deeds, and all the facts of the case.

The question raised by this appeal was whether each of the [79] two members of the joint family held the house property mentioned in the deeds of 1880 in severalty, this depending on whether the transaction was real, or pretended, as the defendant alleged it to have been.

Having fixed issues as to whether the deeds were *bonâ fide* and operative or not, and taken the evidence, the Subordinate Judge dismissed the suit. He found that Sham Chand Pal had never delivered his deed of gift to the plaintiff; that the consideration of natural affection stated in the deeds did not exist, as the brothers were not on good terms; and that there was no consideration given. As to the possession of the six houses, he accepted the defendant's assertion that they continued to be treated as joint property down to 1294, or 1887. Separate collections having taken place after that date, demands for partition ensued, which were made on both sides in 1890. On the whole case his view was that Sham Chand Pal was induced to make a *dan-patro* in favour of the plaintiff in case none of his (Sham Chand's) wives should bear a

male child. When sons were born to him he changed his mind. The gift of the six houses was treated as invalid for want of transfer of possession, and therein it was held that the whole suit must fail, as some important properties were not included in it.

Against this decision the plaintiff appealed to the High Court, whereof a Bench (TREVELYAN and AMEER ALI, JJ.) reversed the decree of the original Court, and directed a partition of all the property, except such as was comprised in the two deeds of 1880. In their judgment the Court pointed out that, at all events, there should have been a decree for a partition of all the properties which had been admitted to be joint. They considered that the two deeds were executed to carry out an arrangement for the interests of the family, and that there was nothing unreal in the transaction. They were also of opinion that possession was sufficiently given on each side in accordance with the documents

The defendant, therefore, obtained leave from the High Court to prefer this appeal.

Mr. *M Crackanthorpe*, Q. C., and Mr. *C. W. Arathoon*, for the appellant, argued that the Subordinate Judge's decision was correct, and that the High Court had not given due weight to material [80] facts which showed, when considered, that the plaintiff had not established his claim No exclusive possession of the property mentioned in the deeds of gift had followed their execution and registration. The deed executed by the defendant had, after having been registered, remained with the defendant since 1880. No exclusive possession of the property to which either deed referred had passed to the donees. The defendant had put forward a valid reason for his having executed the deed in favour of his brother, that it was to prevent the donor's widows from getting possession of the six houses on his death. The just inference was that no transaction of gift was intended, and that the gift was in suspense —a state of things resulting in no gift. The burden of proof was thus shifted from the defendant to the plaintiff. Registration gave the donee neither actual, nor constructive, nor symbolical, possession. The plaintiff thus had failed to establish his case. They cited *Dagai Dabee* v. *Mothura Nath Chattopadhya*, (1883) I. L. R., 9 Cal., 854, *Vasudev Bhat* v. *Narayan Daji Damle*, (1882) I.L.R., 7 Bom., 131, *Kishto Soondery Dabea* v. *Kishtomotee*, (1863) Marshall, 367, *Kilpin* v. *Ratlay*, (1892) L. R., 1 Q. B. D., 582, *Cochrane* v. *Moore*, (1890) L. R, 25 Q. B. D., 57, *Standing* v. *Bowring*, (1885) L. R, 31 Ch. D, 282.

Mr. *J. D. Mayne*, for the respondent, argued that the High Court were right in deciding that the object of the two deeds of 1880 was to carry out a transaction then considered to be for the interests of the family, and that the gifts were, as they were intended to be, operative between the parties. To prove what the defendant alleged, viz., that the deeds were not executed and registered as representing a real transaction, but were intended for another purpose, and designed to prevent widows from obtaining possession of the property, was a burden cast upon the defendant, and he had not discharged it. Of the deed of gift executed by the defendant there had been an actual delivery in the act of registering it, and how it had come into his possession [81] had not been satisfactorily explained. Of the house property given by the members of the joint family, *inter se*, which was the severance of undivided interest, the possession had been enough when accompanied by the declaration of the donor. This accorded with what was said in the judgment in *Appoovier* v. *Rama Subba Aiyan*, (1866) 11 Moo. I. A., 75; 8 W.R.P.C., 1. Reference was also made to the judgment of WEST, J., in *Ibhram* v. *Suleman*, (1884) I. L.

R., 9 Bom., 146, regarding the general principles of delivery upon gift, where the donee was in prior possession.

Mr. *C. W. Arathoon* replied.

Afterwards, on the 3rd July 1887, their Lordships' **judgment** was delivered by

Lord Macnaghten.—The question at issue in this appeal arises in a partition suit in which the respondent was plaintiff and the appellant, who is the respondent's full brother and an older man by about three years, was defendant.

The two brothers, who were for some time engaged in a yarn or twist business on their joint account, had, it seems, acquired a considerable amount of property while they were living together as members of an undivided Hindu family. The plaintiff's case was that part of the joint property consisting of certain houses in Calcutta was divided in 1880 under two instruments described as deeds of gift, both dated the 30th of August in that year, and both duly registered on the following day. He now claimed partition of the rest of the property as specified in a schedule to the plaint.

The defendant in his written statement alleged that the arrangement appearing on the face of the deeds was not a real or *bona fide* transaction. His story was this: There was, he said, some dissension in the family owing to quarrels between his two wives. The result was that his second wife, together with his mother and the plaintiff, left the house No. 16, Baranasi Ghose's Street, which had been the joint residence of the family up to that time. He was very ill himself and he had no male child, and so, fearing lest in the event of his death half the property comprised in the two deeds would fall into the hands of his wives and be wasted, he executed the deed of gift in favour of his brother, and at **[82]** the same time, in order to give colour to the transaction, the plaintiff executed the other deed in his favour. The property, however, still remained in the joint possession of his brother and himself, and he kept the deed of gift which he had executed in his brother's favour. He had now two sons born to him, and he wished to have the whole property partitioned.

The two deeds which, of course, must be regarded as parts of the same transaction, were both in the same form. Each referred to the other. By the one the defendant purported to give to the plaintiff out and out a moiety of six houses stated to be valued in their entirety at Rs. 25,250. By the other the plaintiff purported to give to the defendant a moiety of No 16, Baranasi Ghose's Street, which was stated to be valued in its entirety at Rs. 3,500. Both the deeds contained a declaration that the parties would continue to own jointly the rest of their joint property, and that if it became necessary to make a further partition the rest of the property should be divided in equal shares, and that neither of the parties should then claim anything or raise any objection on the ground of inequality of valuation in respect of the gifts comprised in the two deeds of August 1880.

The only question at the hearing was whether the transaction of August 1880 was a reality or a pretence.

As the deeds were duly executed and duly registered the burden of proving that the transaction was not real lay upon the defendant.

Their Lordships agree with the High Court in thinking that the defendant failed in the proof.

The defendant's case rested merely upon his own testimony. In his examination-in-chief he repeated in substance the story told in his written statement, varying it slightly by stating that the deed of gift in favour of the plaintiff

was executed simply to prevent all of his properties from falling after his death into the hands of his two wives in case he died of the disease from which he was then suffering. He said he executed the instrument "only in name," and for that reason he had kept it in his possession.

In his cross-examination, however, he set up a very different case. "Before I signed the deed of gift," he said, "no proposal [83] thereof was made to me and I did not know a bit of it. The plaintiff and Punchanun Banerji"—Punchanun was their manager and received their rents—"having taken me to the registration office when I was out of my senses made me sign the deed of gift. Before I was taken to the said office nobody told me I should have to sign a deed of gift" This story, as the learned Counsel for the appellant admitted, was an absolute falsehood. The story told by the defendant in his examination-in-chief seems hardly more worthy of credence. It is wholly uncorroborated. On the face of it it is extremely improbable. The defendant had only to make a will in order to carry out his alleged intentions. There seems to have been no reason for concocting such an elaborate piece of deception, and it is difficult to understand why the plaintiff should have been a party to the scheme at a time when it is common ground that the two brothers were not on good terms. It was suggested by the learned Counsel for the appellant that the deed which he executed was not a mere pretence, but that it was intended to be operative in the event of his having no male issue. But there is nothing in the deed or in the evidence to support that suggestion. Nor does it account for the execution of the deed of gift in his favour.

It is undisputed that the defendant was a man of dissipated life and extravagant habits, and that he spent a large amount of the joint property on his vices. The plaintiff's case was that his brother's conduct led to remonstrances and reproaches from his mother and from an uncle who is now dead as well as from the plaintiff himself, and that ultimately the defendant was prevailed upon to come to the arrangement embodied in the two deeds with the view of making some amends and saving the family property.

The fact that the deeds themselves contain a detailed statement as to the values of the respective lots is a circumstance certainly more consistent with the plaintiff's story than with the defendant's. Accept the plaintiff's story and the difference in value is seen to be an important element in the arrangement and one which would naturally find a place in deeds intended to carry it into effect. On the other hand, if the deeds were a mere blind and false in all other respects, why should they contain this one [84] unnecessary truth, the record of which seems only calculated to provoke inquiry and to suggest grounds for attacking the arrangement.

The only part of the defendant's case which seems to be true is that he had possession of the deed of gift which he executed in favour of the plaintiff. It is not very clear how he came to have that deed. The plaintiff was the only person who could have obtained it from the Registry Office. He says he took it to No. 16 and left it with his brother for safe custody. That may be so, if the defendant is correct in saying, as he does, that the plaintiff continued to live on at No. 16 for about eight months. But after all it is not very material what became of the deed, seeing that it was duly registered.

As regards possession of the property comprised in the deeds of 1880 it is quite clear that the defendant was left in occupation of No. 16 without any interference on the part of the plaintiff, and he has not succeeded in proving that after the execution of the deeds he ever received any portion of the rents of the property comprised in the deed of gift in favour of the plaintiff. The

plaintiff avers that that property remained in his sole possession, and that he executed repairs and made additions and improvements to it out of his own monies. There is no evidence to disprove or contradict that assertion.

The Subordinate Judge found in favour of the defendant. The High Court reversed his decision, and their Lordships have no difficulty in affirming the decree of the High Court. The decree as it stands only applies to the property specified in the schedules. Before their Lordships the appellant suggested, and the respondent admitted, that the partition should go to the whole of the undivided property if there be any other property now undivided.

Their Lordships, therefore, will humbly advise Her Majesty that the decree of the High Court with this slight variation ought to be affirmed and the appeal dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co*

Solicitor for the Respondent: Mr. *W. W. Box*

C. B.

NOTES.

[See also (1898) 23 Bom , 146]

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[85] APPELLATE CIVIL

The 6th May, 1897

PRESENT

MR. JUSTICE TREVELYAN AND MR. JUSTICE STEVENS.

Mohibul Huq............Defendant

versus

Shew Sahay Singh .... Plaintiff *

Right of suit—Suit to set aside sale for arrears of Road and Public cesses—Appeal to Commissioner—Act XI of 1859, section 33—Public Demands Recovery Act (Bengal Act VII of 1880), section 2.

A suit to set aside a sale for arrears of road and public cesses will lie, although no previous appeal to the Commissioner has been made under section 33† of Act XI of 1859. Such a sale

* Appeal from Appellate Decree No 1444 of 1896, against the decree of Babu Hemangu Chunder Bose, Subordinate Judge of Patna, dated the 1st of June 1896, affirming the decree of Babu Sudhangshu Bhusan Roy, Munsif of Behar, dated the 16th of December 1895.

† [Sec. 33.—No sale for arrears of revenue or other demand, realizable in the same manner as arrears of revenue are realizable, made after the passing of this Act, shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of : and no such sale shall be annulled upon such ground, unless such ground shall have been declared and specified in an appeal made to the Commissioner under Section XXV of this Act; and no suit to annul a sale made under this Act shall be received by any Court of Justice unless it

Jurisdiction of Civil Courts in suits to annul sales.

is not one for "arrears of revenue or other demands realizable in the same manner as arrears of revenue are realizable" within the meaning of that section.

THE facts material to the report in this case appear from the judgment.

The defendant appealed to the High Court.

Moulvie *Mahomed Yusuf* and Moulvie *Serajul Islam* for the Appellant

Babu *Baikanth Nath Das* for the Respondent was absent.

The **judgment** of the High Court (**Trevelyan and Stevens, JJ.**) was as follows:—

This was a suit to set aside a sale for arrears of road and public work cesses on the ground that no notice had been served under section 10 of Bengal Act VII of 1880, and that no sale proclamation had been published on the land, and that the property had been sold for a very inadequate price. The findings of fact arrived at by the Lower Appellate Court are in favour of the plaintiff.

The only question before us is whether such a suit would lie without a previous appeal to the Commissioner from the order of the Collector.

It has been contended that section 33 of Act XI of 1859 applies to cases like the present. Section 2, Bengal Act VII of 1880, says: "This Act, so far as is consistent with the tenor thereof, shall be construed as one with Act XI of 1859."

[86] We think that this contention is not correct. Arrears of road cess are recoverable under section 98 of Bengal Act IX of 1880, "by any process provided by any law for the time being in force for the realization of public demands;" and it is provided by that section that such arrears "shall be deemed to be a public demand under such law." The law under which public demands are recovered is Bengal Act VII of 1880, and under the provisions of that Act, such demands are realized by the certificate procedure. Section 19 of the Act provides that a certificate under the Act, "may be enforced and executed by all or any of the ways and means mentioned and provided in and by the Code of Civil Procedure for the enforcement and execution of decrees for money."

It thus appears that the sale in the present case for the realization of the arrears of cesses was not a sale for "arrears of revenue and other demands realizable in the same manner as arrears of revenue are realizable" within the meaning of section 33 of Act XI of 1859, and therefore the provisions of section 33 can have no application to the sale with which we are concerned.

We therefore dismiss this appeal without costs, the respondent's pleader not being present.

S. C. C. *Appeal dismissed.*

NOTES.

[See also (1899) 26 Cal., 414 at 427.]

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shall be instituted within one year from the date of the sale becoming final and conclusive, as provided in Section XXVII of this Act; and no person shall be entitled to contest the legality of a sale after having received any portion of the purchase-money. Provided, however, that nothing in this Act contained shall be construed to debar any person considering himself wronged by any act or omission connected with a sale under this Act, from his remedy in a personal action for damages against the person by whose act or omission he considers himself to have been wronged.]

Proviso.

[25 Cal. 86]

The 13th July, 1897.

PRESENT:

MR. JUSTICE O'KINEALY AND MR. JUSTICE RAMPINI.

Durga Prasad Banerjee and others............Plaintiffs, Decree-holders

versus

Lalit Mohon Singh Roy............Defendant, Judgment-debtor.*

Execution of decree—Adjustment or satisfaction of decree— Civil Procedure Code (Act XIV of 1882), sections 257A, 258—Sanction of Court to agreements for satisfaction of decree - Payments by judgment-debtor under void agreement—Effect of uncertified payments to decree-holder.

A sum paid under an agreement void under section 257A of the Civil Procedure Code cannot be acknowledged or recognised in execution of a decree under section 258† of the Code, unless it has been certified within the proper time.

Agreements for the satisfaction of a judgment-debt not sanctioned under section 257A of the Civil Procedure Code are void; but, if sanctioned, they may be carried out in execution.

[87] *Gajapati Narayana Devu* v. *Chath Venkataramanaya* [(1890) 1 Mad. Law Journal, 332] and *Chedumbara Pillai* v. *Ratna Ammal* [(1881) I. L. R., 3 Mad., 113] referred to.

THE decree-holders obtained two decrees for rent, and in execution thereof had the tenure of the judgment-debtor attached and advertised for sale; upon that, on the 2nd of September 1893, the judgment-debtor, with the consent of the decree-holders, presented a petition to the Subordinate Judge, who passed the decree, praying for time, and stating in the petition that the decree-holders had agreed to allow him time in consideration of his agreeing to pay interest at 12 per cent. per annum from the date of the institution of the suits, *i.e.*, at a higher rate than what was allowed in the decrees; and the Court thereupon ordered that "the case be struck off;" and it was further ordered that "the sums paid by the judgment-debtor to the decree-holders on account of the decretal debt in each of the two execution cases respectively be noted in the register." On the 10th of May 1894 the decree-holders again applied for execution, without mentioning the fact of the aforesaid agreement for payment of excess interest, and the tenure of the judgment-debtor was again attached; on which the judgment-debtor filed another petition on the 2nd July 1894 with the decree-holder's consent, praying that a further time of six months be allowed him, and the case struck off, as the decree was going to be satisfied amicably. Upon

* Appeal from Order No. 343 of 1896, against the order of Babu Kedar Nath Mojumdar, Subordinate Judge of Burdwan, dated the 1st of August 1896.

†[Sec. 258 :— If any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, or if any payment is made in pursuance of an agreement of the nature mentioned in section 257A, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree.

Payment to decree-holder.

The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after due service of such notice, the decree-holder fails to appear on the day fixed, or having appeared fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

No such payment or adjustment shall be recognized by any Court unless it has been certified as aforesaid.]

that the Court made the following order: "Case struck off as per judgment-debtor's petition filed with the consent of the decree-holders. Attachment to subsist."

On the 14th of April 1896 the decree-holders applied for the third time for execution, to which the judgment-debtor objected, stating that the sums of money paid to the decree-holders as excess interest (the receipts of which had been admitted by the decree-holders) over and above the interest payable under the decree, should be deducted from the decretal amount, as the agreement entered into by the parties with respect to the payment of the excess interest was not sanctioned by the Court as provided by section 257A of the Civil Procedure Code, and that the said sums should be applied to the satisfaction of the judgment-debt.

[88] The decree-holders contended that as payment of the aforesaid sums was not certified to the Court under section 258 of the Civil Procedure Code, the Court executing the decree could not recognize that payment.

The Subordinate Judge observed that when the judgment-debtor applied for time, the Court simply struck off the execution case without directing its attention to the provision, in the judgment-debtors' petition, for payment of the excess interest, and it did not pass any order with respect to it, nor did it consider whether that provision was reasonable or not; and he held that the agreement for payment of the excess interest was therefore void, as it did not receive the necessary sanction of the Court under section 257A of the Civil Procedure Code. He further held that the contention of the decree-holders was not a valid one, inasmuch as the provisions of section 258 of the Code had no application to any payment made in pursuance of an invalid agreement not sanctioned by the Court; and he ordered, relying upon the last clause of section 257A of the Code, and also upon the case of *Gajapati Narayana Deou* v. *Chath Venkataramanaya*, (1890) 1 Mad. Law Journal, 332, that the money paid to the decree-holders as excess interest be credited in payment of the decretal amount.

From this order the decree-holders appealed to the High Court.

Dr. *Rash Behary Ghose* and Babu *Nalini Ranjan Chatterjee* for the Appellants.

The *Advocate-General* (Sir *Charles Paul*) and Babu *Karuna Sindhu Mookerjee* for the Respondent.

The **judgment** of the High Court (**O'Kinealy** and **Rampini, JJ.**) was as follows:—

This is an appeal from the decision of the Subordinate Judge of Burdwan, dated the 1st August 1896; and the question we have to determine is whether a sum paid under an agreement void under section 257A of the Code of Civil Procedure, can be acknowledged or recognised in execution of a decree under section 258, unless it has been certified within the proper time.

Section 257A refers to two kinds of agreement, (*1st*) "agree-[89]ments to give time for the satisfaction of a judgment-debt," and (*2ndly*) "agreements for the satisfaction of a judgment-debt." If the Court does not sanction them they are void. If the Court sanctions them they may be carried out in execution. For the section states that "any sum paid in contravention of the provisions of this section," that is any sums paid under agreements void, "shall be applied to the satisfaction of the judgment-debt; and the surplus, if any, shall be recoverable by the judgment-debtor."

The agreement in this case is an agreement between the parties, and its force depends upon the sanction of the Court. It was not sanctioned and is void.

Section 258 says: "If any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, or if any payment is made in pursuance of an agreement of the nature mentioned in section 257A, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree." Then the section goes on to say that, "unless such payment or adjustment has been certified as aforesaid, it shall not be recognised as a payment or adjustment of the decree by the Court executing the decree."

The learned Advocate-General argues that the Judge in the Court below was right in saying that the agreement referred to in section 258 is a "valid agreement;" but the section itself makes no reference to validity, and section 257A provides for agreements null and void. We are unable therefore to agree with the construction placed upon section 258. The case of *Gajapati Narayana Devu* v. *Chath Venkataramanaya*, (1890) 1 Mad. Law Journal, 332, cited to us seems to militate against the reasons given in the decision of the case of *Chedumbara Pillai* v. *Ratna Ammal*, (1881) I. L R, 3 Mad., 113.

We think the view taken by the Court below is wrong, and we set aside the decree of the Subordinate Judge with costs in both Courts, and direct that the money allowed by him under that agreement be not allowed in execution of the decree

B. D. B. *Appeal allowed.*

NOTES.

[See the C.P.C., 1908, O. 20, r. 11, which alters the previous law. See also (1911) 22 M.L J, 166, (1908) P.R, 29, (1904) P.R., 88]

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[90] *The 29th April, 1897.*

PRESENT.

MR. JUSTICE RAMPINI AND MR. JUSTICE STEVENS

Perma Roy and another............Plaintiffs

versus

Kishen Roy and others...........Defendants.*

Evidence Act (I of 1872), section 35—"Butwara Khasra"—Estates Partition Act (Bengal Act VIII of 1876), section 54—Measurement papers, Entry made in—"Record."

A *butwara khasra* or measurement paper prepared under section 54 of the Estates Partition Act (Bengal Act VIII of 1876) is not a "record" within the meaning of section 35† of

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* Appeal from Appellate Decree, No. 778 of 1896, against the decree of F. H. Harding, Esq., District Judge of Shahabad, dated the 22nd of February 1896, reversing the decree of Babu Debendra Prosad Bagchi, Munsif at Arrah, dated the 28th of May 1895.

Entry in public record, made in performance of duty enjoined by law, when relevant.

† [Sec 35 —An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact]

the Evidence Act (I of 1872). An entry made therein of the name of a **tenant in possession** is not admissible in evidence under that section.

Mohi Chowdhry v. *Dhiro Misrain*, (1880) 6 C. L. R., 139, referred to.

THE plaintiffs in this case claimed to recover possession of a plot of land on the allegation that they took a settlement of it in 1296 and paid rent to the landlords till 1300, when a *butwara* having been effected the land fell to the share of one of them, and rent was paid since then to that person; that in consequence of certain criminal proceedings at the instance of the defendants, plaintiffs' crops were put under attachment and finally the plaintiffs were forcibly dispossessed from the lands. The defendant No. 1 contested the claim as regards the southern portion only of the plot in question; he admitted that he had no concern with the northern portion, and that that portion belonged to the plaintiffs and defendants Nos. 2 and 3. Defendants 2 and 3 confessed judgment.

The Munsif decreed the claim, and one of the reasons on which his judgment was based was stated by him as follows:—

"The copy of the *khasra* of the *butwara* measurement of 1891 also shows that the land in suit was then measured in the name of the plaintiffs. This would never have been done unless the plaintiffs were then in possession of it."

On appeal by the defendant the District Judge set aside the **[91]** decree of the Munsif, and held, with reference to the *khasra*, that that paper was not admissible in evidence.

The plaintiffs appealed to the High Court.

Babu *Jogendra Chandra Ghose* for the Appellants.

Babu *Karuna Sindhu Mukerjee* and Babu *Lalmohan Ganguli* for the Respondents.

The **judgment** of the High Court (**Rampini** and **Stevens, JJ.**) was as follows:—

This is a suit in which the plaintiffs seek to establish their title to and to recover possession of certain land. The Lower Appellate Court has given them a decree for the northern half of the land in suit, but has dismissed their claim to the southern half of it.

The plaintiffs now appeal to this Court, and on their behalf it has been urged that the Lower Appellate Court has erroneously excluded from evidence three documents, the first being a plaint, the second, an application for the execution of a decree, and the third, a *butwara khasra*. The first two of these documents are said to be admissible in evidence under the provisions of section 32, clause 7, of the Indian Evidence Act read in connection with section 13, clause (*a*) inasmuch as it is said that they contain statements by one Gulzar, who is dead, to the effect that the plaintiffs' land is to the west of Gulzar's land and is *bagar* land. It must here be noted that the statement of the land being west of Gulzar's land, and being in possession of the plaintiffs, is only to be found in the second document, the application for execution of a decree. In the other document, the land is merely described as *bagar* land.

Now, the learned District Judge has rejected these documents and has excluded them from the evidence in the case on the ground that, although Gulzar may be dead, yet these documents do not come within the provisions of section 13, clause (*a*), of the Evidence Act, as they are not transactions in which any right of the plaintiffs has been recognised or asserted. We certainly agree with the learned District Judge in this view of the case. There is no recognition of the plaintiffs' right in any land in these documents, and even if there were any such recognition, **[92]** we do not see how they could have any

weight. Such admissions made by a third party as Gulzar was, could have no weight at all.

The third document, which the learned District Judge has excluded from evidence, is a *butwara khasra* prepared under the provisions of section 54 of the Bengal Act VIII of 1876, that is, the Estates Partition Act. It is contended that this document is admissible in evidence under the provisions of section 35 of the Indian Evidence Act, and certain rulings have been cited before us, both for and against this contention, namely, the rulings in the cases of *Gopal Chunder Shaha* v. *Madhub Chunder Shaha*, (1873) 21 W. R., 29, *Mohi Chowdhry* v. *Dhiro Misrain*, (1880) 6 C. L. R., 139; *Govindrao Deshmukh* v. *Ragho Deshmukh*, (1884) I. L. R., 8 Bom., 543, and *Taru Patui* v. *Abinash Chunder Dutt*, (1878) I. L. R., 4 Cal., 79.

The only rulings which we think are applicable are *Govindrao Deshmukh* v. *Ragho Deshmukh*, (1884) I. L. R., 8 Bom., 543, and *Mohi Chowdhry* v. *Dhiro Misrain*, (1880) 6 C. L. R., 139. But the former case is not on all fours with the present case, inasmuch as it relates to statements by Survey Officers contained in an extract from a village register of lands. The document referred to in that case is not of the nature of the *butwara khasra* in dispute here. The other case, however, namely, the case of *Mohi Chowdhry* v. *Dhiro Misrain*, (1880) 6 C. L. R., 139, seems to us to be exactly in point, and it lays down that measurement papers prepared by a *butwara* Amin deputed by the Collector to make a partition do not come within section 35 of the Evidence Act.

Applying this ruling to the present case, it is clear that this *butwara khasra* has been rightly excluded from evidence by the learned District Judge, and independently of that ruling we think that the *butwara khasra* in question cannot come within the provisions of section 35, inasmuch as it is not an official book, register, or record, such as is referred to in that section. The "record," it is clear, must be *ejusdem generis*, or of the same class, with the "official book" and "register" referred to immediately before, and we do not think a *butwara khasra* is such a [93] record as is contemplated by section 35 of the Indian Evidence Act. Moreover, it would also appear that even if it was a record, the entry as to the possession of the plaintiff is not an entry which the Amin had to make under the provisions of section 54 of Bengal Act VIII of 1876, because all that the Amin, or rather the Deputy Collector, who is referred to in this section, is authorised to make is the measurement of the land comprised in the estate to be divided and a rent roll; but the section, as far as we can see, does not authorize him to make any entry as to the names of the parties in possession of the land which he measures.

For these reasons, then, we think that the learned District Judge has not committed any error in law in excluding these three pieces of documentary evidence, and we accordingly dismiss this appeal with costs.

S. C. C. *Appeal dismissed.*

NOTES.

[This was followed in 1 I.C., 807; (1910) 8 I.C., 890.

See also (1906) 30 Bom., 523. The Estates Partition Act, V of 1897 (B.C.) was held to have altered the law as to admissibility, (1908) 13 C.W.N., 93 See also (1913) 17 C.W.N., 779 where this case was followed as regards *batwara* proceedings held prior to that enactment.]

[25 Cal. 93]

The 16th August, 1897.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE STEVENS.

Kudrathi Begum............Plaintiff

versus

Najibunnessa............Defendant.*

Registration Act (III of 1877), sections 35, 73, 76, 77—Denial of execution—Suit to enforce registration—Right of suit.

Where the executant of a document did not appear before the Sub-Registrar, although a summons was issued to such executant, and the Sub-Registrar thereupon refused to register the document, *Held*, in a suit under section 77 of the Registration Act to enforce registration of the document—

(1) That the case was one of "denial" of execution within the meaning of sections 35† and 73‡ of the Registration Act (III of 1877), *Luckhi Narain Khettry* v. *Satcowrie Pyne* [(1888) I. L. R., 16 Cal., 189], and *Radhakissen Rowra Dakna* v. *Chooneelall Dutt* [(1879) I. L. R., 5 Cal., 445], referred to.

(2) That an application to the Registrar made under section 73 of the Act in this case was properly made under that section.

(3) That the order of the Special Sub-Registrar to whom the case was referred, refusing registration of the document, was equivalent to an order by the Registrar.

* Appeal from Original Decree No. 302 of 1896 against the decree of Babu Juggaddurlabh Mozumdar, Subordinate Judge of Tirhoot, dated the 2nd of June 1896.

† [Sec. 35: If all the persons executing the document appear personally before the registering officer, and are personally known to him, or if he be otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document;

Procedure on admission of execution.

or, in the case of any person appearing by a representative, assign or agent, if such representative, assign or agent, admits the execution;

or, if the person executing the document is dead, and his representative or assign appears before the registering officer, and admits the execution,

the registering officer shall register the document as directed in sections 58 to 61, inclusive.

The registering officer may, in order to satisfy himself that the persons appearing before him are the persons they represent themselves to be, or for any other purpose contemplated by this Act, examine any one present in his office.

Procedure on denial of execution, etc.

If any of the persons by whom the document purports to be executed deny its execution,

or if any such person appears to be a minor, an idiot, or a lunatic,

or if any person by whom the document purports to be executed is dead, and his representative or assign denies its execution,

the registering officer shall refuse to register the document. Provided that, where such officer is a Registrar, he shall follow the procedure prescribed in part XII of this Act.]

Application where Sub-Registrar refuses to register on ground of denial of execution.

‡ [Sec. 73:—When a Sub-Registrar has refused to register a document on the ground that any person by whom it purports to be executed, or his representative or assign, denies its execution,

any person claiming under such document, or his representative, assign or agent authorized as aforesaid, may, within thirty days after the making of the order of refusal, apply to the Registrar to whom such Sub-Registrar is subordinate in order to establish his right to have the document registered.

Such application shall be in writing and shall be accompanied by a copy of the reason recorded under section 71, and the statements in the application shall be verified by the applicant in manner required by law for the verification of plaints.]

[94] (4) That the case came under clause (a) of section 76 of the Act, and the present suit did lie under the provisions of section 77.

THE facts of this case appear sufficiently from the judgment of the High Court. The plaintiff asked for a decree directing that a deed of sale executed in her favour by the defendant be registered under the provisions of section 77 of the Indian Registration Act. The Subordinate Judge, before whom the case was brought, held that the suit did not lie, as the case was not one of denial of execution, and the plaintiff in applying under section 73, instead of appealing under section 72, mistook her remedy, and virtually did not go to the Registrar as the law required her to do before proceeding under section 77.

The plaintiff appealed to the High Court.

Dr. *Asutosh Mukerjee* for the Appellant. The original order was one under section 35, and a proper order under that section. The order should be construed to be a refusal on the ground of denial of execution. Non-appearance in this case comes within the meaning of denial of execution in sections 35 and 73, and the present suit was properly brought under section 77. *Luckhi Narain Khettry* v. *Satcowrie Pyne*, (1888) I.L.R., 16 Cal., 189, and *Radhakissen Rowra Dakna* v. *Choonee Lall Dutt*, (1879) I. L. R., 5 Cal., 445, were cited.

Moulvie *Mahomed Mustafa* for the Respondent contended that there was no denial in this case, and that the cases cited were not in point. This case really came under section 72. The Sub-Registrar was the person who passed the order and not the Registrar; sections 76 and 77 would not apply. All the remedies provided for in the Registration Offices were not here exhausted, and the present action should fail.

Dr. *Asutosh Mukerjee* in reply.

The **judgment** of the High Court (TREVELYAN and STEVENS, JJ.) was delivered by

Stevens, J.—This appeal arises out of a suit under section 77 of the Registration Act. Registration was in the first instance refused by the Sub Registrar under the following order: "Eight months from the date of execution have passed. Although summons was [95] issued against the executant to appear, she did not appear to admit execution. I refuse registration under section 35 of Act III of 1877, paragraph 159 of the 'Registration Manual.'" The plaintiff (now appellant) who was the party interested in the deed in question, then presented a petition under section 73 of the Registration Act to the District Registrar of Mozufferpore, praying that an order for the registration of the document might be made after taking of evidence. The Registrar made over this application to the Special Sub-Registrar for the necessary action and report. The Special Sub-Registrar passed the following order: "This deed, dated the 24th November 1894, was presented by Mahomed Hossein, agent of Kudrathi Begum, before the Sub-Registrar of Mozufferpore on the 18th March 1895. The executant Najibunnessa did not appear either personally or by her authorized agent within eight months from the date of execution. The Sub-Registrar refused registration under paragraph 159 of the 'Registration Manual' on the 26th July 1895. The appeal does not lie under section 73 of Act III of 1877. I reject the application accordingly." It was in consequence of this order of the Special Sub-Registrar that the present suit was instituted under section 77 of the Registration Act.

The learned Subordinate Judge has held that the suit does not lie. He takes the order to be equivalent to an order of the Registrar, which is apparently the correct view, looking to the provisions of section 7 of the Registration Act, and the first of the rules made by the Inspector-General under the provisions

of section 69 of the Act. Under that rule the Sub-Registrar at the head-quarters of a district, whose office has been amalgamated with that of the Registrar, is authorised to act as the working deputy of the Registrar exercising, as a matter of routine, all the functions of a Registrar, except the powers of supervision and control under section 68, and that of hearing appeals from orders refusing to register under section 72. He is authorised to deal with applications under section 73 of the Act as a matter of course.

The ground on which the learned Subordinate Judge has held that no suit lies in this case is that registration had been refused on a ground other than the denial of execution, and therefore **[96]** the proper remedy of the plaintiff was an appeal to the Registrar under section 72 against the order of the Sub-Registrar refusing to admit the document to registration, and not an application under section 73. He says: "When plaintiff ought to have appealed to the Registrar under section 72, but mistaking her remedy she made an application under section 73, it is the same as if she did not at all go to the Registrar. It is thus abundantly clear that the plaintiff has not complied with the provisions of the Registration Act. She is therefore out of Court."

The attention of the learned Subordinate Judge does not appear to have been directed to the case of *Luckhi Narain Khettry* v. *Satcowrie Pyne*, (1888) I. L. R., 16 Cal., 189, and the case of *Radhakissen Rowra Dakna* v. *Choonee Lall Dutt*, (1879) I. L. R., 5 Cal., 445, where it has been held that a wilful refusal or neglect to attend and admit execution is equivalent to a denial of execution within the meaning of the Registration Act; and that where such refusal or neglect occurs a suit will lie under section 77 of the Act for the purpose of having the document registered. In paragraph 146 of the rules made by the Inspector-General, the latter case and another case, *In re Abdul Aziz*, (1887) I. L. R., 11 Bom., 691, are referred to as authority for that proposition, and it is stated that as soon as such refusal or neglect is proved before him, a registering officer may record his refusal to register the document under section 35. It is remarked that an appeal, by which is apparently meant an application, will then lie to the Registrar under section 73, who will make inquiry and pass orders under sections 74 and 75 just as if execution had been specifically denied. We think that in accordance with the rulings to which we have referred and the practice of the Registration Department, the plaintiff did not mistake her remedy in applying in the present case to the Registrar under section 73. The original order of refusal was on the face of it an order passed under section 35 of the Act, and it was passed in consequence of the neglect of the executant to attend and admit execution. Taking the order of the Special Sub-Registrar on the application under section 73 as equivalent to an order of the Registrar, the case comes under **[97]** clause (*a*) of secion 76 of the Act, and, therefore, the plaintiff had a right of suit under the provisions of section 77.

The decree of the lower Court must be set aside, and the case remitted to that Court for disposal on the merits.

The appellant will get the costs of this appeal.

S. C. C. *Appeal allowed*; *case remanded.*

NOTES.

[This was followed in (1907) 29 All., 284; (1912) 16 I. C., 614 (Cal.).]

[25 Cal. 97]

The 28th July, 1897.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE AMEER ALI.

Rami Deka............Defendant

versus

Brojo Nath Saikia and others.........Plaintiffs.*

Judgment—Form of judgment on appeal—Judgment not in conformity with law—Dismissal of appeal—Civil Procedure Code (Act XIV of 1882), sections 551, 574, 584.

The Lower Appellate Court, in disposing of an appeal from a decree of the Munsif, recorded the following judgment. "Suit laid at Rs. 180, value of buffaloes. Appeal rejected under section 551 † of the Civil Procedure Code."

Held, that this was not a judgment in conformity with law.

The dismissal of an appeal under section 551 of the Civil Procedure Code by a Court, whose decision may be the subject of an appeal, does not relieve the Court from the necessity of writing a judgment which, according to the provisions of section 574‡ of the Code, should show the points raised, the decision upon those points, and the reasons for deciding them.

FOR the purposes of this report the facts and points for decision are sufficiently stated in the judgment.

Babu *Basanta Coomer Bose* for the Appellant.

Babu *Mon Mohun Dutt* for the Respondents.

The **judgment** of the High Court (**Macpherson** and **Ameer Ali, JJ.**) was as follows:—

The judgment of the Lower Appellate Court in this case is: "Appeal rejected under section 551 of the Code of Civil Procedure"

It is contended that this is not a judgment in conformity with law, and that there is an error of procedure, which brings the case under section 584.

[98] The dismissal of an appeal under section 551 by a Court, whose decision may be the subject of an appeal, does not, we think, relieve the Court from the necessity of writing a judgment which, according to the provisions of section 574, should show the points raised, the decision upon those points,

* Appeal from Appellate Decree No. 311 of 1896, against the decree of M. A. Gray, Esq., Subordinate Judge of Durrung, dated the 1st of November 1895, affirming the decree of Babu Prosanno Coomar Ghose, Munsif of Tejpore, dated the 22nd of July 1895.

† [Sec. 551:—The Appellate Court may, if it thinks fit, after fixing a time for hearing the appellant or his pleader, and hearing him accordingly if he appears at such time, confirm the decision of the Court against whose decree the appeal is made, without sending notice of the appeal to such Court and without serving notice on the respondent or his pleader; but in such case the confirmation shall be notified to the same Court.]

Power to confirm decision of lower Court without sending it notice

‡ [Sec 574:—The judgment of the Appellate Court shall state—

Contents of judgment.

(a) the points for determination;
(b) the decision thereupon;
(c) the reasons for the decision; and,
(d) when the decree appealed against is reversed or varied, the relief to which the appellant is entitled,

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.]

Date and signature.

and the reasons for deciding them. There was an appeal before the Court, and the judgment disposing of that appeal must, we think, be in conformity with the provisions of the Code. We set aside the decision and remand the case in order that the appeal may be disposed of according to law. The costs of this appeal will abide the result.

B. D. B. *Case remanded.*

NOTES.

[This was followed in (1905) 9 C. C., 32; (1907) 31 Mad., 469 . 18 M.L.J., 84 ; but not followed in (1907) 30 All., 319, (1910) 8 I. C., 911 (Sind) It has been held in (1911) 36 Bom., 116 . 13 Bom. L. R, 1002 12 I. C., 564, that under the corresponding provisions of the C.P.C, 1908, writing out a judgment was unnecessary.

In (1906) 5 C L.J., 318, it was held that there was a sufficient compliance with the requirements of s. 574, C.P.C., 1882.

See also (1909) 13 C.W N., 1031.]

[27 Cal. 98]

The 30th June, 1897.

PRESENT

MR. JUSTICE MACPHERSON AND MR. JUSTICE AMEER ALI.

Issur Chandra Dutt..........Plaintiff

versus

Gopal Chandra Das. .. ..Defendant.*

Right of suit--Benamidar Suit for ejectment—Parties.

A mere *benamidar* cannot maintain a suit for ejectment, he having neither title to, nor possession of, the property.

Hari Gobinda Adhikari v. *Akhoy Kumar Mozumdar*, (1889) I.L.R., 16 Cal., 364, followed in principle *Nand Kishore Lal* v *Ahmed Ata*, (1896) I. L. R., 18 All., 69, dissented from

FOR the purposes of this report the facts are sufficiently stated in the judgment of the High Court

Babu *Saroda Charan Mitter* and Babu *Jadub Chunder Seal* for the Appellant.

Babu *Sree Nath Dass* and Babu *Guru Sankar Mozumdar* for the Respondent.

The **judgment** of the High Court (**Macpherson** and **Ameer Ali, JJ.**) was as follows –

The appellant brought this suit to eject the defendant as a trespasser. The defendant contended that the plaintiff had no right to bring the suit, as he is a mere *benamidar* of Guru Churn Dutt, under whom and others the defendant admits that **[99]** he is a tenant. Both the Courts have found that the appellant is a mere *benamidar* of Guru Churn Dutt, and that he cannot maintain the suit. This is quite in accordance with the decision of this Court in *Hari Gobindo Adhikari* v. *Akhoy Coomar Mozoomdar*, (1889) I. L. R., 16 Cal., 364, in which it was held that a person who was a *benamidar* for one of the

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* Appeal from Appellate Decree No 1932 of 1895, against the decree of K. N. Roy, Esq., Officiating District Judge of Pubna and Bogra, dated the 23rd of August 1895, affirming the decree of Babu Sarat Chander Sen, Munsif of Pubna, dated the 22nd of August 1894.

defendants could not maintain a suit for a declaration of his right to, and for possession of, immoveable property, such a person cannot, it seems to us, any the more maintain a suit for ejectment He has neither title nor possession Our attention has been called to a recent decision of the Allahabad High Court in the case of *Nand Kishore Lal* v *Ahmad Ata*, (1896) I L R., 18 All., 69. In that case it was held, dissenting from the decision of this Court, that a *benamidar* can maintain a suit of the kind mentioned We cannot follow that decision as we think the case in this Court referred to above was rightly decided, and is in accordance with the previous decisions on the same point The only contention raised in this appeal is that the appellant, assuming him to be a *benamidar* for some one else, can maintain the suit, and as that fails, the appeal must be dismissed with costs

B D B *Appeal dismissed*

NOTES

[This was followed in (1898) 25 Cal 874 (1902) 30 Cal 269 (1902) 7 C W N, 229, (1906) 30 Mad 245 but dissented from in (1899) 21 All 380 (1899) 13 C P L R 38]

[25 Cal 99]

The 17th June, 1897

PRESENT

MR JUSTICE MACPHERSON AND MR JUSTICE AMEER ALI

Kali Kishore Deb Sarkar (Purchaser) Plaintiff

versus

Guru Prosad Sukul (Decree holder) Defendant *

Appeal—Order under Civil Procedure Code (Act XIV of 1882), section 293, on defaulting purchaser to make good deficiency on resale—Second appeal—Sale in execution of decree Civil Procedure Code (Act XIV of 1882), sections 244, 313— Misdescription of property in proclamation of sale

Both an appeal and a second appeal lie from an order under section 293 † of the Civil Procedure Code, directing a defaulting purchaser at an execution sale to make good the deficiency of price happening on a resale owing to his default

[100] *Sree Narain Mitter* v *Mahatab Chand*, (1865) 3 W R 3 *Soorun Buksh Singh* v *Sree Kishen Doss*, (1866) 6 W R, Mis 126 *Joobraj Sing* v *Gour Suksh* 7 *All* (1867) 7 W. R, 110, *Baij Nath Sahai* v *Moheep Narain Singh* (1889) I L R 16 Cal 535 and *Amir Baksha Sahib* v *Venkatachala Mudali* (1895) I L R 18 Mad 439 followed

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* Appeal from Order No 4 of 1897 against the order of W H Lee Esq, Officiating District Judge of Mymensingh dated the 2nd of October 1896, affirming the order of Babu Krishna Chundra Chatterjee Subordinate Judge of that district dated the 6th of August 1896

† [Sec 293 —The deficiency of price (if any) which may happen on a re-sale under this Code by reason of the purchaser's default, and all expenses attending such re sale shall be certified to the Court by the officer holding the sale,

Defaulting purchaser answerable for loss by re-sale

and shall, at the instance of either the judgment creditor or the judgment debtor, be recoverable from the defaulter under the rules contained in this chapter for the execution of a decree for money

Deoki Nandan Rai v. *Tapesri Lal*, (1892) I. L. R., 14 All., 201, referred to and discussed.

In this case it was held on appeal, reversing the decision of the lower Courts, that under the circumstances the purchaser was not liable for the deficiency.

THE facts of the case sufficiently appear from the judgment of the High Court.

Babu *Dwarka Nath Chuckerbutty* for the Appellant.

Babu *Tara Kishore Chowdhry* for the Respondent.

The **judgment** of the Court (**Macpherson** and **Ameer Ali, JJ.**) was as follows:--

The appellant having purchased a share of a *taluk* at an execution sale failed to pay the balance of the purchase-money, and there was a resale at which the price realised was much smaller than the price realized at the first sale. Both Courts have held that the appellant must make good the deficiency according to the terms of section 293 of the Procedure Code. The decree-holder is the person seeking to enforce the payment and the respondent in the appeal.

A preliminary objection is taken that no appeal lies, but there is a current of decisions in this Court dating from 1865, showing that an appeal does lie, and we feel bound to follow them. The cases are *Sree Narain Mitter* v. *Mahatab Chand*, (1865) 3 W. R., 3; *Soorug Buksh Singh* v. *Sree Kishen Doss*, (1866) 6 W. R., Mis., 126; *Joobraj Singh* v. *Gour Buksh Lall*, (1867) 7 W. R., 110; and *Baij Nath Sahai* v. *Moheep Narain Singh*, (1889) I. L. R., 16 Cal., 535. No decision to the contrary has been cited, although the question has been raised in several other cases but not decided. The first three cases were under the Code of 1859 as amended by Act XXIII of 1861, but there is in this respect no substantial difference between the old Code and the present Code. The Madras Court has taken **[101]** the same view in *Amir Baksha Sahib* v. *Venkatachala Mudali*, (1895) I. L. R., 18 Mad., 439. The Allahabad Court took a different view in *Deoki Nandan Rai* v. *Tapesri Lal*, (1892) I. L. R., 14 All., 201, and held that there was no appeal. But it may be noticed that Mr. Justice STRAIGHT dissented, and Mr. Justice KNOX seems to have held that an appeal would lie from an adjudication in proceedings to enforce an order under section 293.

In all the cases in which it was held that an appeal lay the question was regarded as one under section 244 of the present Code, or the corresponding section of the old Code, so that if there is an appeal at all there is no doubt as to the right of second appeal. It seems that before the resale the appellant applied to have the first sale set aside under section 313 of the Code on the ground that the judgment-debtor had no saleable interest in the property. It was found that what was sold was the judgment-debtor's interest in a *shikmi taluk* called Radha Govind Biswas with a rental of Rs. 890 odd, and comprising certain *mouzahs*, *kismuts* and *paras*, whereas what was advertised and put for sale was his interest in a *shikmi taluk* called Ram Govind Biswas with a rental of Rs. 495, but comprising the same *mouzahs*, *kismuts* and *paras*. The first Court refused to set aside the sale, holding that the misdescription was immaterial, as the judgment-debtor had no other *shikmi taluk* in those *mouzahs*, and that the appellant, who was his co-sharer, must have known this and understood quite well what he was buying. The order rejecting the application was upheld by the Appellate Court on the same grounds. The property was put up at the first sale, realised Rs. 3,200, the next highest bidder being the decree-holder, and when put up at the second sale under precisely the same description, it realised Rs. 850. The decree-holder had obtained leave to bid at the second sale, provided he did not bid less than Rs. 3,100.

The appellant resisted the attempt to make him liable on three grounds: *first*, that there was no such property as the one sold; *second*, that the decree-holder and judgment-debtor had made false representations to him as to the property which was being sold, and, *third*, that the purchaser at the second sale was a mere *benamidar* of the decree-holder. His objections were overruled by both [102] Courts without any inquiry, and an order was made for the realization of the deficiency by the process prescribed for the execution of decrees We cannot, of course, interfere with the order under section 313, or with the order confirming the second sale, which it appears has been confirmed, but the question is whether on the facts as stated above the appellant is liable for the deficiency, and we must hold that he is not in any view of the case

Before the defaulting purchaser can be made liable under section 293, it must appear that the property which is the subject of the two sales is the same in every respect If the Courts were right in holding in the proceeding under section 313 that, notwithstanding the misdescription, the property sold on the first occasion was the judgment debtor's share in *shikmi taluk*, Radha Govind Biswas, bearing a rent of Rs 890, it is clear that is not what was put up for sale on the second occasion, ostensibly at least It may be said that the same property was really sold, but that there was a misdescription on both occasions Assuming this to be so, it makes no difference If there was a misdescription on the first occasion the decree holder was aware of it, and he ought not to have had the property again proclaimed for sale under a description which he knew to be wrong Having done that he cannot make the defaulting purchaser answerable for the deficiency

It is not necessary to consider what would have happened if the property, which the Courts considered was the property sold on the first occasion, had been rightly described on the second, as we must deal with the facts as they are Possibly in that case the decree holder might have found himself in a difficulty in attempting to realize from the defaulting purchaser any deficiency in the price He cannot, however, be allowed to evade that difficulty by having the property proclaimed for sale under a description which he knew to be wrong

We set aside the order of both Courts The application of the decree-holder fails and must be rejected The appellant will get his costs in this Court

B D B *Appeal allowed*

NOTES

[See also (1898) 2 C W N 411 (1889) 13 Mad 437 *contra* (1892) 14 All 201 (1911) 12 I C., 960 7 N L R 134]

[103] *The 3rd August, 1897.*

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Sarat Chandra Banerjee and another...........Plaintiffs

versus

Bhupendra Nath Basu and others...........Defendants.*

Hindu law—Will—Executor—Position of an executor under a Hindu will before the Hindu Wills Act (XXI of 1870) came into force—Difference in position between an executor under a Hindu will and an executor under an English will—Probate and Administration Act (V of 1881), sections 2, 4 and 90.

An executor under a Hindu will, before the Hindu Wills Act came into force, is not in the same position as an English executor under an English will, and the property does not vest in him; he holds it only as manager.

THE facts of this case are shortly these: One Tituram Haldar died in the month of July 1857, leaving behind him his widow and three daughters. He executed a will on the day of his death, and appointed his widow Rani Kumari Debi and his son-in-law executors. On the 21st January 1864 the executors of Tituram Haldar's will conveyed the property in dispute to one John Bayley, from whom it passed by subsequent assignments until the defendant Troilucko Nath Basu obtained it under a mortgage decree. The plaintiffs, who now represent the entire estate of Tituram Haldar, brought this suit to recover possession of the property sold to John Bayley on the allegation that Tituram Haldar's executors were not competent to give an absolute title. Bhupendra Nath Basu was joined as a defendant because he lived with his brother Troilucko Nath Basu. The Court of First Instance gave the plaintiffs a decree, holding that the executors did not hold any higher position than that of an ordinary manager; they had not the same power as an executor in England had, and that they could give a title only under circumstances in which an ordinary manager could do so. On appeal, the District Judge of 24-Parganas reversed the decision of the first Court. The material portion of his judgment was as follows:—

"The plaintiffs raise the question of the validity of transfer to John Bayley [104] and whether the plaintiffs are entitled to dispute it. It will therefore be necessary here to set down an abstract of the provisions of the will.

Paragraph 1.—Testator's wife Ram Kumari Debi is to remain in possession of and enjoy during her life-time all the testator's moveable and immoveable properties; she shall manage the same as executrix, take care of the testator's daughters, be entitled to institute and defend suits. Testator's son-in-law Umesh Chunder Bandopadhaya, husband of Kadambini, is vested with the same powers as Ram Kumari Debi. Both shall manage with equal rights and with each other's consent. If the son-in-law causes devastation, the testator's widow will henceforth act as sole executrix.

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* Appeal from Appellate Decree No. 2267 of 1895 against the decree of J. Pratt, Esq., District Judge of zillah 24-Parganas, dated the 16th of September 1895, reversing the decree of Babu Purna Chandra Shome, Subordinate Judge, 1st Court of that District, dated the 30th of August 1894.

Paragraph 2.—On the decease of the testator's widow the property shall be equally divided between testator's three daughters; but none of the property is to be alienated for the payment of debts that may be incurred by the testator's daughters or their successors.

Paragraph 3.—Testator's wife with the consent of their son-in-law is empowered to pay off the testator's debts by sale, but no transfer shall be valid unless effected with the consent and signature of both of them; and none shall have authority to transfer any property for any reason other than that mentioned above.

Paragraph 4.—During the lifetime of the testator's widow, their three daughters and also the husbands of the two younger ones shall be maintained out of the testator's estate.

Paragraph 5.—Specifies a legacy to testator's nephew.

Now it appears to me clear that the executors had an estate under the will, and they were fully empowered to sell in order to pay off the testator's debts. The sale to John Bayley was made ostensibly for that very purpose. On the principle enunciated in *In re Tanqueray Willaume*, (1882) L. R., 20 Ch D., 465, the sale conveyed a good title, and it was neither necessary nor prudent for the purchaser to inquire whether there were any subsisting debts. That this principle holds good may be deduced from certain observations of Mr. Justice PHEAR in the case of *Rooploll Khettry* v. *Mohima Chunn Roy*, (1870) 10 B.L.R., 271 note.

From this decision the plaintiffs appealed to the High Court.

Sir *Griffith Evans*, Babu *Girish Chunder Chowdhry*, and Babu *Horendra Nath Mookerjee* for the Appellants.

Mr. *C. P. Hill*, and Babu *Sarada Churn Mitter*, for the Respondents.

The following **judgments** were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.)

[105] Maclean, C J. In my opinion the learned Judge in the Court below has made a mistake in law In point of fact he holds that an executor under a Hindu will, before the Hindu Wills Act came into force, is substantially in the same position as an English executor under an English Will, in the sense that the property vests in him, and that this is his view is clear from the fact that he relied upon the well-known case of *In re Tanqueray Willaume*, (1882) L.R., 20 Ch. D, 465, decided in the English Courts, which shows that he regarded the property under the will as vested in the executor. I think it is clear from the authorities that have been cited that an executor under a Hindu will is not in that position which the learned Judge in the Court below seems to think, but he practically holds the property as manager, as is stated by Mr. Justice MARKBY in the case of *Kherodemoney Dossee* v. *Doorgamoney Dossee*, (1878) I.L.R., 4 Cal., 455, where he says "It has been frequently held that, the mere appointment of a person as executor to a Hindu does not cause any property to vest in him at all; and that if as executor he is entitled to hold the property, he holds only as manager." I think that view of the law is correct as applied to the executors appointed under the particular will in this case; but that does not dispose of this point. Mr. *Hill* argued ingeniously that, having regard to the provisions of sections 2 and 4 of the Probate and Administration Act V of 1881, the property vested in these executors under the effect of section 2 of that Act, which says that section 4, amongst others, is to apply to the case of every Hindu dying before the 1st April 1881, which is the date on which the Act came into operation. Admittedly, in this case, the testator did die before that date, and Mr. *Hill's* contention is that, having regard to the language of sections 2 and 4, the effect of those sections is to vest in these executors, who were appointed, so far back as 1857, under a Hindu will, which it was then not obligatory to prove, the property of the testator. This argument does not commend itself to me as sound; one must look to the whole purview and intention of the Act. If we

look to the preamble of the Act, it is there stated that the Act is intended to provide for the grant of probates of wills and letters of administration to the estates of [106] deceased persons, in cases to which the Indian Succession Act does not apply, that is the object of the Act—the grant of probates of wills and letters of administration. The Act did not come into force until April 1881, and to my mind it would be a very strong conclusion to draw from the words of section 2 "dying before the 1st April 1881" that it was intended —this Act having been passed for the purpose which I have stated above—that section 4 should have a retrospective operation, so as to vest in an executor appointed under a Hindu will an estate which but for that section would admittedly not otherwise vest in him. I think sections 2 and 4 read together mean that in the case of a Hindu dying before April 1881, where the estate is unadministered, if any one desire to come in and prove the will and get the benefit of the Act in that sense, he may have the opportunity of doing so, and the effect would be that the estate from that time would vest in such executor under section 4. That view to my mind is strengthened by the consideration that section 4 comes in under Chapter II of the Act, and the heading is "of grant of Probate and Letters of Administration,' which to my mind indicates strongly that the vesting was only to follow upon the grant of probate of the will in the one case or grant of letters of administration in the other. That view is further strengthened by the consideration that the section applies, not only to executors, but to administrators who obtain letters of administration under the Act.

But assuming that view of sections 2 and 4 of the Act to be wrong, it appears to me that Mr *Hill* does not carry his case much further by reason of the provisions of section 90 of the Act, which says that the 'power of an executor to dispose of immoveable property so vested in him" under the will "is subject to any restriction that may be imposed by the will appointing him." Now, in this case, the will distinctly states that there was to be no sale and no alienation other than an alienation for the payment of debts. Mr *Hill* tries to get out of this difficulty by contending that, once concede that the estate is vested in the executor, the cases in the English Courts show (amongst others that to which I have referred) that where an executor, in whom the estate is vested has a power to sell for debts, the purchaser need not inquire as to the existence of those debts or the necessity for the [107] sale. But I doubt if the principle of these English cases can apply in the face of the clear statutory provision of section 90. However, as in my view no estate was vested in this executor, the point becomes immaterial. I think the Judge was wrong on this point of law.

That being so, it appears to me that we must remand the case, and must remand it because the Judge in the Court below has not, as a matter of fact, gone into the question of whether this sale was effected for the purpose of paying the testator's debts. I desire, however, to point out, I hope for the assistance of the learned Judge in the Court below when the case is retried on this remand, that it is not necessary, as a condition precedent to the validity of this transaction, that the defendants should make out the real existence of the necessity for raising this money. Beyond that he will doubtless give every due effect to the lapse of time, which has occurred in this case, for the sale is 30 years old, to the fact that the original vendee is dead, and can give no account of the transaction, to the long possession and enjoyment of which the defendants have had of this property, and to that which looks *prima facie* something like acquiescence on the part of the plaintiffs, and especially to the recital on the face of the *kobala* itself that "according to the provisions of the will made by the deceased Tituram Haldar, we, to clear the debts and liabilities of his estate, have sold to you the said land with buildings and all interests for a

consideration of Rs. 3,000; you are vested this day with the right to dispose of the said property by sale or gift, etc."

Now in the case of *Hunoomanpersaud Panday* v. *Mundraj Koonweree*, (1856) 6 Moo. I.A., 393 (419)—the passage which I am about to read is at page 419—the Privy Council say: "It is to be observed that the representations by the manager accompanying the loan as part of the *res gestæ* and contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *prima facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable [108] and right that it should be required." In the present case there was a clear representation by the executors that they were selling the property to clear the debts and liabilities of the estate, and that, in the opinion of the Privy Council, is *prima facie* evidence as to the necessity for the loan. It is, in fact, an admission; it is an admission by a Hindu executor as to the object and necessity for which the money was being raised. We must, therefore, ask the learned Judge to consider whether on the face of these recitals there is not *prima facie* evidence in favour of the defendant's case, and, if so, that would be sufficient to shift the onus and throw it upon the plaintiffs to show that there was no necessity for raising this loan. In remanding this case, we remand it upon the terms that neither party is to be allowed to go into fresh evidence, but the case is to be decided upon the evidence already adduced. Having regard to the length of time during which this case has been going on, we direct that the lower Court should dispose of this matter as soon as conveniently can be. The costs will abide the result.

Banerjee, J.—I am of the same opinion. I only wish to add one word with reference to Mr. *Hill's* argument based upon section 2 read with section 4 of the Probate and Administration Act. It is quite true that section 2 of that Act makes chapters II to XIII, both inclusive, applicable to the case of every Hindu dying before, on, or after, the first day of April 1881; and if the words of the section are to be taken in an unrestricted sense, section 4, which occurs in chapter II of the Act, would apply to this case, and would have the effect of vesting in the executor in this case the property of the testator. But the provisions of the Act must be taken to be controlled by the preamble of the Act which is very significant, and which runs in these words: "Whereas it is expedient to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act 1865 does not apply, it is hereby enacted as follows." The Act then is passed with a view to provide for the grant of probates and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act does not apply, and any provision of the Act which is said to be applicable to [109] the case of a Hindu dying before the 1st September 1870, in which the taking of probate is optional [*See Krishna Kinkur Roy* v. *Raj Mohun Roy* (1886) I.L.R., 14 Cal., 37; and *Moosa* v. *Essa* (1884) I. L. R., 8 Bom., 241] must be taken to be applicable to his case only in the event of the Act being resorted to for the purpose of obtaining probate or letters of administration But where the Act is not availed of for the purpose of obtaining probate or letters of administration, for the granting of which it was passed, I do not think it would be right to hold that the provisions of the Act would apply to such a case.

Granting, however, that section 4 of the Act was applicable to this case, and that the property of the testator was, therefore, vested in the executor, that

would not affect the result, because by sub-section 2 of section 90 the power of the executor to dispose of immoveable property so vested in him is subject to the restriction imposed by the will. The question would still remain whether the power of sale was exercised in this case within the limits prescribed.

S. C. G. *Appeal allowed, case remanded.*

NOTES.

[I. DICTA IN THE CASE—

The question in 25 Cal. 103 was as to the validity of a sale made by an executor under a Hindu Will in the year 1864 long before the Probate and Administration Act was passed. It was contended on behalf of the alienee that the acts of the executor were as valid as if they had been done after Act V of 1881 had come into force * * * There are no doubt observations to be found in the judgment of these learned Judges which would show that in the case of a Hindu dying before 1881 if the executor or administrator should wish to get the benefit of sec. 4 of the Act he should come in and prove the Will and take out Probate or Letters of Administration * * * The inference is apparently drawn that a party could obtain the benefits of the provisions of the Act only on obtaining Probate or Letters of Administration but this inference so far as the decision is concerned is expressly limited to the case of a Hindu dying before April 1881. We cannot assume that the learned Judges would have taken the same view with respect to wills made by a person who died after 1881. If the learned Judges had taken the view which we do that no executor could before 1881 claim powers which were for the first time given by that Act they would probably not have considered it necessary to rest their decision on the ground that a person who did not take out probate of the Will of a testator who died before 1881 could not claim the benefit of any of the provisions of the Act.—(1912) 23 M. L. J. 306.

II. POWERS OF EXECUTORS—

Before the Statutory provision in the Hindu Wills Act, The Probate and Administration Act, the position of the executor of a Hindu Will was that of a mere manager whose acts were subject to the restrictions in 6 M. I. A. 393.—(1905) 32 Cal. 861 : 1 C. L. J. 270.

In (1912) 23 M. L. J. 306 it was held that the executor of a Hindu Will after 1881 could sell without obtaining probate.

The position regarding executors of a Mahomedan Will is the same in principle.—(1910) 37 Cal. 839 : 15 C. W. N. 183 : 8 I. C. 453.

III. ONUS—

Representation of the debt is sufficient to shift the onus to the person who impeaches the debt or alienation.—(1910) 21 M. L. J. 593.]

[25 Cal. 109.]

The 23rd June, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Golam Gaffar Mandal and others .... Decree-holders

versus

Goljan Bibi and others .... Judgment-debtors.*

Limitation Act (XV of 1877), Schedule II, Art. 179—Meaning of the words "date of the decree"—Execution of decree—Code of Civil Procedure (Act XIV of 1882), sections 205 and 235.

The words "date of the decree" in schedule II, art. 179 of the Limitation Act mean the date the decree is directed to bear under section 205 of the Code of Civil Procedure, and that is the date on which the judgment was pronounced. Therefore an application to execute a decree, if not made within three years from the date when the judgment was pronounced, is barred by limitation.

* Appeals from Order Nos. 134-135 of 1896 against the order of Babu Bulloram Mullick, Subordinate Judge of Khulna, dated the 21st of December 1895, affirming the order of Babu Ashutosh Mitter, Munsif, 3rd Court at Satkhira, dated the 29th of October 1895.

[110] *Bani Madhub Mitter* v. *Matungini Dassi*, (1886) I.L.R., 13 Cal., 104, referred to.

THE facts of the case for the purposes of this report appear sufficiently from the judgment of the High Court.

Babu *Nuná Lal Sarkar* for the Appellants.

No one appeared for the Respondents.

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.)

Maclean, C.J.—In my opinion these appeals are not susceptible of serious argument. It is clear that the period of limitation began to run from the date of the decree, and the date of the decree was the 14th September 1892. It is quite immaterial on what date the Judge signed it. The appeals must be dismissed but without costs, as the respondents have not appeared.

Banerjee, J.—I am of the same opinion. The question for decision in this case is what is the meaning of the words "date of the decree" in clause 1 of article 179 of the second schedule of the Limitation Act. Do they mean the date that the decree is by section 205, of the Code of Civil Procedure directed to bear, or do they mean the date on which the Judge actually puts his signature to the decree? I am of opinion that they must mean the date the decree is directed to bear under section 205, and that is the date on which the judgment was pronounced: and if time runs from that date, this application was clearly out of time. It was argued by the learned Vakil for the appellant that the words in question should be construed to mean the date on which the Judge put his signature to the decree, and the only reason assigned in support of this contention was that otherwise the decree-holder would not have the full period of three years allowed him by law for making an application for execution, because it was said that he was required by section 235 of the Code of Civil Procedure to insert certain particulars in his application for execution, which particulars could be given only after the decree was drawn up. Granting that some of the particulars required by section 235 could be given only after the decree was drawn up, that does not deprive the decree-holder of the benefit of the full period of three years, if the **[111]** words in question mean the date that the decree is required by section 205 to bear. He must have known the date on which judgment was pronounced in his favour, and he could have made all necessary preparations for making an application for execution from that date, and thus he can avail himself of the full period of three years. An extreme case might be put, where the decree is not actually prepared until after the expiry of three years from the date of the judgment. Practically that is an extremely unlikely case. But if such a case were to happen, there would be nothing to prevent the successful party in the suit from making the application for execution within three years, without such of the details required by section 235 as could not be given by reason of the decree not being ready, representing to the Court that the application was made in that imperfect form to save it from being barred

I may add that the decision of a Full Bench of this Court in the case of *Bani Madhub Mitter* v. *Matungini Dassi*, (1886) I. L. R., 13 Cal., 104 fully supports the view we take. There the learned Judges had to construe the words "the date of the decree" occurring in article 152 of the second schedule of the Limitation Act; and Sir COMER PETHERAM in delivering the judgment of the Court, after referring to section 205 of the Code of Civil Procedure, observed: "It is provided by that section that the decree shall bear date the day on which judgment was pronounced, and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree, so that whatever may be the day on which the actual

signature is made, the date of the decree for all purposes is to be the date on which the judgment was pronounced." If then the words "the date of the decree' in article 152 bear that meaning, there is no reason why those same words occurring in another article of the same schedule should not bear the same meaning

S. C G — — *Appeal dismissed.*

NOTES

[Date of decree means the date the decree is directed to bear, *i.e.*, the date when the decree is actually signed, C P C 1908, O 20, r 7 —(1907) 11 C.L.J., 243; (1909) 10 C L.J, 467, (1913) 19 I C 410 (1913) 25 M L J 560, (1914) 25 I C., 67 (Mad.); (1898) 23 Bom. 442]

[112] ORIGINAL CIVIL

The 9th July, 1897

PRESENT

MR JUSTICE SALE.

Bhuggobutty Prosonno Sen ... Plaintiff

versus

Gooroo Prosonno Sen and others Defendants.

Will —Construction of will—Administration Suit —Chancery practice "Living," Meaning of—Trust for religious purposes— Perpetuities, Rule as to

A testator by his will devised certain house property, first for the celebration of *pujahs* and the worship of an idol and then that his children with their families should be allowed to *live* there One of the sons used the premises for the purpose of his business as a *kabiraj*, which was objected to by the other sons as being contrary to the terms of the will. One of the defendants also contended that before the Court could construe the terms of the will to ascertain the meaning of the testator it was necessary to bring a proper administration suit *Held* that considering the character of the consequential relief sought the Court could construe the will without an administration suit

That questions between trustees and beneficiaries and between trustees and strangers requiring the construction of provisions in a trust deed have been determined without the Court being asked to undertake the entire administration of the trust

In re Weall (1889) L R, 42 Ch D, 674, approved

To ascertain the meaning intended to be applied to a particular phrase, it is necessary first to consider the words of the will and next the surrounding circumstances, which may affect the testator's meaning *Soorjeemoney Dossee* v *Denobundoo Mullick*, (1857) 6 Moo. I. A, 526 (535)

If there is a valid dedication of premises for religious purposes, this is not invalid merely because it transgresses against the rule forbidding the creation of perpetuities.

Under Hindu law an idol, as symbolical of religious purposes, is capable of being endowed with property, but no express words of gift to such idol in the shape of a trust or otherwise are required to create a valid dedication

Manohar Ganesh Tambekar v *Lakhmiram Govindram*, (1887) I. L. R., 12 Bom., 247 (263) approved.

[113] *Sonatun Bysack* v *Juggutsoondree Dossee*, (1859) 8 Moo. I. A., 66 and *Ashutosh Dutt* v. *Doorga Churn Chatterjee*, (1879) I. L. R, 5 Cal, 438 · L. R, 6 I. A., 182, distinguished

* Original Civil Suit No. 439 of 1896.

GUNGA PROSAD SEN, a *kabiraj* of considerable repute for several years prior to his death, lived with the plaintiff, his eldest son, the defendant Gooroo Prosonno Sen, his youngest son, and another son, who had since died, and their wives and families, in premises Nos. 16 and 17, Kumertolli Street, and carried on and practised his profession as a *kabiraj* in another house belonging to him on the opposite side of the street, No. 9/1, Kumertolli Street, where he had established a dispensary. On 9th December 1895 Gunga Prosad died leaving him surviving the plaintiff, his eldest son, the defendant Gooroo Prosonno Sen, his youngest son, and the infant defendants Birressur Prosad and Ramessur Prosad, the sons of his second and predeceased son Hurry Prosad Sen. He also left a will, whereby he appointed the plaintiff, his nephew, the defendant Nishi Kanto Sen, and his brother, the defendant Annoda Prosad Sen, executors, and purported to deal with his family residence as a religious endowment dedicated in perpetuity to the worship of certain *thakurs*, which he had established therein and to other religious purposes, reserving only in favour of his sons and grandsons with their respective families a right of residence therein. His other three residences were specifically devised to his two surviving sons and the children of his deceased son respectively. The testator trained all his sons for the profession or business of a *kabiraj*, and it was admitted in the course of the suit that the plaintiff and his second son Hurry Prosad had started dispensaries on their own account with their father's help; the former in Chitpore Road, and the latter in Burtollah Street. Previous to the testator's death, the plaintiff and the defendant, Gooroo Prosonno Sen, had quarrelled and had separated in mess, and the testator, for the last two or three years of his life, messed alternatively with them. Shortly after the testator's death, fresh disputes broke out between the two surviving sons. The plaintiff alleged that the defendant Gooroo Prosonno Sen had, after the testator's death and contrary to the wishes of the testator, and in breach of the trust created by his will, taken exclusive possession [114] of two of the rooms on the ground floor of the family residence, and, after making certain structural alterations therein, had established there a dispensary and was practising his profession there as a *kabiraj* to the inconvenience and annoyance of the testator's family. This defendant, while admitting that he had established a dispensary there and was practising his profession as a *kabiraj*, denied that he had done so contrary to the wishes or directions of the testator, but alleged that the dispensary was started in the lifetime of the testator and with his express sanction and consent.

The plaintiff instituted this suit to have it declared that the defendant Gooroo Prosonno Sen was not entitled to establish a dispensary or practise as a *kabiraj* at the family residence and to restrain him from so doing by a perpetual injunction. The plaintiff also asked that as far as it might be necessary for the purposes of the suit the testator's will might be construed and the rights of all parties thereunder in this behalf ascertained and declared. No relief was asked against the infant defendants or the other executors; although by their written statement the infant defendants supported in the main the case for the defendant Gooroo Prosonno Sen.

The terms of the will were as follows.—

This Instrument of will is executed by (me) Sri Gunga Prosad Sen, *kabiraj*, inhabitant of No. 17, Kumertolli, Town of Calcutta to the following effect. I am far advanced in age and am now attacked with such a disease that it is likely to prove fatal. I have a small ancestral property and I having by my own acquisitions acquired various immoveable and moveable properties have been in possession (thereof). I have several things in contemplation, as specified below, and I desire that all the said contemplated things being mentioned in

a permanent way my ancestral and self-acquired properties, etc., shall be divided among and received by my heirs as per paragraphs below.

Paragraph 1. I endow my house Nos. 16 and 17, Kumertolli Street, for the celebration of *Durgotsub* every year, and for the worship of the *thakurs* existing in the said house. In the said house the *thakurs* established by me shall for ever remain, and in accordance with the undermentioned rule their worship shall be carried on; and *Sri Sri Issur Durga Pujah* shall be annually celebrated in accordance with the undermentioned rule and every year the annual *shrad* of my issur *thakur* in heaven (deceased father) shall be performed and on such occasions Brahmins and people of other castes shall [115] be fed, and every year the *Dolejatra* festival shall be celebrated. Besides these my sons and grandsons (son's sons) with their respective families shall live in the said house. In case of disagreement among them the person who would be the cause of disagreement shall leave the said house with his family. I endow (make *urpon*) this house for all these purposes. With regard thereto no right of my heirs shall exist or accrue. They shall simply live (therein) as mentioned above. My furniture, etc., which exist in the said house shall be used for the worship, etc., of the said idols; my heirs shall get nothing whatever of the same. The said house and the said furniture shall never be partitioned amongst any persons.

Paragraph 2. I give my house No. 9/1 Kumertolli Street and the land thereto appertaining to my eldest son Sriman Bhuggobutty Prosonno Sen in absolute right, that is he being vested with right to make gift and sale shall remain in enjoyment and possession thereof down to son, grandson, etc., in succession. I give my house No. 21, Bonomally Sircar's Street and the land thereto appertaining to my youngest son Sriman Gooroo Prosonno Sen in absolute right, that is, he being vested with right to make gift and sale shall remain in enjoyment and possession thereof down to son, grandson, etc., in succession. I give to two persons Sriman Bissessur Prosad Sen and Sriman Ramessur Prosad Sen, the sons of my son Hurry Prosonno Sen, deceased, No. 10, Schalch Street or Kumertolli Street, and the land thereto appertaining in equal shares in absolute right, that is they being vested with right to make gift and sale shall remain in possession and enjoyment down to son, grandson, etc., in succession.

Paragraph 3. There is at present a *Shib thakur* in the house which I have at Kashidham (Benares). My executors shall cause a good temple to be built (for it) making an expenditure up to two thousand rupees out of my estate.

Paragraph 4. I give my house No. 179 Chitpur Road, and the land thereto appertaining to my eldest son Sriman Bhuggobutty Prosonno Sen in absolute right, that is he being vested with right to make gift and sale shall remain in possession and enjoyment thereof down to son, grandson, etc., in succession.

Paragraph 5. My executors shall realise the rent of my house and lands Nos. 162 and 164, Harrison Road, and out of the same pay at first the tax revenue and cost of repairs of the said house and tax revenue and cost of repairs of my aforesaid house Nos. 16 and 17, Kumertolli Street, and then spend 100 (one hundred) rupees per month for the worship of *Shib thakur* at Kashidham (Benares) aforesaid and for feeding (there) charity at least 10 persons (and) for preserving the said house and temple and for employing servants and others for performing all the acts in respect of the same, and after that my executors shall spend 16 (sixteen) rupees per month for the worship of the *thakurs* established in my aforesaid house Nos. 16 and 17, Kumertolli Street, and for daily recitation of *chundipath* in my aforesaid [116] house. Afterwards out of the said rents (the executors) shall every month save (literally hold in deposit or lay aside) 250 (two hundred and fifty) rupees per month, and thus secure every year 3,000 (three thousand) rupees in a lump and (with the said money secure in a lump) *Durgatsub* and *Dolejatra* shall every year be celebrated in my aforesaid house Nos. 16 and 17, Kumertolli Street, out of the same 2,500 (two thousand and five hundred) rupees shall be spent on *Durgatsub* and 500 (five hundred) rupees on *Dolejatra*. Afterwards out of the said rent 500 (five hundred rupees) shall be annually spent for the annual *shrad* of my *Issur Pita Thakur* (deceased father) and for feeding Brahmins and persons of other castes on the occasions of these *shrads*. The balance left after paying the expenses,

specified in this paragraph, out of the rent of this house (these houses) shall be divided in the mode stated below.

Paragraph 6. Out of my estate, that is out of the general estate 10,000 (ten thousand) rupees shall be spent on my first *shrad*, and the said expenditure shall be made through (by) my eldest son Sriman Bhuggobutty Prosonno Sen, and out of my general estate my executors shall on my demise pay the costs of (taking out) probate of this will and 5,000 (five thousand) rupees for the marriage of my grand daughter (by son) Sremutty Indoobala 6,000 (six thousand) rupees to my youngest brother Sriman Annada Prosad Sen and my oldest son Sriman Bhuggobutty Prosonno Sen's 7,000 (seven thousand) rupees which is in deposit with me.

Paragraph 7. My remaining properties and goods and effects that may remain and the remaining rent of my aforesaid houses Nos. 162 and 164, Harrison Road, shall be divided into three equal parts. My eldest son Sriman Bhuggobutty Prosonno Sen shall get one of these parts and my youngest son Sriman Gooroo Prosonno Sen the other one part and my two grandsons (by son) Sriman Bissessur Prosonno Sen and Sriman Ramessur Prosonno Sen the remaining one part in equal parts.

Paragraph 8. I appoint my eldest son Sriman Bhuggobutty Prosonno Sen and nephew (brother's son) Sriman Nisikanta Sen and my brother Sriman Annoda Prosad Sen as executors of this my will. When my eldest son Sriman Bhuggobutty Sen is not available (*i.e.* dies) my youngest son Sriman Gooroo Prosonno Sen shall become executor of this my will. Be it further declared herein that after the acts of the executors of this will have been finished, that is after all my other properties and things, &c., excluding the properties which I have endowed for the worship of the above-named idols, and have been partitioned among the above named persons, the entire charge and authority for collecting the rent of the said houses Nos. 162 and 164, Harrison Road, and for paying out of the same the expenses specified above in paragrrph 5, and of giving by division the remaining rent thereof, and of performing the worship of the idols mentioned in the said paragraph and doing other acts, &c., shall be revived by and devolve on the person who might be senior in age among my lineal descendants and heirs following the Hindu religion.

[117] Paragraph 9. Out of my general estate my executors shall pay 2,000 (two thousand) rupees to my youngest son Sriman Gooroo Prosonno Sen. Finis. Dated the 8th December 1895.

Mr. *Hill* (Mr. *Jackson*, Mr. *Bonnerjee* and Mr. *P. L. Roy* with him), for the Plaintiff.—It is not necessary that before the will in this suit is construed, an administration suit should be brought to have the whole will construed and the rights of parties thereunder ascertained. The Court can construe this will to see if defendant should not be restrained from carrying on business in the family residence. That position is not warranted by the practice of this Court. It is an old practice of the Courts of Chancery in England. It is an attempt to get rid of this suit on a mere technicality as to the procedure. *In re Wilson*, (1885) L. R., 28 Ch. D., 457; *In re Davies*, (1888) L. R., 38 Ch. D., 210. If the right exists the jurisdiction this Court has is that given by section 11 of the Code of Civil Procedure. Under the will the defendant had only a right of living. What is the meaning of the word "living." There may be an occupation of the house by a tenant; *Mannox* v. *Greener*, (1872) L. R., 14 Eq, 456 (461); *Rabbeth* v. *Squire*, (1859) 4 De Gex and Jones, 406 (412). Again, he may live and carry on business at two separate places. The word "living" does not contemplate the carrying on of a business for the purpose of obtaining a livelihood. *Ex parte Breull, In re Bowie*, (1880) L. R., 16 Ch. D., 484. There the word "reside" is defined. The plaint discloses a good cause of action and the right to live does not involve the right to practise as a medical man. This was never contemplated by the testator.

The *Advocate-General* (Sir *C. Paul*) with him Mr. *Mitter* and Mr. *Stephen* for Defendant No. 1.—The right to live includes right to carry on a business

and earn a living. It is a part of the man's life. "Living" cannot mean only eating, drinking and sleeping. It is not alleged that I am carrying on a nuisance. "Living" cannot exclude a man from carrying on his profession on the premises. If he was a lawyer could it be said that he was precluded from seeing clients in his study. If the defendant [118] wishes to see two patients there per day, it is said the terms of the will preclude him from doing so.

The plaintiff is not competent to sue for the construction of the will without bringing an administration suit--Williams on Executors, p. 1810. The practice which prevails in England now of a suit on an originating summons does not extend to this Court. This Court must be guided by the old Chancery Court practice Annual Practice, 1897, p. 998. We have nothing like the originating summons here, but the old Equity practice is retained.

Further, the intention of the will here is to make a perpetuity and tie up the property, which the testator could not do. Bhuttacharjee's Commentaries on Hindu Law, p. 604. *Sonatun Bysack* v. *Juggutsoondree Dossee*, (1859) 8 Moo. I. A., 66 (83). The testator granted the property first for the celebration of *pujahs*, then for the worship of an idol, and then that the residence should be occupied by the children. Who was the owner of the house? They would say the idol; but under what words? Where is the grant to the idol? There is a difference between a grant to the idol and a grant to trustees for the benefit of the worship of an idol. The testator would, by this means, be creating a perpetuity and making a permanent provision for the benefit of the children, which he cannot do. *Promotho Dossee* v. *Radhika Persaud Dutt*, (1875) 14 B.L.R., 175, *Shibchunder Doss* v. *Sibkissen Bonnerjee*, (1856) 1 Boul., 71. This is not a proper *debutter* property, the property has not passed out of the heirs-at-law to any one else They are still tenants in common. If so the defendant is acting lawfully in carrying on his business. *Jacobs* v. *Seward*, (1872) 5 Eng. & Ir. App., 464 (474). In *Fillingham* v. *Bromley*, (1823) 1 Turn. & Russ., 530, the words "live and reside" were held to be incapable of definition.

Mr. *J. G. Woodroffe* (Sir *G. Evans* with him), for the Infant Defendants.--As regards the preliminary issue dealing with the maintainability of the suit, the Court will not allow the construction of the will to be carried out piecemeal. If there is a suit which illustrates the evil of partial construction and partial administration, it is this. The meaning of the words [119] "live in the house" depends on whether the clause in which they occur gives a proprietary interest in the house or not. If a beneficial interest is taken by the heirs, a heavy onus will lie on the other side to establish a forfeiture. The clause with regard to disagreement is ancillary to the partition clause. There is besides no warrant or precedent for bringing an action of this kind. It is for the plaintiff to satisfy the Court that it ought to adopt the same practice as in England. Before the system of an originating summons was introduced it was only in a proper administration suit that questions such as those could be dealt with. There is no ground for following the practice under an originating summons in this Court. *Say* v. *Creed*, (1844) 3 Hare., 455.

Can it be contended that the decision in this matter will set aside all questions between the parties hereafter If the plaintiff withdraws the question relating to the *shebait* in this suit, it still leaves an important question undecided. This does not come within the purview of cases brought on an originating summons in England. *In re Wilson*, (1885) L. R., 28 Ch. D., 457 (461); *In re Lofthouse*, (1885) L. R., 29 Ch. D., 921, (932).

Sale, J. (after stating the facts, continued).—The first objection, which has been urged against the suit, is that it is not maintainable as framed. The

objection is thus stated in the 1st paragraph of the written statement of Gooroo Prosonno Sen :—

"This defendant submits that the suit as framed cannot be maintained, inasmuch as it is not competent to the plaintiff to sue for the construction in part only (and not as a whole) of the will of the testator Gunga Prosad Sen, nor for the administration or execution of part only (and not of the whole) of the trusts of the said will, nor for the relief claimed, otherwise than in a suit for general administration of the estate of the said testator."

The argument is that the course which this Court ought to adopt as regards the present suit is the course which the Court of Chancery would have followed in a like case before the practice was introduced of determining on an originating summons isolated questions arising in the course of administration of an estate without taking the accounts of the estate or making a [120] general order for administration. The old and new practice as regards the question of the necessity of making an administration order before dealing with any point arising in the course of the administration of the estate are contrasted by PEARSON, J., in *In re Wilson*, (1885) L.R., 28 Ch. D., 457 (460). In showing how the practice as to administration actions was changed by the rules of the Supreme Court, 1883, the learned Judge makes the following observations :—

"There were formerly in the Court of Chancery numbers and numbers of cases in which an administration suit was necessarily instituted, not because the parties desired the administration of the estate generally, but because there were certain questions—they may have been minute, they may have been limited, they may have been very important—over which the Court would have had no control, without the existence of an administration action. There were no means according to the old practice of bringing isolated questions under a will before the Court for its determination except by an administration suit. It was felt that that very often involved parties in an amount of expense which was unnecessary and which they ought to be relieved from."

Accordingly, in order to avoid this expense, power is expressly given to the Court by the rules of 1883 to determine any question without making a judgment or order for the administration of a trust or of the estate of a deceased person, if the question between the parties can be properly determined without such judgment or order. This power is not confined to cases which can, under Order LV, rules 3 and 4, be raised by originating summons, but under Order LV., rule 10, the Court has this power, whether the question arise on summons "*or otherwise*," and it extends to administration actions commenced before, but tried after, the rule came into operation Williams on Executors, 9th Edition, Vol. II, 1810-1811.

The question then is whether the Court of Chancery in England would have declined to grant the relief sought in this suit, except in a suit framed for the general administration of the estate of the testator on the ground that it involved the partial construction of the testator's will. This is a question which it [121] is admitted does not affect the jurisdiction of this Court. It is a question of the practice of the Court, and that only. It is undoubtedly the fact that before the Court can determine whether the plaintiff is entitled to the main relief which he seeks, the testator's will must be construed; for upon the construction of the will of the testator must depend the question whether the trust in fact exists, the breach of which is charged against the defendant Gooroo Prosonno Sen. There is therefore a question of the construction of the testator's will, which arises necessarily, though incidentally in form, in this case. But then this question has not been raised as an aid to the

administration of the testator's estate, nor is the Court being asked to take upon itself the execution of the trusts or the administration of the estate.

The plaintiff claims to be a trustee, who is entitled to ask the Court's assistance in preventing a breach of trust. Is there any reason why in a suit of this character, where all the parties interested in the question of construction are before the Court, the Court should refuse to construe the will of the testator simply because this is not an administration suit?

I have not been referred to any authority, nor am I aware that any such authority exists which establishes the proposition that this Court ought not under any circumstances to consider any question involving the construction of a will or deed of trust, except in a suit for the administration of the trust or for the administration of the estate of the testator. Circumstances might, no doubt, exist which would render it undesirable or improper that the Court should make a mere declaratory order based on a partial construction of a will, or that it should declare the rights of parties at all except in an administration suit. But I am unable to say that any such circumstances exist in the present case.

In the first place it is no mere declaratory decree or order that is sought. The plaintiff seeks consequential relief of a very special kind, and he bases his claim on a cause of action which exists only as against the defendant Gooroo Prosonno Sen, although it indirectly affects the infant defendants as heirs of the testator and beneficiaries under his will.

[122] In the next place there seems to be no reason why the question, whether there has been a valid declaration in perpetuity of the family dwelling house for religious purposes, should not be dealt with in this case separately and apart from any other questions which may arise in the course of the administration of the testator's estate. Assuming, although this is not admitted, that the estate is still unadministered in full, it is said that the infant defendants are interested in the question of the dedication of the house, and that it is inconvenient that this matter in which they are concerned should be disposed of without at the same time disposing of other questions as to their rights under the will of the testator which remain for determination. They complain that the plaintiff has deprived them of certain accommodation in the family dwelling house to which they are entitled under the will. It is difficult to see how the question of the amount of accommodation, to which the infants may be entitled to in the family dwelling house, depends in any sense on the question whether there has been a valid dedication of the house for religious purposes, or on the question whether the defendant Gooroo Prosonno Sen should be restrained from exercising his profession on the premises. The causes of action in the two cases are distinct and exist, if they exist at all, against different individuals, and no good or convenient purpose would be served by insisting on both being joined together and dealt with in one suit.

Moreover, assuming that the old practice of the Chancery Court as regards administration suits is binding on or ought to be rigidly followed by this Court, it is not clear to my mind that in accordance with that practice the Court of Chancery would have declined to entertain this suit. Having regard to the consequential relief sought it seems impossible that it could be said that the question of construction, which is raised in this case, is a question over which (to use the words of PEARSON, J.) the Court "would have no control without the existence of an administration suit."

On the contrary, questions between trustees and beneficiaries, and between trustees and strangers, necessitating often, it may be presumed, the construction of certain provisions of the trust-[123] deed have been entertained and determined

by both Courts of Law and Equity, without the Court being asked to undertake the entire administration of the trust. The case of *Re Weall*, (1889) L.R., 42 Ch. D., 674, may be cited as an illustration. See also Lewin on Trusts, 9th Ed., p. 246, and also at p. 290, where there occurs this passage: "A trustee is called upon, if a breach of trust be threatened, to prevent it by obtaining an injunction, and if a breach of trust has been already committed, to bring an action for the restoration of the trust fund to its proper condition, or at least to take such other active measures as with a due regard to all the circumstances of the case may be considered the most prudential."

In view of all these considerations, it appears to me that the objection that the present suit cannot be maintained is not sustainable.

The next objection is that the plaint discloses no cause of action. The argument on this point is put in this way. The plaint, it is said, discloses no facts or circumstances which would justify the Court's interference to prevent the defendant Gooroo Prosonno Sen from carrying on his dispensary business and otherwise following and practising his profession as *kabiraj* at the premises Nos. 16 and 17, Kumertolli Street. Admittedly the defendant Gooroo Prosonno Sen has a right under the will to *live* in the premises, and, if he has a right to live there, he has a right, it is argued, to carry on his profession there as a means of livelihood, so long at least as he does not interfere with the rights of the other beneficiaries.

This contention involves, it is obvious, the question of the construction of the will of the testator.

What is included in the right of living in the premises which the testator has reserved to his sons and grandsons and their families? Or to put the question in another way, is the carrying on the business or profession of a *kabiraj* on the premises in question inconsistent with the disposition which the testator has made of the property, so as to constitute the action of the defendant Gooroo Prosonno Sen, a breach of a valid trust created by the testator?

[124] A great deal has been said as to what is the proper definition of the word "living," and as to what are the rights which are comprised within the right of living in any given place. It seems to me impossible to lay down a strict hard-and-fast definition of the word, which shall be applicable under all circumstances. The meaning must vary according to the circumstances under which the word is used, or the purpose or object for which it is employed. It may have a very extended meaning from the point of view of International Law as indicating the country where a son is entitled to exercise all the privileges of a subject or citizen. On the other hand, it has a much restricted meaning when used in Statutes for the purpose of defining the personal jurisdiction of a particular Court. The cases which have been decided in this country under clause 12 of the Charter, or under section 16 of the Civil Procedure Code, or under the Insolvent Debtors' Act, and also in England under the County Courts' Acts, show in what different senses the words "living," "residing" or "dwelling" and similar expressions may be used, and that sometimes a very narrow and artificial meaning is applied to them. The question to my mind to be asked in this case is—What is the meaning which the testator intended the word should bear?

Now, when the testator's meaning has to be discovered, the well-known ruling of the Privy Council in *Soorjeemoney Dossee* v. *Denobundoo Mullick*, (1857) 6 Moo. I. A., 535, lays it down that primarily the words of the will are to be considered, and next the surrounding circumstances, when the testator's meaning may be affected by them. I turn first to the will itself.

The first question which suggests itself is what was the testator's real object and purpose in dealing with the family residence? Did he really mean to make an absolute dedication of the property to religious purposes, or was this purpose colourable only, and did he really intend to secure to his family a permanent beneficial interest of the nature of a perpetuity?

The right of living, which the testator reserved to the members of his family, must, as the one or the other was the true [126] purpose of the testator, receive a wide or a restricted interpretation. Was there then a valid dedication of the premises for religious purposes? If there was this intention on the part of the testator, the dedication will not be invalid merely by reason of its transgressing against the rule, which forbids the creation of a perpetuity. Mayne's Hindu Law, 4th Edition, paragraph 395.

By paragraph 1 of the will the testator declares that he *endows* (or as the defendants suggest *assigns*) his house Nos. 16 and 17, Kumertolli Street, for certain specific purposes. These purposes are as follows: For the residence and worship for ever of the *Thakurs* established by him. Next, for the celebration in the house annually of the *Sri Sri Issur Durga Pujah* and the *Dolejatra* festival. Thirdly, for the performance of the annual *shradh* of the testator's father, and for the feeding on such occasion of Brahmins and people of other castes.

After describing these religious purposes for which he desired to dedicate the house, the testator proceeds: "Besides these my sons and grandsons (son's sons) with their respective families shall live in the house. In case of disagreement among them, the person who would be the cause of disagreement shall leave the house with his family. *I endow* (or make over or assign) this house for all these purposes. With regard thereto no right of my heirs shall exist or accrue. They shall simply live (therein) as mentioned above. My furniture, etc., which exist in the said house shall be used for the worship, &c., of the said idols. My heirs shall get nothing whatever of the same. The said house and the said furniture shall never be partitioned amongst any persons." By this clause of the will the testator prescribes the particular uses to which the house is to be put, and except in the manner expressly provided the testator declares that his heirs shall have no beneficial interest in, or enjoyment of, the property.

Moreover, the testator makes express pecuniary provision for the permanent maintenance of the endowment which he has created. He does not contemplate that the property shall ever be rent-producing, for he provides by paragraph 5 of the will that "tax revenue and cost of repairs" of the house Nos. 16 and 17 are to be [126] paid out of the rents realized by his executors of the testator's house and lands in Harrison Road. The testator then proceeds:—

"My executors shall spend Rs. 16 per month for the worship of the *Thakurs* established in my aforesaid house, Nos. 16 and 17, Kumertolli Street, and for daily recitation of *Chandipat* in my aforesaid house. Afterwards, out of the said rent (*i.e.*, the rent of the property in Harrison Road) the executors shall every month lay aside Rs. 250 per month, and thus secure every year three thousand rupees in a lump and (with the said money secured in a lump) *Durgatsub* and *Dolejatra* shall every year be celebrated in my aforesaid house Nos. 16 and 17, Kumertolli Street. Out of the same Rs. 2,500 shall be spent in *Durgatsub* and Rs. 500 in *Dolejatra*. Afterwards out of the said rent Rs. 500 shall be annually spent for the annual *shrad* of my *Ishur Pita Thakur* (deceased father) and for feeding Brahmins and persons of other castes on the occasion of the *shrads*. The balance left after paying the expenses specified in

this paragraph out of the rent of these houses (*i.e.*, the Harrison Road property) shall be divided in the mode stated below."

By paragraph 7 the testator provides that the residue of his property, including the balance of the rent of the Harrison Road properties, shall be divided into three parts, and given to his two sons and the sons of his pre-deceased son. The testator having thus provided for the permanent dedication of his family residence for certain particular purposes, and having created a charge on the Harrison Road properties for the maintenance of this endowment, proceeds to say that the person who shall collect the rents of the Harrison Road properties and carry out the trusts created for religious worship, and the celebration of the festivals in the house dedicated for this purpose, shall be the senior in age among his lineal descendants and persons, following the Hindu religion.

It is said that there are no express words of gift in favour of the idol, and that failing such words of gift there is nothing more than a trust for worship created by the will, and that subject to such trust the beneficial interest in the property passes to the heirs of the testator or falls into the residue. But no express words of gift to the idol either directly or indirectly in the shape of a trust are required to create a valid dedication; see [127] the remarks of WEST, J., in *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* [(1887) I. L. R., 12 Bom., 263].

Under the Hindu law an idol as symbolical of certain religious purposes is capable of being endowed or vested with property. But it is not an essential condition of a valid endowment that it should take the form of an express gift to an idol. All that is necessary is that the religious purposes or objects of the testator should be clearly specified, and that the property intended for the endowment should be set apart for or dedicated to these purposes.

In the present case the language of the will shews that the testator intended that the dedication or endowment that he was making should operate so as to cover the whole of the beneficial interest he had in this property. There is no reservation of any proprietary or pecuniary right or interest in the property in favour of his family which could be attached in execution in satisfaction of their debts. His heirs as such are excluded in express terms from all rights to the property. The right of living, which is reserved in favour of his sons and grandsons and their families, is rather of the nature of a personal privilege which the testator intended to continue to certain persons who were in the enjoyment of it, by his permission, during his life-time. It is noteworthy that the language employed by the testator in making this reservation seems to exclude the idea that he intended to create a heritable right. The words used for sons and grandsons in the vernacular do not convey the idea of a line of succession of heirs, and in this respect this clause of the will differs from the subsequent clauses which deal with the specific gifts to his sons and grandsons. Moreover, the testator himself by his will has drawn a marked distinction between the dedication or endowment of a property and a charge or trust to provide for the expenses of religious worship. Paragraph 1 deals with the case of a dedication of property and paragraph 5 with a charge or trust for religious purposes.

In these respects the case seems distinguishable from the cases of *Sonatun Bysack* v. *Juggutsoonderee Dossee* [(1859) 8 Moo. I. A., 66] and of *Ashutosh* [128] *Dutt* v. *Doorga Churn Chatterjee* [(1879) I. L. R., 5 Cal., 438: L. R., 6 I. A., 182]. I hold therefore that there has been a valid perpetual endowment or dedication effected by the testator of the premises Nos. 16 and

17, Kumertolli Street, for the religious purposes mentioned in paragraph 1 of the will.

The question still remains whether the testator, in reserving to his sons and grandsons and their families the right of living in the premises dedicated by him for religious purposes, intended to exclude his sons or grandsons from carrying on or practising therein the business or profession for which they had been or were being trained.

There are certain indications of the testator's mind derivable from the will itself, which are not without a bearing on this question. It is to be remembered the testator himself had kept his place of business separate from his family residence, at all events ever since the premises Nos. 16 and 17, Kumertolli Street, became the family residence. The testator then provides for his family continuing to reside in the same place and proceeds to devise to each of his sons and to his grandsons a separate house suitable (so far as one can judge) for business purposes, and in so doing it seems not improbable that the testator contemplated that his sons and grandsons would carry on their separate businesses in these different houses. Moreover, it is clear that the testator insisted that those of his descendants who chose to live together in the residence he had provided for them should do so amicably and peaceably. If, therefore, the testator was anxious so to arrange that his descendants should live together harmoniously, it seems inconsistent to suppose that he at the same time contemplated the possibility of different members of the family carrying on rival businesses in the common residence, because it is difficult to imagine a state of things which would be more likely to introduce friction and discord. It is reasonable on the other hand to suppose that the testator would be specially anxious to exclude all such disturbing elements as might be likely to induce disputes amongst his heirs in connection with a property he desired should be maintained as a perpetual religious endowment.

Apart from the expressions contained in the will itself, I [129] think the case is one where the surrounding facts and circumstances may be fairly looked to, for the purpose of obtaining an indication as to the testator's meaning in respect of the clause in question. I think it may be said that the testator intended that the privilege of living in the family dwelling house should be interpreted with regard to his sons and grandsons after his death in the same way as he interpreted it during his life-time; that, in other words, his sons and grandsons should use the premises in the same manner and for the same purposes as he used them, or permitted them to be used, in his life-time. If then this is a test which may be fairly applied for ascertaining the testator's meaning, it is necessary to inquire as to what the mode of living was which the testator adopted during his life-time for himself and the members of his family at the premises Nos. 16 and 17, Kumertolli Street, from the time it became the family residence.

[The learned Judge then considered all the evidence on this point and continued—]

All these facts taken together indicate I think very clearly that while the testator did not object to his youngest son using his *baitakhana* at No. 17 in a certain limited way for the purposes of his profession as a physician, he did object to the regular business of a medical dispensary being started and carried on in the house in which he and the other members of his family were living.

Another circumstance which may, I think, have affected the testator's meaning is the effect which the carrying on of the business of a medical dispensary at the family dwelling house might be expected to have on the state of comfort and enjoyment which the various members of the family had

been previously accustomed to in living together. A large body of evidence has been adduced on the question as to the actual inconvenience occasioned to the female residents of the family dwelling house by the carrying on of the dispensary business by the defendant Gooroo Prosonno. I do not think it is necessary to examine this evidence in detail, because I am not prepared to say that the plaintiff has succeeded in showing that the effect of the defendant's action amounts to a nuisance or such an interference of the rights **[130]** of the plaintiff or his family which, apart from the prohibition to be implied from the testator's will, would justify the issue of an injunction. But on the other hand I think there is sufficient evidence to show that the natural and ordinary incidents connected with the carrying on of a medical dispensary business in accordance with the Ayurvedic system at the family dwelling house, such as the supply of gratuitous medical relief to poor and needy patients, the preparation, storing and sale or other distribution of drugs, and the condition of publicity which must result from all these things cannot but interfere sensibly and appreciably with that condition and state of comfort and enjoyment and privacy of family life in which the testator maintained the members of his family during his life, and which, it may reasonably be supposed, the testator would, as an orthodox Hindu of wealth and position, be anxious to secure to them so long as they chose to live together in the residence which he provided for them.

All these considerations lead me to the conclusion that the defendant Gooroo Prosonno's action in opening and carrying on the business of a medical dispensary at the premises, Nos. 16 and 17, Kumertolli Street, is contrary to the wishes and intentions of the testator, and is opposed to the disposition which the testator has made in respect of those premises, and amounts to a breach of the trusts created by his will, and that the plaintiff is entitled to have the defendant restrained by the injunction of this Court from continuing so to act in breach of these trusts.

The claim for the relief sought in clause (*c*) of the prayer of the plaint has not been pressed, and as regards clause (*d*) the result of the evidence as to the structural alterations in the premises alleged to have been effected by the defendant Gooroo Prosonno Sen since the testator's death is not sufficiently clear to warrant the issue of the mandatory order which the plaintiff seeks.

The result is there will be a decree in terms of the 1st and 2nd paragraphs of the prayer in the plaint, but I think the declaration and injunction therein prayed for should be limited to the dispensary business now carried on in the premises, Nos. 16 and 17, Kumertolli Street, by the defendant Gooroo Prosonno Sen.

The defendant Gooroo Prosonno Sen must pay the plaintiff's **[131]** costs of this suit, including the costs of the commission, to be taxed on scale 2. The other defendants must bear their own costs.

Attorneys for the Plaintiff: Messrs. *G. C. Chunder & Co.*

Attorney for Defendant No. 1: Babu *B. N. Bose.*

Attorneys for other Defendants: Messrs. *Dignam & Co.*

NOTES.

[I. A dedication to idol *to be set up* is valid :—(1909) 37 Cal., 128 F.B.

II. Property may be bequeathed to an idol :—(1913) 24 I.C., 72 (Oudh).

III. A valid dedication of premises to religious purposes is not rendered invalid by reason of its transgressing the rule against perpetuities :—(1913) 24 I.C., 72.

IV. As to when a dedication is complete, and when it is partial, see (1906) 3 C.L.J., 224.]

[25 Cal. 131]

The 29th June, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Mokbul Hossain............Plaintiff

versus

Ameer Sheikh............Defendant.*

Landlord and Tenant—Suit for ejectment—Service tenure—Bengal Tenancy Act (VIII of 1885), sections 89 and 181.

Service tenures are excepted from the operation of section 89 of the Bengal Tenancy Act.

THE plaintiff brought a suit for recovery of possession of certain land, on the allegation that the land in dispute had been held by him and his ancestors as *halshahanas* of the zemindars; that the zemindars had no right to dismiss him, and that they aided the defendants to oust him. The defence was that the plaintiff had no title to the land in dispute, that he held the land in lieu of wages only, and as he was dismissed for neglect of duty, the land was resumed, and was given to the defendant who was appointed in his place. The Munsif dismissed the suit holding that the plaintiff had failed to prove that the land in dispute was held by him or by his ancestors as *chakran* land, and that the zemindar had a right to resume it. On appeal, the District Judge confirmed the decision of the Court of First Instance. From this decision the plaintiff appealed to the High Court, mainly on the grounds that, having reference to the provisions of section 89 of the Bengal Tenancy Act, he was not liable to be ejected except in execution of a decree; and not without a reasonable notice.

Babu *Pramatha Nath Sen*, for the Appellant.

Babu *Karuna Sindhu Mookherjee* for the Respondent.

[132] The following **judgments** were delivered by the High Court (MACLEAN, C. J. and BANERJEE, J.)

Maclean, C. J.—I think the appeal fails on both grounds. The first ground is, that, under section 89 of the Bengal Tenancy Act, the plaintiff could not be ejected except in execution of a decree. But this tenure admittedly is a service tenure, and looking at section 181, I think upon the construction of that section service tenures are excepted from the operation of section 89. If the section does not mean that, I feel a difficulty in appreciating what it does mean. It has been found as a fact in this case that liability to dismissal at the will of the zemindar was incidental to the service tenure in question.

The second point is, that the plaintiff can only be ejected after reasonable notice.

That point was not raised in the Court of First Instance, but it was raised for the first time in the Lower Appellate Court. There is nothing, however, in the findings of fact in the Court below which enables us to say whether or not there was reasonable notice. On both points the appeal fails and must be dismissed with costs.

Banerjee, J.—I am of the same opinion. I only wish to add one word with reference to the first of the two contentions raised before us. The contention

*Appeal from Appellate Decree No. 1801 of 1895 against the decree of F. B. Taylor, Esq., District Judge of Moorshedabad, dated the 20th of June 1895, affirming the decree of Baboo Jogendra Nath Ghose, Munsif of Kandi, dated the 22nd of March 1895.

was that the plaintiff was not liable to ejectment except in execution of a decree as provided by section 89 of the Bengal Tenancy Act. I am of opinion that the application of that section to service tenures must be taken to be limited by section 181 of the Act, which enacts that nothing in this Act shall affect any incident of a *ghatwali* or other service tenure. ? It has been found as a fact that liability to dismissal at the will of the zemindar is an incident of the particular service tenure now under consideration. That being so, the question is whether, notwithstanding that that is an incident of this service tenure, and notwithstanding that section 181 enacts that nothing in the Act shall affect any such incident, it is still open to the plaintiff to claim the benefit of section 89. I think the question must be answered in the negative. For if, notwithstanding all this, section 89 is to have operation, then section 181 would become so far nugatory, and that could not have been intended by the Legislature.

S. C. G. *Appeal dismissed.*

NOTES

[This was applied in (1905) 2 C L.J, 403, see also (1899) 26 Cal, 611]

[133] *The 30th April, 1897*

PRESENT

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR JUSTICE BANERJEE.

Akikunnissa Bibee . . . one of the Judgment-debtors*

versus

Roop Lal Das and another . . . . Decree-holders

Civil Procedure Code (Act XIV of 1882), section 244—Question in execution of decree—Order absolute for sale—Transfer of Property Act (IV of 1882) section 88—Question arising as to the order absolute for sale.

When an order absolute for sale of mortgaged property has been made, any question that arises as to that order absolute for sale is not a question relating to the execution of the decree within the meaning of section 244 of the Code of Civil Procedure.

Ajudhia Pershad v *Baldeo Singh* [(1894) I L R, 21 Cal, 818 (823)], *Tiluck Singh* v. *Parsotein Proshad* [(1895) I L R, 22 Cal, 924], *Tara Prosad Roy* v *Bhobodeb Roy* [(1895) I.L.R, 22 Cal,, 931 (934)], and *Ranbir Singh* v *Drigpal*, (1893) I L R, 16 All, 23, followed.

Kedar Nath v. *Lalji Sahai*, (1890) I L R, 12 All, 61, *Oudh Behari Lal* v *Nageshar Lal*, (1891) I. L. R., 13 All, 278, dissented from

THE facts of this case were shortly these --

An application was made by the decree-holders Roop Lal Das and another, on the 10th August 1895, for an order to make absolute the mortgage decree which they obtained against one Golam Mowlah Saheb, after substitution, on the death of the judgment-debtor, of his heirs, *viz*, his widow Manjura Banu Bibee, his minor sons, and his daughters, in his place. The application was granted, and the Subordinate Judge through inadvertence passed an order making the decree absolute, without making the heirs parties to the case by substituting their names in the place of the deceased judgment-debtor, and without any summons served on the heirs who had attained majority, but only

* Appeal from Order No. 174 of 1896 against the orders of Babu Ram Gopal Chuki, Subordinate Judge, First Court of Zillah Dacca, dated the 22nd of February 1896.

appointing a guardian *ad litem* of the heirs who were minors. On the 18th [134] January 1896 another application was made by the decree-holder to the effect that as the decree was made absolute without all the representatives of the deceased judgment-debtor being made parties to the case, and as there were other defects, the previous order making the decree absolute be cancelled, and a fresh order for a decree absolute be made after substituting the heirs of the deceased judgment-debtor. The previous order was cancelled and summonses were issued to the representatives. Some of them objected to the decree being made absolute, on the grounds, amongst others, that notices should issue to all the defendants, that the minors were not the legal representatives of the deceased judgment-debtor, and that Akikunnissa Bibee was owner of a 4-annas share of the properties which Golam Mowlah mortgaged as his own. The Subordinate Judge overruled all the objections, and made the decree absolute.

From this decision the judgment-debtor, Akikunnissa, appealed to the High Court, mainly on the grounds that the Subordinate Judge was wrong in holding that in the present proceedings it was not necessary to decide any dispute as to the representation of the deceased judgment-debtor, and also that the present application of the decree-holder was not an application in execution of the decree, and the question as to the rights and status of the legal representatives ought not to be decided in these proceedings.

Mr. *C. P. Hill*, Moulvi *Syed Samsul Huda*, Moulvi *Abdul Jawad*, and Moulvi *Mahomed Mustapha Khan* for the Appellant.

Babu *Lal Mohun Das*, Babu *Jogendra Chunder Ghose*, and Babu *Satis Chunder Ghose* for the Respondents.

The following **judgments** were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.)

Maclean, C. J.—The question we have to decide is whether, when an order absolute for the sale of mortgaged property has been made after an ordinary decree in the mortgage suit has been made, and any question arises as to that order absolute for sale, it is a question relating to the execution of the decree within the meaning of section 244 of the Code. The point is not *res nova* in this Court. The cases of *Ajudhia Pershad* v. *Baldeo Singh*, (1894) I. L. R., 21 Cal., 818 (823), [135] *Tiluck Singh* v. *Parsotein Proshad*, (1895) I. L. R., 22 Cal., 994; *Tara Prosad Roy* v *Bhobodeb Roy*, (1895) I. L. R., 22 Cal., 931, (934), and that of *Ranbir Singh* v. *Drigpal*, (1893) I. L. R., 16 All., 23, are to the effect that this question should be answered in the negative. I agree in that view. Two other cases in the Allahabad High Court, the cases of *Kedar Nath* v. *Lalji Sahai*, (1890) I. L. R, 12 All., 61, and *Oudh Behari Lal* v. *Nageshar Lal*, (1891) I. L. R, 13 All., 278, are authorities the other way. I prefer, however, to follow the previous cases, three of which are in this Court. In matters of procedure, and this is a matter of procedure, it is to my mind very important that the decisions of the various Benches of the High Court should, if possible, be in harmony. Otherwise confusion is created in the minds of the suitors and practitioners, and even of the Judges in the lower Courts who, if they find a conflict of view upon a question of practice in the decisions of the High Courts, are placed in a difficulty as to which course to adopt. I hold that this question is not one relating to the execution of a decree within the meaning of section 244 of the Code.

Then it is urged by the appellant that before the decree for sale is made absolute, the Court should inquire into the validity of the claim of the appellant to a 4-anna share in the so-called mortgaged property. The appellant is the sister of the deceased mortgagor. He has died pending the suit, and she is brought upon the record as party to the suit as one of his heirs. Being

brought before the Court, she claims a 4-anna share of the mortgaged property in her own right, and contends that the Court below ought to have gone into that question in this suit, and not have left her to bring another separate suit to establish her right. But I think a claim such as this ought to be raised and decided in a separate suit, and not in the mortgage suit. If the 4-anna share really belong to the appellant, I think she should assert that right in a separate suit, and that the present suit, in its present stage, ought not to be further delayed in order that this [136] entirely fresh issue may be decided. There is nothing to prevent the appellant bringing such fresh suit.

Then it is said that the Court below was wrong in allowing both the minor sons of the deceased mortgagor and the present appellant and a daughter of the mortgagor to be placed upon the record as the heirs of the deceased mortgagor. But the position is this. The plaintiff does not know who are the heirs. The guardians for the minors allege that the minors are: the appellant alleges the minors are illegitimate, and that the appellant and the mortgagor's daughter are the heirs. Under the circumstances the plaintiff, to make himself secure, brings both of these contending parties before the Court. If either of them consider they are unnecessary parties, they can disclaim any interest in the property, disclaim any right or title to the heirship and thus be dismissed from the suit. In the meantime, in the face of these conflicting claims, I consider the plaintiff was justified in the course he has taken.

In my opinion this appeal fails, and must be dismissed with costs.

Banerjee, J.—I concur.

S. C. G. *Appeal dismissed.*

NOTES.

[This was followed in (1907) 30 Mad., 26 : 16 M.L.J., 545 ; (1902) 25 Mad., 244 ; (1901) 20 Cal., 644 ; (1906) 33 Cal., 867 ; (1904) 6 Bom., L.R., 1041. See also 9 C.L.J., 358 ; 8 C.W.N., 102.]

[25 Cal. 136]

The 14th July, 1897.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Kasiswar Mukhopadhya............Plaintiff

versus

Mohendra Nath Bhandari and others............Defendants.*

Res judicata—*Code of Civil Procedure (Act XIV of 1882), section 13—Landlord and tenant—Suit for rent—Issue whether land was mal or lakhiraj—Question raised in a rent suit, whether directly and substantially in issue in that suit—Subsequent suit for khas possession.*

In a previous suit brought by the predecessor in title of the plaintiff against the defendants for rent, one of the questions raised was, whether the land, in respect of which rent was claimed, was *mal* or *lakhiraj* and that question was decided in favour of the defendants. In a subsequent suit by the [137] plaintiff against the same defendant for *khas* possession

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* Appeal from Appellate Decree No. 1882 of 1895, against the decree of Babu Beni Madhub Mitter, Subordinate Judge, 3rd Court of Zillah Hooghly, dated the 8th of June 1895, affirming the decree of Babu Upendra Nath Bose, Munsif of Amta, dated the 15th of May 1894.

of certain land, the defence was that the land in dispute was their *lakhiraj* land, and that the judgment in the previous suit operated as *res judicata*.

Held, that though the previous suit was one for rent, yet the issue upon the question whether the land was *mal* or *lakhiraj* was raised directly in that suit, and therefore the subsequent suit was barred as *res judicata*.

Radhamadhub Holdar v. *Monohur Mukerji*, (1888) I. L. R., 15 Cal., 756 : L. R., 15 I. A., 97, followed. *Srihari Banerjee* v. *Khitish Chandra Rai Bahadoor*, (1897) I. L. R., 24 Cal., 569, distinguished.

THE facts of the case and the arguments for the purposes of this report appear sufficiently from the judgment of the High Court.

Babu *Ram Chunder Mitter* and Babu *Dwarka Nath Chuckerbutty* for the appellant.

Babu *Akhoy Kumar Banerjee* for the Respondents.

The **judgment** of the High Court (BANERJEE and STEVENS, JJ.) was as follows:—

Banerjee, J.—The only question raised in this appeal is, whether the Courts below are right in holding that the suit is barred under section 13 of the Code of Civil Procedure.

The suit was one for *khas* possession of certain plots of land. The former suit, the judgment in which is made the basis of the plea of *res judicata*, was brought by the predecessor in title of the present plaintiff against the present defendants for rent, and one of the questions raised in the case in the first Court, and the only question upon which the decision of the case was made to rest finally in the Appellate Court, was whether the land, in respect of which rent was claimed, was the *mal* land of the plaintiff, or the *lakhiraj* land of the defendants. That question was determined by the Appellate Court against the plaintiff, and his suit was dismissed. The Lower Appellate Court has held that the judgment in the former suit operates as *res judicata* upon the question raised in this case, namely, whether the land in dispute is the *mal* land of the plaintiff or the *lakhiraj* land of the defendants. There is no dispute here that the question raised in this suit was in issue in the former suit, and **[138]** was heard and determined in that suit, and the only ground upon which the learned Vakil for the plaintiff (appellant) asks us to hold that the judgment in the former suit does not operate as *res judicata* is that, though the matter now in dispute was in issue in the former suit, it was not directly and substantially in issue in that suit within the meaning of section 13 of the Code of Civil Procedure, because the former suit was one for rent, and the primary question for decision in that suit was whether the relationship of landlord and tenant subsisted between the parties And, in support of this contention, the cases of *Run Bahadoor Singh* v. *Lucho Koer*, (1885) I. L. R., 11 Cal., 301 : L. R., 12 I. A., 23, and of *Srihari Banerjee* v. *Khitish Chandra Rai*, (1897) I. L. R., 24 Cal., 569, are relied upon.

No doubt there are certain observations in the judgment of their Lordships of the Privy Council in the case of *Run Bahadoor Singh* v. *Lucho Koer*, which apparently lend some support to the plaintiff's contention; but then a subsequent decision of the Privy Council in the case of *Radha Madhub Holdar* v. *Monohur Mukerji*, (1888) I. L. R., 15 Cal., 756 : L. R., 15 I. A., 97, clearly shows that the mere fact of the former suit in which the question of title is determined being a rent suit, does not prevent that determination from operating as *res judicata* in a subsequent suit brought for the establishment of title. Their Lordships in the last mentioned case observe: " Radha Madhab now comes to redeem; but the right to redeem rests on precisely the same

ground as the right to rent was rested. In each case the question is equally—who is the true representative of Matangini? Therefore, their Lordships conceive that the matter was expressly decided by the High Court in the rent suit." That being so, we do not think that the plaintiff's contention can be supported to the extent to which it goes.

As for the case of *Srihari Banerjee* v. *Khitish Chandra Rai*, (1897) I.L.R., 24 Cal., 569, the facts there were very different from those of the present case. There the issue tried in the former suit was, what was the share of the rent to which the plaintiff was entitled; whereas the issue raised in the subsequent suit was, what was the **[139]** share of the property to which the plaintiff was entitled; and, as is pointed out in the judgment, the two questions were not identical. "And the judgment," the learned Judges in that case say, "of the Court of Appeal rested upon considerations based on the provisions of the Land Registration Act, and on the fact of the purchase of the present plaintiffs being subsequent to that under which the present defendant No. 1 claimed—considerations which were necessary and sufficient for the determination of the rent suit, but which are not conclusive in a suit like the present, which is for determination of title to land as distinguished from title to recover rent, and in which the plaintiffs claim a preferential right, notwithstanding that their purchase was subsequent to that of the defendant No. 1 by reason of that purchase being in satisfaction of a decree on a prior mortgage. Section 78 of Bengal Act VII of 1876, and s. 60 of Act VIII of 1885, bar inquiry in a rent suit into any question of title independently of the Land Registration Record, while clause (*a*) of section 89 of the former Act reserves the right to obtain a declaration of title independently of such record by a regular suit."

These then were the grounds upon which it was held that the decision in a rent suit did not operate as *res judicata* in a subsequent suit brought for establishment of title. But these considerations have no application to the facts of this case.

It remains then to consider whether there is anything in the circumstances of this case which would warrant our holding that the question heard and determined in the former suit, namely, that relating to the question of *mal* or *lakhiraj*, was not directly and substantially in issue in that suit.

Now the Code of Civil Procedure does not define the expression "matter directly and substantially in issue." The only explanation of the expression that is given is in explanation II of section 13 of the Code: and that relates to cases where a matter is to be held to have been directly and substantially in issue constructively, though it was not directly and substantially in issue actually. Here there is no question that the matter was in issue actually, and not merely constructively. The only question is whether the matter was directly and substantially in issue. "Substantially," **[140]** evidently, signifies what was indicated by the phrase, "in effect though not in express terms," in Lord HARDWICKE'S statement of the doctrine of *res judicata* in the case of *Gregory* v. *Molesworth*, (1747) 3 Atkyns., 626), which is cited with approbation by their Lordships of the Privy Council in the case of *Soorjo Monee Dayee* v. *Suddanund Mohapatter*, (1874) 12 B. L. R., 304: L. R., I. A., Sup. Vol., 212: 20 W. R., 377. In the present case there can be no question that the issue now raised was raised *substantially* in the former case within the meaning assigned to that word in the cases just referred to. Here the matter was not merely in effect, but also in express terms decided.

Then there remains the question whether the matter was directly in issue. The word "directly" seems to have been used in *contra*-distinction to the words

"incidentally" and "collaterally" made use of in the statement of the opinion of the Judges in the *Duchess of Kingston's* case, (1776) 2 Smith's L. C. (9th Ed.) 812 (814).

Without attempting to lay down any hard and fast rule for determining when an issue should be considered to have been directly raised, and when incidentally or collaterally, we think it enough, for the purposes of the present case, to say that, whatever meaning may be assigned to the term "directly," it is impossible to avoid the conclusion that the issue upon the question of *mal* and *lakhiraj* was raised directly in the former suit, quite as much as it is in this suit. On referring to the final judgment of the Appellate Court in that suit we find that the learned District Judge, after setting out the previous proceedings in the case, observes: "For the plaintiff appellant it is urged that his evidence in the lower Court fully established that the land was *mal* and not *lakhiraj* and that the Munsif erred in holding otherwise. This then is the point for determination." And then, after discussing the evidence at some length, the learned Judge concludes with these words: "The point for determination is found against the appellant, and the appeal will be dismissed with costs." It appears clear from this that even if the decision in the former suit, which was one for rent, might have been made to rest upon grounds **[141]** other than that upon which it is actually made to rest, after the first Court had distinctly found the issue upon the question of *mal* or *lakhiraj* against the plaintiff, the plaintiff, who was the appellant, thought it fit to rest his case before the Appellate Court upon the sole ground that he was entitled to succeed because the land was proved to be his *mal* land, and not the *lakhiraj* land of the defendant. It is, therefore, impossible to say that, upon any view of the meaning of the term 'directly,' the issue tried in the former suit, as to whether the land was *mal* or *lakhiraj*, was anything but a direct issue in the case. The decision in the former case, therefore, has, in our opinion, been rightly held to operate as *res judicata* in this case. That being so, the only contention raised by the appellant fails, and the appeal must be dismissed with costs.

S. C. G. *Appeal dismissed.*

NOTES.

[See also (1906) 10 C W.N., 820; (1913) 19 I.C., 632 (Cal.); (1910) 10 I.C., 363 (Cal.); 23 M L.J., 543.]

[25 Cal. 141]

The 7th June, 1897.

PRESENT :

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Kali Prosanno Ghose............Plaintiff

versus

Rajani Kant Chatterjee and another............Defendants.*

Appeal—Arbitration—Validity of Award—Judgment in accordance with an award—Code of Civil Procedure (Act XIV of 1882), sections 521 and 522.

An appeal will lie against a decree given in accordance with an award under section 522 of the Code of Civil Procedure, when the award upon which the decree is based is not a valid and legal award.

Debendra Nath Shaw v. *Aubhoy Churn Bagchi*, (1883) I.L.R., 9 Cal., 905; *Joy Prokash Lall* v. *Sheo Golam Singh*, (1885) I.L.R., 11 Cal., 37; *Bindessuri Pershad Singh* v. *Jankee Pershad Singh*, (1889) I. L. R., 16 Cal., 482; *Lachman Das* v. *Brij Pal*, (1884) I. L. R., 6 All., 174; and *Venkayya* v. *Venkatappayya*, (1892) I. L. R., 15 Mad., 348, referred to.

A Court is justified in holding that an award is not valid and binding upon the defendant, when the arbitrator was the retained pleader of the plaintiff, and no disclosure of this fact was made, before the arbitrator was appointed, to the defendant who was consequently unaware of it.

[142] THE facts of the case are shortly these: The plaintiff brought a suit for arrears of rent against the defendants. The matter was referred to arbitration. The arbitrator made his award, but the defendants took exception to it on certain grounds. The Subordinate Judge, before whom the matter came on for hearing, overruled the defendants' objection, and passed a decree in accordance with the award. An appeal was preferred against this decision to the District Judge by the defendants. A preliminary objection was taken to the hearing of the appeal on the ground that no appeal lay to him. The learned District Judge overruled this objection, and upon the merits held that the award was not valid and binding and set aside the decision of the first Court.

From this decision the plaintiff appealed to the High Court.

Babu *Sarada Churn Mitter*, and Babu *Harakumar Mitter* for the Appellant

Dr. *Rash Behary Ghosh*, and Dr. *Ashutosh Mookerjee* for the Respondent.

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.)

Maclean, C.J.—In this case there was a litigation between the plaintiff and the defendants. The matter was referred to arbitration. The questions submitted to arbitration were inquired into by the arbitrator, who made his award. The defendants objected to that award, and applied to have it set aside. The matter came before the Subordinate Judge who heard the parties and rejected the application to set aside the award, and decided practically in favour of the plaintiff and made a decree in accordance with the award. The defendants, dissatisfied with the ruling of the Subordinate Judge, presented, an appeal to the District Judge. Upon the matter coming before the District Judge

* Appeal from Order No. 140 of 1896 against the order of G. K. Deb, Esq., District Judge of Zillah Nuddia, dated the 10th January 1896, reversing the order of Babu Saroda Prosad Chatterjee, Subordinate Judge of that district, dated the 22nd of February 1895.

objection was taken by the plaintiff, the then respondent, that, having regard to the last sentence of section 522 of the Code of Civil Procedure, no appeal lay from the decree of the Subordinate Judge. Those words are these: "No appeal shall lie from such a decree except in so far as the decree is in excess of, or not in accordance with, the award." The plaintiff contends that those words mean that inasmuch as in this case the decree is not in excess of, **[143]** but in accordance with, the award, no appeal can lie. But on the other hand the defendants contend that the award there spoken of must be taken to be an award which has been regularly and properly arrived at by the arbitrator who has been appointed arbitrator: in other words it must be a valid and legal award.

In my opinion the contention of the defendants upon this point is sound. The matter has been practically dealt with in various cases. It is sufficient if I refer to the case of *Joy Prokash Lall* v. *Sheo Golam Singh*, (1885) I. L. R., 11 Cal., 37, where it was held that the question under section 522 of the Code of Civil Procedure whether an appeal will lie against a decree in accordance with the award depends upon whether the award upon which the decree is based is a valid and legal award. There are several other cases which have been referred to in the course of the argument, cases not only in this Court, but in the High Courts of Madras and Allahabad, which appear to me consistent with the view laid down in the case which I have just cited. It appears to me that, if one were to hold the contrary view, the result would be rather startling. It is not difficult to conceive cases, in which the award may be obviously invalid, and where the Judge of First Instance, either through misapprehension of the facts, or of the law, has yet made a decree affirming the award. In these cases is there to be no appeal? I think there ought to be, and I concur in those decisions which lay down that there is. In my opinion, therefore, an appeal does lie.

That being so, we have to consider the second point, namely, whether assuming that an appeal lies, the District Judge was correct in his opinion that the award was not valid or binding upon the plaintiff. In my opinion it was not binding upon him, and I base that conclusion upon one fact, and one fact alone, in the case. It is admitted that the arbitrator in this case was the retained pleader of the plaintiff. It is proved that the defendants were not aware of that most important fact until after the proceedings had terminated before the Subordinate Judge. It is equally clear that the fact was not disclosed to the defendants. What then is the position of matters? You have a gentleman appointed as arbitrator who had been admittedly retained as the pleader of the plaintiff: you have the fact that there is no dis-**[144]** closure of that fact made by the plaintiff or by the arbitrator himself, to the defendant, and that the defendant goes to arbitration in ignorance of that fact. To my mind that circumstance alone is sufficient to justify the Court in holding that the award is not valid and binding upon the defendant. In cases of arbitration where a person is appointed by two parties to exercise judicial duties there should be *uberrima fides* on the part of all the parties concerned in relation to his selection and appointment, and every disclosure, which might in the least affect the minds of those who are proposing to submit their dispute to the arbitrament of any particular individual, as regards his selection and fitness for the post, ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made. In my opinion, there was such concealment in this case on the part of the plaintiff as to vitiate the award,

under the provisions of section 521 of the Code; and holding that view, and that there was a right of appeal, the appeal must be dismissed with costs.

Banerjee, J.—I am of the same opinion. The question raised before us is, whether an appeal lay to the Lower Appellate Court. The learned Vakil for the appellant contends, that as the decree of the first Court was made in accordance with the award of an arbitrator, an appeal from that decree was barred by section 522 of the Code of Civil Procedure. That section, no doubt, provides that where judgment is given according to the award pronounced by an arbitrator, " no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award." But these words have been held in a series of cases in this Court, and in the High Courts of Allahabad and Madras, to refer to a decree made in accordance with a legal and a valid award. See the cases of *Debendra Nath Saw* v. *Aubhoy Churn Bagchi*, (1883) I. L. R., 9 Cal., 905; *Joy Prokash Lall* v. *Sheo Golam Singh*, (1885) I. L. R., 11 Cal., 37; *Bindessuri Pershad Singh* v. *Jankee Pershad Singh*, (1889) I.L.R., 16 Cal., 482, *Luchman Das* v. *Brij Pal*, (1884) I. L. R., 6 All., 174, and *Venkayya* v. *Venkatappayya*, (1892) I. L. R., 15 Mad., 348.

[145] If it were necessary to refer to any reason in support of a view which is so amply supported by authority, I should say that it would be unreasonable to hold that the Legislature intended to make a decree final on the ground of its being in accordance with an award when the validity of the award itself is called in question. What the Legislature meant to declare to be final was the decree, supposing the award to be unassailable on the ground of illegality or invalidity for any of the reasons referred to in section 521 of the Code of Civil Procedure, such as corruption or misconduct on the part of the arbitrator, or fraudulent conduct on the part of either party. But though the correctness of the award, and therefore of the decree based upon it, may not be open to question by appeal, it does not follow that the *validity* of the award, and the decision of the Court touching the objections to the same as contemplated by section 521 are intended to be matters beyond question by appeal. It is difficult to suppose that a decision upon such grave and important matters was intended to be final when orders upon comparatively less important matters, such as those referred to in section 518, are made appealable by section 588, clause 26.

It was argued by the learned Vakil for the appellant that the decisions, which I have referred to above, are intended to apply only to cases where an award was a nullity as distinguished from cases in which the award was liable to be set aside upon some one or other of the grounds mentioned in clauses (*a*), (*b*) and (*c*) of section 521. I am unable to appreciate the force of this argument. If, as was admitted in the argument, and as has been held by the Privy Council in *Har Narain Singh* v. *Chaudhrani Bhagwant Kuar*, (1891) I.L.R., 13 All., 300: L. R., 18 I. A., 55, an award that is made after the expiry of the period allowed by the Court is an invalid award, and a nullity, as provided by the last paragraph of section 521, it is difficult to see why an award which is made in contravention of an order superseding the arbitration, as contemplated by clause (*c*) of section 521, should be regarded as being of a different character, so far as the present question is concerned, or why an award which a party has succeeded in obtaining by fraudulent concealment of facts should be viewed in a different light.

[146] Then, as regards the question, whether in the present case the award was really valid or not, I do not think it necessary to say anything in addition to what has been said in the judgment of the learned Chief Justice.

The award here, upon the facts found, was clearly invalid under clauses (*a*) and (*b*) of section 521 of the Code of Civil Procedure.

For these reasons I think that the award in the case was invalid, and that, therefore, an appeal lay to the Lower Appellate Court.

S. C. G. *Appeal dismissed.*

NOTES.

[The leading case on this subject is the decision of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan* **(1901) 29 Cal., 167 P.C.**, in the light of which this decision must be taken to be erroneous. See also 25 Cal., 757 ; 29 Bom., 285 ; 10 C.W.N., 601 : (1906) 33 Cal., 498 ; (1902) 29 Cal., 278, (1904) 6 Bom. L R, 1132.]

[25 Cal. 146]

The 6th July, 1897.

PRESENT.

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Achha Mian Chowdhry and others............Defendants

versus

Durga Churn Law and others... ....Plaintiffs.*

Bengal Tenancy Act (VIII of 1885), sections 103, 104, 143—Rules framed under section 189 of the Bengal Tenancy Act—Whether proceedings under section 103 of the Bengal Tenancy Act are suits between landlord and tenant—Code of Civil Procedure (Act XIV of 1882)—Review of judgment—Second appeal—Settlement of fair and equitable rent.

Proceedings under section 103 of the Bengal Tenancy Act are suits between landlord and tenant within the meaning of section 143, by virtue of the rules framed under section 189 of that Act ; therefore the provisions of the Code of Civil Procedure relating to review of judgment are applicable to such proceedings.

No second appeal lies to the High Court from a decision of a Revenue Officer settling rents under section 104 of the Bengal Tenancy Act.

THE facts of the case and the arguments appear sufficiently, for the purpose of this report, from the judgments of the High Court.

Dr. *Ashutosh Mookerjee*, and Babu *Janendra Nath Bose* for the Appellants.

Mr. *Jackson*, Babu *Baikanto Nath Pal*, and Babu *Devendra Nath Ghose*, for the Respondents.

[147] The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) -

Maclean, C.J.—I think we can dispose of these appeals, considering the very full arguments which have been submitted to us by both sides. The real point we have to decide lies in a somewhat narrow compass, and is whether or not the present proceedings are a suit within the meaning of section 143 of the Bengal Tenancy Act.

* Appeal from Appellate Decree No. 1852 of 1895, against the decree of J. Pratt, Esq., District Judge of 24-Pergunnahs, dated the 22nd of August 1895, modifying the decree of Babu Jatindra Nath Gupta, Settlement Officer of Baraset, dated the 21st of August 1894.

The facts are as follows: There were certain proceedings taken under section 103 of the Bengal Tenancy Act, the practical object of which, as I understand them, was to have a fair and equitable rate of rent in respect of certain premises fixed. It was a question admittedly between landlord and tenant. The matter came before the Settlement Officer at Baraset, who, on the 21st August 1894, decided, in effect, that the rent was not enhanceable. There was an appeal from that decision to Mr. Pratt, the Special Judge under the Act, and he, in the first instance, confirmed this decision of the Settlement Officer and dismissed the appeal. This was on the 30th of May 1895. The plaintiff subsequently applied for a review of the judgment of Mr. Pratt, and on the 22nd of August 1895 that learned Judge heard the review, and, without admitting any fresh evidence, but upon the old evidence, arrived at the conclusion that he had on the former occasion come to a wrong decision in the matter, and he practically reversed his previous judgment and held that the rent was enhanceable. Whether the present appellants did or did not appear on that occasion before Mr. Pratt is, perhaps, not very clear; at any rate they had notice of the application, and might have appeared and raised the point that they now raise, but they did not do so. The present appeal is then presented, and the main contention of the appellant is that Mr. Pratt had no jurisdiction to review the previous judgment he had delivered. That turns upon whether the proceedings are a suit within the meaning of the Bengal Tenancy Act. This point was not taken when the matter was before Mr. Pratt; it is taken for the first time in this Court; but in the view I take of the real question on this appeal I do not propose to express any opinion as to whether or not the point can now be raised, nor to express any opinion as to whether this appeal is maintainable, [148] having regard to the language of section 584 of the Code of Civil Procedure. Both these points are to my thinking of no practical importance, as in my opinion the appellant fails on the real merits of his appeal. If these proceedings be a suit within the meaning of the Bengal Tenancy Act, then the provisions of the Code of Civil Procedure would admittedly apply, and Mr. Pratt would have had the power of doing that which he did, viz., reviewing his previous decision.

Is this proceeding then a suit within the meaning of that Act? The documents themselves in the proceedings are such as are usual in a suit. In the paper-book there is a note "Date of institution of suit." There is a plaint, a written statement of the defences, which indicate that it has been treated as a suit, and one to which the Code of Civil Procedure would apply as if it were an ordinary suit.

The sections of the Bengal Tenancy Act which bear upon the matter are these. But before I refer to them, I ought, perhaps, to state what is the argument of the learned Vakil who appears for the appellants. His argument is that this proceeding is not a suit, but is a mere application under the Act, and being a mere application under the Act, the provisions of the Code of Civil Procedure do not apply to it. That argument is based to a great extent upon the terms of sections 143 and 144 of the Act in question, and also of sections 107 and 108. Section 143 of the Act is in these terms: "The High Court may, from time to time, with the approval of the Governor-General in Council, make rules consistent with this Act, declaring that any portions of the Code of Civil Procedure shall not apply to suits between landlord and tenant as such, or to any specified classes of such suits, or shall apply to them subject to modifications specified in the rules."

If we stop there it is obvious that the High Court may, with the approval mentioned in that section, make rules, the effect of which might be to limit

the operation of the Code of Civil Procedure to a certain class of suits. Then it goes on, "subject to any rules so made, and subject also to the other provisions of this Act, the Code of Civil Procedure shall apply to all such suits." In section 144 there is no doubt a distinction drawn between the term "suit," in the first part of that section, and the term " applica-**[149]**tion " in the second part of that section. But there is another section in the Act, which, to my mind, materially bears upon the question we have to decide, and that is section 189. Section 189 says that "the Local Government may from time to time by notification in the *Official Gazette* make rules consistent with the Act (1) to regulate the procedure to be followed by Revenue officers in the discharge of any duty imposed upon them by or under this Act, and may by such rules confer upon any such officer (*a*) any power exercised by a Civil Court in the trial of suits," and other powers.

What has happened is this. In pursuance of that section, the Local Government has made rules, and there are certain rules which apply to cases of such a class as are now before the Court, and rules 27 and 32 of those rules so apply. Rule 27 says: "If within the period fixed and notified under rule 16, the landlord applies for a settlement of a fair rent (which was the case here) he shall be considered as plaintiff and the tenant as defendant, and the proceeding shall be dealt with as a suit under the Act." Rule 32 is to the same effect. The Legislature then seems to have told us that if a landlord applies for a settlement of a fair rent his proceeding shall be dealt with as if it were a suit under the Act. If then it is to be dealt with, *quâ* procedure, as a suit under the Act, it is a suit within the meaning of section 143, and the Code of Civil Procedure would apply, and if so Mr. Pratt would have power to review his judgment. If the Code of Civil Procedure do not apply, what procedure is to apply? Under what procedure is that, which is to be dealt as a suit, to proceed? It is urged that we are not to take this extremely reasonable view because section 144 shows a distinction between applications and suits, but as the rules say this is, *quâ* procedure, to be dealt with as a suit. I fail to appreciate any real force in the argument.

Then it is urged that sections 107 and 108 of the Act are inconsistent with this view. It is urged that, inasmuch as section 108 specifies a particular procedure to be followed, that is inconsistent with the procedure to be followed being that used in the Code of Civil Procedure. I fail to see the inconsistency. It may be superfluous, but I cannot see any inconsistency between the two. Those responsible for the Bengal Tenancy Act may have **[150]** thought it advisable to make it clear that an appeal was to lie, and not leave that point open and resting upon the construction of various sections of the Code. They thought it advisable to make that quite clear. In my judgment, it would be a very narrow construction to place upon this Act, and the rules framed under it, if we were to say that this proceeding is not a suit within the meaning of the Act. Were we to so hold, there would be no procedure applicable to such a proceeding. That practically disposes of the appeal.

The other point is a very small matter. It is said that under sub-section 3 of section 104, the Judge in the Court below ought to have presumed, until the contrary was proved, that the existing rent was fair and equitable. I don't know how that may be, or whether the Judge really did not do so, but it is pretty clear that having regard to section 106 the appeal will not lie to this Court on that point. The appeal fails and must be dismissed with costs.

Banerjee, J.—I concur with the learned Chief Justice in thinking that this appeal ought to be dismissed with costs. It arises out of certain proceedings instituted under section 103 of the Bengal Tenancy Act. Upon the

proceedings being instituted the Revenue Officer found that the tenants were tenure-holders holding at fixed rates of rent, and he, accordingly, recorded a declaration to that effect. Upon appeal to the Special Judge, that officer in the first instance held that the tenants were occupancy-raiyats, but on the question of fixity of rent he confirmed the decision of the first Court. But upon an application for review of judgment being made, he granted the application, modified his former decision, and came to the conclusion that the defendants were occupancy-raiyats holding at a rent that was enhanceable, and he directed that the rent should be assessed at a certain rate per bigha

Against this last mentioned decision the present appeal has been preferred, and it is contended, on behalf of the appellants, that the decision of the Court below is wrong in law, *first*, because the learned Special Judge had no power to review his former judgment, and, *secondly*, because he was wrong in enhancing the rent without assigning any definite reasons, when under sub-section 3 of section 104 of the Bengal Tenancy Act, he was [151] bound to presume, until the contrary was proved, that the existing rent was fair and equitable.

Before dealing with the first of these two grounds, it becomes necessary to consider two questions raised by the learned Counsel for the respondents, namely, first, whether it is open to the appellants to raise the first contention when they did not take any objection in the Court below as to its not having any jurisdiction to entertain the application for review of judgment; and, secondly, whether the ground upon which we are asked to interfere is a ground that comes within the scope of section 584 of the Code of Civil Procedure which governs second appeals

As to the first question, I do not think that the mere fact of the appellants not having objected in the Court below to the lower Courts entertaining the application for review of judgment, precludes them from raising the objection now before us, if it is a valid objection. In this view I am supported by the decision of their Lordships of the Privy Council in the case of *Minakshi Naidu* v. *Subramanya Sastri*, (1887) I.L.R, 11 Mad, 26 · L.R. 14 I. A., 160. It was there held by their Lordships that where there is an inherent incompetency in the Court below to deal with the question before it, no consent would have conferred upon the Court below that jurisdiction which it did not possess. Here there was no consent, there was merely an absence of objection. Assuming that the contention of the appellants is right, that the Lower Appellate Court had no power to grant the application for review, the mere fact of their not having raised that point in the lower Court, ought not, in my opinion, to prevent them from raising it now.

Then, as to the second question, I do not think that the ground raised on behalf of the appellants is outside the scope of section 584 of the Code. A second appeal is allowed by that section on this, amongst other grounds, namely, that the decision is contrary to some specified law or usage having the force of law; and "specified," as explained by the Judicial Committee in the case of *Durga Chowdhrani* v. *Jewahir Singh*, (1891) I. L. R., 18 Cal., 23, means specified in the memorandum of appeal. The decision that is appealed against in this [152] case is the decision of the 22nd August 1895. It is one and the same decision that holds that the application for review ought to be admitted, and holds, in modification of the former judgment, that the defendants ought to be recorded as raiyats with rights of occupancy, holding at enhanceable rates. The correctness of that decision is called in question on the ground of its being contrary to law, that is, contrary to law for this reason, that the decision, in so far as it grants the application for review, is in contravention

of the law regulating the procedure on this subject, and is in excess of the power of the Court. That being so, the two preliminary questions raised on behalf of the respondents ought, in my opinion, to be decided in favour of the appellants.

It becomes necessary then to consider the first ground of appeal on its merits. The contention of the appellants is that the Code of Civil Procedure, subject to certain modifications, applies only to suits between landlord and tenant under the provisions of section 143 of the Bengal Tenancy Act; that proceedings under section 103 of that Act are not suits, but are initiated by applications; and that a distinction is made between suits and applications in the Act as will appear from section 144. It is further contended that sections 107 and 108, which make the provisions of the Code of Civil Procedure applicable to proceedings under Chapter X of the Act, such as the one out of which this appeal has arisen, make them applicable only to a limited extent, that is, as regards the trial in the first Court, the appeal to the Special Judge, and a second appeal to this Court. And it is argued that the inference to be drawn from these several provisions of the Bengal Tenancy Act, is that the provisions of the Code of Civil Procedure relating to review of judgment do not apply to proceedings like these.

On the other hand, it is contended, in the first place, that every Court has an inherent power, unless there is any express provision of the law to the contrary, to correct its own errors by review of judgment; and in support of this contention reference is made to certain decisions of this Court and of the Judicial Committee. It is further contended that proceedings under Chapter X, at any rate, in certain cases, and the present case is one of them, should be treated as suits under the Bengal Tenancy Act, as provided by [153] paragraphs 27 and 32 of the rules made by the local Government under section 189 of the Bengal Tenancy Act.

The question has been very fully discussed on both sides; and after giving my best consideration to the arguments advanced, I am of opinion that the appellant's contention is not sound, and that the view contended for by the learned Counsel for the respondents that proceedings like these should be regarded as suits is correct.

The local Government is, by section 189 of the Act, given authority to make rules to regulate the proceedings to be held by Revenue Officers in pursuance of any duty imposed upon them under this Act. Chapter X of the Act, under which this proceeding was instituted. relates to proceedings to be conducted by Revenue Officers under this Act; and in regulating their procedure, the local Government has, under the provisions of section 189, made the two rules to which reference has just been made, which provide that the proceeding shall be dealt with as a suit under this Act. If, then, as regards procedure, and the question before us is one of procedure, the proceeding is to be dealt with as a suit under this Act, is there any reason why the proceeding should not be treated as a suit within the meaning of section 143 of the Act, and therefore governed by the Code of Civil Procedure? It was argued that if the Legislature had intended the Code of Civil Procedure to apply to proceedings under Chapter X, the language of section 143, instead of being qualified as it is, would have been to the effect that the Code of Civil Procedure shall apply to suits and proceedings between landlord and tenant under this Act.

I do not think that this argument is valid. These proceedings could not have been treated as suits, and could not, so far as this ground of decision goes, have been treated as governed by the review provisions of the Code of Civil Procedure, if the local Government had not thought it fit, in the exercise

of the power vested in it by section 189 of the Act, to declare that they should be dealt with as suits. The Legislature, in enacting section 143 in the way it has done, has left it to the local Government to say, whether certain proceedings which are by the Act to be initiated by applications, should be treated as suits or not. In this parti-[154] cular case, the local Government has determined to say that these proceedings should be treated as suits. In the absence then of any definition of the term "suit" anywhere in the Act, I think it is only right and proper to hold that a proceeding like this comes within the description of a suit between landlord and tenant under section 143 of the Act.

I may add that it would have been somewhat anomalous if it had been otherwise; for then we should have had the Code of Civil Procedure governing the proceedings down to final judgment in the first Court, and the same Code of Civil Procedure governing the case so far as the first appeal and also the second appeal were concerned, but not so far as an application for review of judgment went. Proceedings like these are not summary proceedings. Decisions passed in them have the force of a decree. An appeal and a second appeal are allowed against those decisions. But if no power of correcting its error by review of judgment were given to the Court, then notwithstanding the provisions as to appeal, grave and irremediable injustice might sometimes result. I think, therefore, that it is consistent with reason and justice to hold that these proceedings ought to be treated as suits within the meaning of section 143 of the Bengal Tenancy Act, and if they are to be so treated, the Code of Civil Procedure applies to them, and there can be no objection to the Judge entertaining an application for review.

As to the second point, it is enough to say that no second appeal is allowed by section 108 of the Bengal Tenancy Act upon a point like this. For sub-section 3 of section 108 of the Act allows an appeal to this Court from the decision of a Special Judge only in cases coming under section 106, and this last mentioned section relates only to disputes arising as to the correctness of any entry, not being an entry of a rent settled under Chapter X, and evidently the second objection relates to an entry of the rent so settled in this case.

S. C. G. *Appeal dismissed.*

NOTES.

[In (1900) 28 Cal., 28 the question was considered with reference to the Amending Act of 1898. See also (1902) 30 Cal., 339; (1906) 33 Cal., 837.

An objection to jurisdiction may be taken at any stage, when the necessary facts are on the record:—(1907) 7 C.L.J., 152.]

[155] *The 5th April, 1897.*

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Mahomed Hamidulla............Decree-holder

versus

Tohurennissa Bibi and others...........Judgment-debtors.*

Civil Procedure Code (Act XIV of 1882), section 108—Ex parte *Decree—Effect of a decree set aside at the instance of some only of several defendants against whom the decree passed was* ex parte—*Meaning of the words " the decree."*

The words " the decree " in section 108 of the Code of Civil Procedure mean the whole decree made in the suit. Therefore, in a case where a decree has been passed *ex parte* against some only of several defendants, the effect of its being set aside on their application under section 108 of the Code of Civil Procedure is that the whole decree made in the suit is set aside, notwithstanding that some of the defendants had entered appearance at the original hearing.

THIS was the hearing of a rule granted to show cause why an order of the Munsif of Alipore setting aside a decree on the application of some only of the defendants against whom it had been made *ex parte* [*sic*]. The facts of the case and the arguments, for the purposes of this report, appear sufficiently from the judgments of the High Court

Dr. *Ashutosh Mookerjee*, in support of the rule

No one appeared to show cause.

The following **judgments** were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.) —

Maclean, C. J.—I am for my own part not satisfied that this case comes within section 622 of the Code of Civil Procedure , but in the view I take of the construction of section 108 of that Code, to which I will advert in a moment, it becomes unnecessary for me to decide that question. The question we have to decide arises under these circumstances . A suit was brought against two sets of defendants upon a promissory note which had been made by two persons, one of whom died before the suit was brought The suit was brought against the surviving maker of the note and the heirs of the other maker of the note who had, as I have said, died [156] in the meantime. Two of these heirs were *purdanashin* women, and it appears that the necessary summons was not served upon them, and that the decree as against them was made *ex parte* in these terms " In the result a decree for Rs. 468 be passed in plaintiff's favour together with costs at *ex parte* scale. The liabilities of the defendants 1 to 3 shall be to the extent of the property inherited by them from the deceased debtor."

The two defendants against whom the decree had been made *ex parte* made an application under section 108 of the Code to have the decree set aside. The application was granted, and the decree not only as against the applicants but also as against the other defendants who had appeared and defended was set aside. The question is whether it ought to have been set aside as against all the defendants, or only as against the applicants, the *purdanashin* women,

* Civil Rule No. 323 of 1897 made against the order passed by Babu Sasi Kumar Ghose, Munsif of Alipore, dated the 16th of January 1897.

against whom admittedly the trial had proceeded *ex parte*. Apparently the point was not mentioned to the Munsif; any way he has not referred to it.

The question turns upon the true construction of section 108 of the Code, the language of which is, perhaps, not so clear upon the point as it might be. The first clause of the section somewhat favours the present applicant's contention, but then the latter clause, after stating that the applicant must satisfy the Court that he was not properly served, goes on to say, "the Court shall pass an order to set aside the decree" * * * The language is imperative, "shall set aside the decree." Now what does "the decree" mean? It must, I think, mean the decree, the whole decree, made in the suit. It does not say part of the decree: it does not say that part of the decree which affects the interest of the applying defendant alone, but it uses the words "the decree." Read according to their ordinary signification and natural meaning the words must mean, I think, that the Court shall set aside the *whole decree*, and that view is strengthened, I consider, by the last words of the section, viz., "and the Court shall appoint a day for proceeding with the suit." The suit would appear to mean the *whole suit*, not merely the suit as against or so far as it affected the particular defendants making the appplication, but the *whole suit*. There seems to me reason in this view of the section If the original decree was allowed to stand as against the original [157] defendants who had appeared and defended the suit, and the suit were only allowed to proceed on the second hearing, if I may call it so, as against the defendants against whom in the first instance the decree had been made *ex parte*, I can conceive cases in which complications and possibly injustice might result. And it may well be that the Legislature, seeing that difficulties might ensue from making in suits in which there were several defendants a decree against them piecemeal, may have deemed it better that the decree should not be set aside partially, but that the whole decree should be set aside. And I may point out that the plaintiff can hardly be heard to complain, for when the suit came on for hearing he knew perfectly well that he was proceeding against some of the defendants *ex parte*, and that he was incurring the risk—a fairly certain risk—of having his decree set aside, if he knew, as he must be taken to have known, that he was proceeding against certain of the defendants who had not been served. Nor can the defendants who appeared be heard to complain. They must have known that the other defendants were not in Court to defend, and a very little inquiry would probably have satisfied them that they had not been served. If then those defendants had pointed out to the Court that their co-defendants were not present, and that it was qustionable whether they had been served with the requisite summons, and that they were *purdanashin* women, it is highly probable that the Court would have adjourned the case to give the other defendants an opportunity of being present or at any rate of being duly served. If, then, the whole decree be set aside, I do not think that either the plaintiff or the other defendants have much real ground for complaint.

Holding this view, on the best construction that I am able to place on the language of the section, I think that the Judge in the Court below arrived at a right conclusion, and that the rule must be discharged.

Banerjee, J.—I also am of opinion that this rule ought to be discharged. We are asked to reverse an order of the Court below made under section 108 of the Code of Civil Procedure, setting aside an *ex parte* decree, so far as that order relates to the two defendants who had entered appearance, and against whom it is contended the original decree was not an *ex parte* decree.

[158] Two questions arise for consideration: *First*, whether the application to this Court comes properly within section 622 of the Code of Civil

Procedure; and, *secondly*, whether the order made by the Court below is a right order or not.

If the contention of the learned Vakil for the petitioner, viz., that the order made by the Court below was wrong, were correct, I am inclined to think that the case would come under that clause of section 622 of the Code, which authorizes this Court to interfere in cases in which a Subordinate Court has exercised a jurisdiction not vested in it by law. For the contention raised on behalf of the petitioner is this, that the Court below, by section 108 of the Code, was authorized to set aside only that part of the decree which was passed *ex parte*; and if, in making the order that it has made, it has set aside also that part of the decree that was not passed *ex parte*, I think that the petitioner may contend that it has, in so doing, exercised a jurisdiction not vested in it by law. This view is in accordance with the decision of the Privy Council in the case of *Brij Mohun Thakur* v. *Rai Umanath Chowdhry*, (1892) I. L. R., 20 Cal., 8: L. R., 19 I. A., 154, and with the decision of this Court in *Jogodanund Singh* v. *Amrita Lal Sircar*, (1895) I. L. R., 22 Cal, 767.

But, then, is the decision of the Court below wrong, or was the Court below right in reversing the entire decree as it has done, notwithstanding that some of the defendants had entered appearance? Section 108 of the Code says: "In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was made, for an order to set it aside, and if he satisfies the Court that the summons was not duly served," as was the case here, "the Court shall pass an order to set aside the decree upon such terms as to costs, payment into Court, or otherwise, as it thinks fit, and shall appoint a day for proceeding with the suit."

The section, therefore, evidently contemplates the setting aside of the decree made in the suit, and it directs the Court to appoint a day for proceeding with the suit.

It was argued that the decree in this case should be treated as a [169] decree partly *ex parte* and partly not an *ex parte* decree, and that the section authorizes the Court to set it aside only so far as it was an *ex parte* decree. The section, however, makes no such distinction, and as pointed out in the judgment of the learned Chief Justice, there may be very good reason why the section did not make any such distinction. It may often happen that the setting aside of the decree as regards some of the defendants renders it necessary in the interests of justice that the whole decree should be re-opened; and the present case is an instance in point. Here, of the two parties who entered appearance, one was one of the executants of the promissory note on which the suit is based, and the other was one of the three persons who are now sued as the legal representatives of another executant of the note, now deceased; and if the decree were to stand as against the defendants who entered appearance, and be set aside only as regards the defendants who did not enter appearance, then, in the event of the suit being dismissed as against the latter, the result would be obviously hard as against the defendant who is sued as one of the heirs of the deceased executant of the note and who had entered appearance at the original hearing. It is to avoid complications like this that the Legislature may have thought it fit to allow a decree made *ex parte* as against some of the defendants to be set aside in its entirety upon their application, if the requirements of section 108 of the Code are satisfied.

Two cases were relied upon by the learned Vakil for the petitioners—*Doorga Pershaud Ghose* v. *Greesh Chunder Bose*, (1864) 1 W. R., 222, and *Brojonath Surmah* v. *Anund Moyee Debia Chowdhrain*, (1867) 7 W. R., 237, as lending support to his contention. They were cases under Act X of 1859,

and section 58 of that Act, which corresponded to section 108 of the Code, contained this provision, that if the petitioner "shall show good and sufficient cause for his previous non-appearance and shall satisfy the Collector that there has been a failure of justice, the Collector may, upon such terms and conditions as to costs or otherwise as he may think proper, revive the suit and alter or rescind the decree according to the justice of the case."

That, I think, was different from the provision in the law now **[160]** under consideration, which is imperative, and requires that the Court shall pass an order to set aside the decree upon such terms as to costs, etc., as it shall think fit, and shall appoint a day for proceeding with the suit. I, therefore, think that decisions under Act X of 1859 cannot be in point in cases coming under section 108 of the Code, and the view I take receives some support from the decision of this Court in the case of *Dookhee Khan* v. *Rajessuree Ranee*, (1871) 15 W. R., 371, in which it was held that it was competent to the Judge of the Small Cause Court, on hearing the objections by one of the several defendants, to set aside the decree as to all, "if justice seems to require it; as, for instance, if the objection is one which is common to the case of all." . . .

Cases may arise in which a decree, though nominally one, really consists of several decrees against different parties, the relief granted against each being separately specified. In such cases the contention urged by the petitioner's Vakil may hold good. But here the decree is one and undivisable, and I think that the Court below was right in setting it aside in its entirety under section 108 of the Code, notwithstanding that some of the defendants had entered appearance at the original hearing.

S. C. G. *Rule discharged.*

NOTES.

[LEGISLATION—

In the C.P.C., 1908, O. 9, r. 13, the words '*as against him*' were inserted after the words ' an order setting aside the decree' and the proviso was added that ' where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.'

This sets at rest the previous conflict of case law ; see (1897) 25 Cal., 155 ; (1897) 25 Cal., 175 ; (1899) 26 Cal., 324 ; (1900) 27 Cal., 810 ; (1900) 5 C.W.N., 58 ; (1902) 24 All., 383; (1905) 5 C.L.J., 202 ; (1907) 6 C.L.J., 226 ; (1906) 3 C.L.J., 160 ; (1899) 4 C.W.N., 456 ; (1903) 26 Mad., 604 ; (1893) 18 Bom., 142 ; (1908) 31 Mad., 454 ; (1911) 17 C.W.N , 133 ; (1909) 10 I.C., 174 (Oudh).]

[25 Cal. 160]
The 28th June, 1897.
PRESENT.
SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Eshan Chunder Mitter, Chairman of the Hooghly and
Chinsurah Municipality.... . . ....Defendant
versus
Banku Behari Pal... .. ..Plaintiff*

Bengal Municipal Act (Bengal Act III of 1884), section 204—Projection caused by restoring a portion of an old building which has been pulled down with the object of its being rebuilt—Meaning of the words "which may have been so erected or placed"—Metropolis Management Amendment Act 1862 (25 & 26 Vict., c. 102), section 75.

[161] Section 204 of the Bengal Municipal Act (Bengal Act III of 1884) does not apply to the case of a projection forming part of a building which is merely in substitution for an old building, which has existed upon the same site before the date on which the District Municipal Improvement Act, 1864, or the District Towns Act 1868 or the Bengal Municipal Act, 1876, as the case may be, took effect in the Municipality.

The words "which may have been so erected or placed" in section 204 mean erected or placed for the first time.

THIS appeal arose out of a suit brought by the plaintiff for a declaration that the order passed by the Municipal Commissioners of Hooghly, directing the plaintiff to pull down a verandah which projected over a public road, was *ultra vires*, illegal, and without jurisdiction. The allegation of the plaintiff was that the verandah in question existed from time immemorial, that he pulled down the verandah in Choitra 1298 B. S. (April 1892), and in the place of the old beams on which the verandah stood he affixed three brackets for reconstructing the verandah upon them, that the new verandah was to be of the same dimension as the old one, that a notice to remove the brackets having been served upon him, he moved the Chairman of the Municipality, who directed an investigation; that, notwithstanding the report of the investigation being in his favour, the Municipal Commissioners at a meeting passed a resolution ordering the brackets to be removed, that thereupon he removed the brackets, protesting against the order of the Commissioners, and hence the suit was instituted by him.

The defence (*inter alia*) was that the plaintiff had no cause of action; that under the provisions of the Bengal Municipal Act the suit was not maintainable in the Civil Court, that the projection was to be regarded as a new one, and it was pulled down about ten years ago, and as the plaintiff proceeded to erect the new one without the permission of the Municipal Commissioners they were legally competent to order its removal.

The Munsif found all the facts in favour of the plaintiff and decreed the suit. On appeal to the Subordinate Judge, he confirmed the decision of the first Court, but as to costs the decree was modified. From this decision the defendant appealed to the High Court.

* Appeal from Appellate Decree No. 1797 of 1895, against the decree of Babu Beni Madhub Mitter, Subordinate Judge of Hooghly, dated the 5th of August 1895, modifying the decree of Babu Khetra Mohan Mitter, Munsif of Hooghly, dated the 30th of April 1894.

[162] Babu *Lal Mohun Das* and Babu *Lal Behary Mitter* for the Appellant.

Dr. *Rash Behary Ghose* and Babu *Shib Prosanna Bhattacharjee* for the Respondent.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

Maclean, C.J.—On the 17th December 1892, the Vice-Chairman of the Hooghly and Chinsurah Municipality wrote and sent to the plaintiff in this suit the following notice :—

"SIR,—By a resolution of the Commissioners at a general meeting held on the 9th September last your prayer to allow the *sajah* to be made was disallowed. I therefore request that you will be good enough to remove the iron brackets put up against your house within eight days from the date of receipt of this letter, otherwise necessary steps should be taken for their removal."

I understand and I have specially asked the question that no other notice was sent by the defendants to the plaintiff.

The first question which we have to decide is whether, having regard to the terms of section 204 of Bengal Act III of 1884, the Municipality were justified, under the circumstances of this case, in giving a notice, which admittedly the above document purported to be, under that section. The Municipality admit that they considered they were entitled to act, and that throughout they have purported to act, under the statutory powers vested in them under that section. I may say, before I refer to the section, that I have entertained grave doubt whether the plaintiff has not been premature in bringing this suit, inasmuch as beyond sending the above notice, the Municipality have done nothing. When he instituted the suit he had suffered no damage. If he had good reason to believe that if he did not remove the brackets, the Municipality would do so, his proper course, to my mind, would have been to have come to the Court and asked for an injunction to restrain them from so acting, upon the ground that their threatened action was *ultra vires*. In such a suit the question of *ultra vires* could have been decided. If the plaintiff's view were correct, the service of the notice was a mere *brutum fulmen*, and he might have put it behind the fire. Inasmuch, however, as in both the [163] lower Courts the Municipality have allowed the question to be fought out upon its merits, and both parties desire to have the decision of this Court upon the point of law involved, by putting, perhaps, a somewhat liberal construction upon section 42 of the Specific Relief Act, I think that, as the parties desire it, the case ought now to be decided upon its merits, and that exception ought not now to be taken as to whether or not the plaintiff was premature in bringing this suit, or as to its form.

Now section 204, so far as it is material for the purposes of our decision, provides as follows : "The Commissioners may give notice in writing to the owner or occupier of any house requiring him to remove or alter any projection, encroachment or obstruction erected or placed against or in front of such house which may have been so erected or placed after the date on which the District Municipal Improvement Act, 1864, or the District Towns Act, 1868, or the Bengal Municipal Act, 1876, as the case may be, took effect in the Municipality."

The contention of the plaintiff is, that if the projection be only caused by restoring a portion of an old building, which has been pulled down with the object of its being rebuilt, section 204 does not apply, and that section 204 only applies to cases of a new erection causing a new projection and not to the case of a projection which is merely a substitution for a projection previously existing

Now the findings of fact in the Court below, so far as they are material for the present purpose, are these : The Subordinate Judge, as to the second point, which was whether the projection which the defendant ordered to be removed was a new one or is to be regarded as such, says this: "I am of opinion that the plaintiff has proved by his own deposition, as well as by the evidence of most of his witnesses, that the old verandah of the plaintiff's house existed for a period of more than thirty years, and it was pulled down about two years ago in order to rebuild it in its former position on iron brackets, and that the iron brackets were affixed in the same month." Again, he says in another part of his judgment: "I am of opinion that the plaintiff has proved that the old and new projections respectively were [164] exactly of the same dimensions, and that the old *sajah* was 11 feet and 6 inches in length, and 3 feet 6 inches in breadth;" and again he finds as a fact: "It has been already shown that it has been proved by the evidence of the witnesses of both sides that the projection in question existed since long before any Municipal Act came into operation in this town, and it has been proved by the evidence of the plaintiff's witnesses that the old *sajah* was pulled down about two years ago, and that the iron brackets were affixed within one month from the time the old *sajah* was pulled down for the purpose of rebuilding it in its former position, so the projection was not a new one."

Upon these findings of fact, we, sitting here on second appeal, must take it that the brackets which the Municipality claimed to have removed were placed for the purpose of supporting a new verandah in substitution for the old verandah which had been in existence long before any Municipal Act came into operation affecting this district, and that it was intended to be of the same dimensions as the old verandah

The point, then, which we have to decide is whether section 204 applies only to the case of a projection which is caused by a building which is new, that is, erected after the passing of the Acts referred to in the section, or whether it applies to the case of a projection forming part of a building which is merely in substitution for an old building which had existed upon the same site before the passing of the Acts mentioned in the section. In my opinion it would be too narrow a construction of the section to hold that it applied to the case of a new building erected in substitution for an old building, which was in existence before the date of the Acts mentioned in the section. If, in point of fact, the new projection is, as in this case, part of a new building erected in the place of an old building which admittedly was in existence before the date of the Acts mentioned in the section, and merely in substitution for that old building, I do not think that the case comes within section 204 of the Act. I think the words "which may have been so erected or placed," must mean erected or placed for the first time.

This view, I consider, receives support from the provision made [165] in section 233 of the same Act, which provides for compensation being made in the case of a projection ordered to be pulled down by the Municipality in those cases where the projection existed before the coming into operation of the Municipal Acts referred to in that section. Though I am not prone in construing Acts of the Indian Legislature to refer to cases decided in the Courts of England upon the construction of certain English Acts of Parliament, I feel that the view I entertain upon this case receives support, so far as the principle is concerned, from the case of *Lord Auckland* v. *Westminster Local Board of Works* [(1872) L. R., 7 Ch. App., 597], which, as I understand that decision, in effect decided that the powers conferred by the 75th section of the Metropolis Management Amendment Act which, in principle, is more or less akin to the

sections I have referred to of Bengal Act III of 1884, did not apply to the case of a new building which was merely a substitution for an old building, which had previously existed upon the same site. The authority of that case is not, in my judgment, impaired by the more recent case of the *London County Council* v. *Pryor* [L. R., (1896) 1 Q. B. D. 330]. The two cases are quite reconcilable.

Upon these grounds I think that the judgment of the Court below was right. There is something in that judgment about "a prescriptive right." I say nothing about that. I do not at present appreciate its bearing upon the question we have to decide. The appeal fails and must be dismissed with costs, but I think the decree—the precise form of which has not been given to us,—ought to be confined to a declaration that the Municipality are not entitled under section 204 of the Act to require the plaintiff to pull down the brackets in question, and that the plaintiff is entitled to re-erect the same. I understand the plaintiff's claim for damages has been abandoned.

Banerjee, J.—I am of the same opinion. The question raised before us is, whether the order passed by the Municipal Commissioners upon the plaintiff to pull down a verandah which projected over a public road was illegal and *ultra vires*.

[166] The facts found are, shortly, these—that the verandah in question had been in existence for upwards of thirty years; that it was pulled down by the plaintiff for the purpose of building a new verandah in its place, and that the verandah intended to be rebuilt was exactly of the same dimensions as the old verandah. And it was admitted in the course of the argument that the Commissioners in issuing notice on the plaintiff had proceeded under section 204 of Bengal Act III of 1884. That being so, the question reduces itself to this, namely, whether the projection in question was one that was erected or placed in front of the plaintiff's house after the dates mentioned in section 204 by reason of such projection being the re-erection of an old projection on the site of the old projection. There is no dispute that the old verandah had been in existence from before those dates, but the contention on behalf of the appellant has been that, as the old verandah had been taken down and a new one was going to be erected in its place after the Bengal Municipal Act had come into operation, the case must be held to come within the scope of section 204.

I do not think that this contention is sound Though, literally speaking, the new projection was put up after the dates mentioned in section 204, reading section 204 with sections 206 and 233 of the Act, I think that the law makes a clear distinction between a new projection or a projection put up for the first time after the dates mentioned in section 204, and a projection which had been in existence from before, and which was being reconstructed.

In the case of old existing projections, the law in sections 206 and 233 makes provision for the award of compensation, whereas in the case of projections put up after the dates mentioned in section 204, no such provision is made; and the intention of the Legislature seems, from a comparison of the three sections to which I have just referred, to be to limit the power conferred upon the Municipal Commissioners under section 204 to cases where projections are put up for the first time.

In making this observation I must guard against its being supposed that a projection erected on the site of an old one should **[167]** always be treated as a continuation of it, notwithstanding that the interval that may have elapsed between the removal of the old structure and the erection of the new one was long enough to raise a presumption that the old structure had been intended

to be finally removed, and any intention to rebuild had been abandoned completely at the time.

But it is unnecessary to say more upon this point, because no question as to the abandonment of an intention to rebuild could arise in the present case, it having been found by the Court below that the new structure was put up shortly after the old one had been taken down for the purpose of being rebuilt.

The view I take receives some support from the case of *Lord Auckland* v. *Westminster Local Board of Works* [(1872) L. R., 7 Ch. App., 597].

S. C. G. *Appeal dismissed.*

NOTES

[See also (1898) 23 Bom., 248.]

[25 Cal. 167]

The 22nd July, 1897

PRESENT

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR JUSTICE BANERJEE.

Nuffer Chandra Pal Chowdhry and another . . . Plaintiffs

versus

Rajendra Lal Goswami... . Defendant.*

Limitation Act (XV of 1877), Schedule II, Article 121—Encroachment by a trespasser—Incumbrance—Adverse possession—Purchaser at sale of taluk for arrears of rent.

Adverse possession is an incumbrance within the meaning of article 121†, schedule II of the Limitation Act (XV of 1877).

Lukhimeer Khan v. *Collector of Rajshahye*, S D A (1851), 116, *Womesh Chunder Goopto* v. *Raj Narain Roy*, (1868) 10 W R, 15, *Khanto Moni Dasi* v. *Bijoy Chand Mahatab Bahadur*, (1892) I L R 19 Cal., 787 *Karimi Khan* v. *Brojo Nath Das*, (1895) I L R, 22 Cal., 244, referred to.

An auction-purchaser of a *putni taluk* in its entirety gets the *taluk* free of all incumbrances, therefore in a suit brought by the auction-purchaser to recover possession of land

* Appeal from Original Decree No. 189 of 1895, against the decree of Babu Saroda Prosad Chatterjee, Subordinate Judge of Zilla Nuddia, dated the 25th of February 1895.

†[Art 121—

Description of suit	Period of limitation.	Time from which period begins to run.
To avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue, or in a *patni taluq* or other saleable tenure sold for arrears of rent	Twelve years	When the sale becomes final and conclusive.]

situated within the *taluk* against a trespasser who [168] alleged to have held the disputed land adversely, the period of limitation would begin to run from the date when the sale becomes final and conclusive.

THE facts of the case and the arguments, for the purposes of this report, appear sufficiently from the judgments of the High Court.

Babu *Sreenath Das*, Dr. *Rash Behary Ghosh*, and Babu *Saroda Prosonno Roy* for the Appellants.

Sir *Griffth Evans*, Babu *Lal Mohun Das*, and Babu *Kishori Lal Goswami* for the Respondents.

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.):—

Banerjee, J.—This was a suit to recover possession, together with mesne profits, of a tract of alluvial land, which is alleged to have re-formed on the original site of the plaintiffs' *putni taluk* Turuf Sagoona, a *taluk* which the plaintiffs have purchased at certain sales, some of which were held under Regulation VIII of 1819, and some in execution of decrees for arrears of rent. The defendant raised the plea of limitation, and various other objections not necessary to be noticed in detail for the purposes of this appeal.

The plaintiffs sought to get over the plea of limitation in two ways, *first*, by showing that as auction-purchasers of the *putni taluk*, or rather *taluks*, at sales in satisfaction of arrears of rent, they were entitled to reckon time from the dates of the auction sales which were all within twelve years before the date of the institution of the suit, and, *secondly* by showing that the disputed land became fit for cultivation within twelve years before the institution of this suit.

The Court below has held that the plaintiffs are not entitled to reckon limitation from the date of their auction purchase,— *first*, because they were not purchasers of the *putni* tenures free of all incumbrances within the meaning either of Regulation VIII of 1819 or of Bengal Act VIII of 1869, and, *secondly*, because even if they were entitled to claim the position of auction-purchasers of the *putni taluks* free from all incumbrances within the meaning of those enactments, their right, as such auction-purchasers, had become extinguished by reason of the arrange-[169]ment that they entered into with the zemindars under the *ikrarnamas* filed in this case, which had the effect of creating new *putni* tenures in their favour. It has further held that the plaintiffs failed to show that the disputed land became fit for cultivation within twelve years before the suit. And, accordingly, without going into the question of title, the Court below has dismissed the suit as barred by limitation.

Against that decision of the lower Court, the two plaintiffs preferred this appeal. At the hearing it was intimated to the Court that one of the two plaintiffs, Bipro Das Pal Chowdhry, had settled the case between himself and the defendant, and that the appeal, so far as he was concerned, should be dismissed, but without costs, the defendant (respondent) not pressing for his costs.

The appeal, therefore, proceeds at the instance of one of the two plaintiffs only, viz., Nuffer Chandra Pal Chowdhry, and it has been contended on his behalf that the Court below was wrong in holding that the plaintiff is not entitled to claim the benefit of the law relating to an auction-purchaser of a *putni taluk* for arrears of rent under article 121 of the second schedule of the Limitation Act, and to reckon limitation from the date of the auction sale, the several *putni taluks* purchased by the plaintiffs being distinct *taluks* though they relate to undivided shares in one *turuf*, and the *ikrarnamahs* referred to by the Court below not having the effect attributed to them.

On the other hand, it has been contended by the learned Counsel for the respondents, in the first place, that it is difficult to say that an encroachment by a trespasser is an incumbrance within article 121 of the second schedule of the Limitation Act, and that, in the second place, even if an encroachment by a trespasser can be treated as an incumbrance, the plaintiffs were not auction-purchasers of a *putni taluk* within the meaning of the article just referred to, as several of the sales at which the plaintiffs made their purchase were not of any of the *putni mehals* in their entirety as originally created, but of portions only of those *putnis*. And it was further contended that the *ikrars* had really the effect which has been attached to them by the Court below.

[170] Before dealing with the question of limitation, it becomes necessary, therefore, to consider how the facts stand. *Turuf* Sagoona was let out in *putni* under five different engagements, each relating to a different share; and the result was that there were the following five *putnis* created: One by Nocoor Moni Debi, comprising one-third of the *zemindari*; a second, by Bama Sundari Debi, comprising a one-sixth, a third by Tincowrie, comprising one-twelfth; a fourth by Annoda Prosad Banerjee, comprising a one-fourth; and the fifth and last by Kali Das Banerjee comprising the remaining one-sixth.

Of these five *putnis*, the three that appertained to the shares of Bama Sundari, Tincowri and Annoda and covered a moiety of the entire estate, were admittedly sold in their entirety. In regard to the remaining moiety belonging to Nocoor Moni and Kali Das, the sales at which the plaintiffs, or rather their predecessors, purchased were not in respect of the entire shares of one-third and one-sixth. The *putni* of the one-third share of Nocoor Moni had subsequently become sub-divided into two equal parts of one-sixth each, one of which was acquired by the plaintiffs at a sale under the *putni* Regulation VIII of 1819, and the other at a sale in execution of a decree for arrears of rent under Bengal Act VIII of 1869. And the *putni* of the one-sixth share of Kali Das was sold at three sales under Regulation VIII of 1819, and purchased separately by the predecessors of the plaintiffs.

I should add here that, in regard to the *putni* of Tincowrie's one-twelfth share, a question was raised as to whether the plaintiffs had acquired any right to the same by the disclaimer of the son and heir of Ram Bux Chetlangi, the auction-purchaser, the disclaimer being of a date subsequent to the date of the institution of the suit. As the question raised is one that relates to the title of the plaintiffs, it should be left to the Court below to determine it after the remand which we propose to direct in this case.

This being the state of the facts, let us now see how the law is applicable to the case as it stands. If the plaintiffs can make out their position as auction-purchasers of a *putni taluk* at a sale **[171]** for arrears of rent, with a right to avoid incumbrances, it must, I think, upon the authorities, be held that they are entitled to reckon limitation from the date of their auction purchase, either under article 121 of the second schedule of the Limitation Act, adverse possession against the defaulting *putnidar* being regarded as an incumbrance, or under article 144, the possession of the defendant being regarded as becoming adverse to the plaintiffs only from the date of the auction-purchase.

Article 121 of the second schedule of the Limitation Act no doubt speaks of suits to avoid incumbrances or under-tenures in an entire estate sold for Government revenue, or in a *putni taluk* or other saleable tenure sold for arrears of rent; but it has been uniformly held in a series of cases in this Court that an encroachment by a trespasser comes within the meaning of an incumbrance, and that the cause of action for a suit by an auction-purchaser, at a sale for arrears of Government revenue or for arrears of rent, dates from

the time of the auction purchase. The earliest of these cases that I shall refer to is the case of *Lukhmeer Khan* v. *Collector of Rajshahye* [S. D. A. (1851), 116]. That was, it is true, a case of an auction-purchaser of a zemindari at a sale for arrears of Government revenue; but the principle of the decision in that case applies equally to this.

The next case, and the most important one upon the present question, is that of *Womesh Chunder Goopto* v. *Rajnarain Roy*[5] [(1868) 10 W. R., 15]. That case was decided in 1868, and was the case of an auction-purchaser of an under-tenure suing to recover possession of land claimed to be part of the under-tenure, which had been encroached upon by a trespasser, and it was held by a Bench of three Judges of this Court that limitation ran from the date of the auction purchase. The reasons for the decision are fully set forth in the judgment of Sir BARNES PEACOCK. This case was followed in *Khanto Moni Dasi* v. *Bijoy Chand Mohatab Bahadoor* [(1892) I. L. R, 19 Cal., 787] in which a purchaser at a sale under Regulation VIII of 1819 was held to be unaffected by any adverse possession of land [172] appertaining to the *putni mehal* which had been encroached upon. And the same view was taken in the case of *Karmi Khan* v. *Brojo Nath Das* [(1895) I. L. R, 22 Cal, 244].

It is unnecessary for us to state at length the reasons for holding that the case should be governed by article 121, or in other words, that an encroachment by a trespasser should be regarded as an incumbrance, and that even if article 121 did not apply, and the case came under article 144, the possession of the defendant became adverse to the plaintiffs only from the date of the auction sale of the *putni*. The reasons in support of this view, as I have already observed, are fully set out in Sir BARNES PEACOCK'S judgment in *Womesh Chunder Gupto* v. *Rajnarain Roy* [(1868) 10 W R, 15], and we do not think that the grounds urged by the learned Counsel for the respondent are sufficient to justify our declining to follow the decisions cited above, which have uniformly held that limitation in such cases should be reckoned from the date of the auction purchase.

That being so, the next question is whether the plaintiffs are auction-purchasers of a *putni taluk* with the right to avoid incumbrances. So far as the *putni taluks* which were originally created by Bama Sundari, Tincowrie and Annoda are concerned, there can be no question that the plaintiffs are auction-purchasers with the right to avoid incumbrances The only question is whether they can be regarded as occupying the same position with regard to the *putni taluks* that were originally created by Nocoor Moni and Kali Das.

Now, in regard to the *putni taluk* that was originally created by Nocoor Moni, the plaintiff cannot claim the benefit of article 121, nor can they treat the possession of the defendant as having become adverse to them only from the date of the auction purchase because what was purchased at the two sales relating to that *putni* was in neither case an entire *putni taluk*, the sale in each case being that of a share in the *putni taluk*

As regards the *putni* that was originally created by Kali Das, although the sales at which the plaintiffs or their predecessors [173] purchased were three different sales, at which Kali Das's share of one-sixth was sold in three different shares, the learned Vakil for the appellant contended that the plaintiffs should be held to be purchasers of an entire *putni taluk* free of all incumbrances, because the three shares were all sold on one and the same day, and were purchased by one and the same person We do not think that the fact of the sale having been held on one and the same day and the purchaser having been one and the same person makes any difference

The sales were sales of the original *putni* in different shares and not in its entirety The purchaser at none of these three sales can therefore be considered to have purchased a *putni taluk* free of all incumbrances. That being so in our opinion the benefit of article 121, or the right to disregard adverse possession against the defaulting *putnidar*, can be claimed only so far as the eight annas share, made up of the shares of Bama Sundari, Tincowrie and Annoda, is concerned But as regards the remaining 8 annas, the suit must be held to be barred, unless the second ground is made out, viz., that the land became fit for cultivation within twelve years of suit

It remains now to consider the effect of the *ikrarnamas* referred to in the judgment of the Court below Though in certain respects the terms on which the *putnis* had been originally created were altered by these documents, we do not think that had the effect of extinguishing the right of the plaintiffs as auction-purchasers of the *putni mehals* to avoid incumbrances or to recover possession of lands belonging to the *putnis* which had been encroached upon.

The terms of the *ikrarnamas* which were most strongly relied upon by the learned Counsel for the respondents as having the effect of extinguishing the rights under the original *putni*, are those relating to the abatement of rent, and to the condition that the lands reformed on the original site of the old *putni*, upon being recovered, should have a new rent assessed upon them , but although that is so, the *ikrarnamas* contain a further condition that the auction-purchasers should institute [174] suits to recover possession of these lands which had been encroached upon, and that if they neglected to institute such suits, the condition relating to the abatement of rent should be cancelled. The terms of the *ikrar*, considered as a whole, do not, therefore, in our opinion, affect the right of the auction-purchasers to avoid incumbrances or recover possession of lands reformed on the original site

As to the second ground upon which the plaintiffs in the Court below sought to get over the plea of limitation, viz , that the lands reformed or became culturable within twelve years of suit, the learned Vakil for the appellants has very properly exercised his discretion in not going into the evidence in detail, as he thought he was not likely to be able to induce us to arrive at a conclusion different from that come to by the Court below

The result then is, that as regards an eight-anna share of the entire *mehal*, Turuf Sagoona, the suit must be held not to be barred by limitation But, then a new issue arises for determination by reason of the withdrawal of one of the plaintiffs from the suit, the share of that plaintiff not being admitted. The Court below must therefore determine what the share of Nuffer Chandra Pal Chowdhry is in *putni mehal* Turuf Sagoona, and then, if he succeeds in establishing his title to the lands in dispute, he will be entitled to recover possession to the extent of one-half of the share which he has in the *putni mehal*, his claim in respect of the other half being barred by limitation. The case will, therefore, go back to the Court below for the determination of the other issues raised in it, together with the additional issues indicated above, as to the extent of the share of Nuffer Chandra Pal Chowdhry, and also as to whether the plaintiff has acquired the interest of Rambux Chetlangi.

Maclean, C.J.—I agree with the view expressed by Mr Justice BANERJEE, and I have but little to add

Practically the only question we are asked to decide is, whether the suit is barred by the Statute of Limitations. We must take it in the face of the decision in the case of *Womesh Chunder Goopto* v. *Rajnarain Roy* [(1868) 10 W R, 15] which is now nearly thirty [175] years old, and

which has been since followed by other decisions of this Court, that the period of limitation in a case such as the present only begins to run from the date of the sale becoming final and conclusive. That being so, the plaintiff's suit is not barred by the Statute. This view, however, only applies to the auction-purchases by the plaintiff or his predecessors in title of the *putni* tenures, which were sold in their entireties.

It will have to be ascertained what the interest of the now sole appealing plaintiff really is.

With reference to the *ikrarnamas*, I cannot regard the effect of those documents as putting an end to the *putni* tenures. They modify some of its provisions, but proceed upon the footing of its continuance. This seems to me pretty plain when one reads the documents. If so, the plaintiffs, as the auction-purchasers of the *putni* tenures, are still entitled to avoid the incumbrance on the tenure.

With this intimation of our opinion upon the point of the Statute of Limitations, the case must go back to the Court below to ascertain what the precise interest of the present appellant now is, and to try out any other issues of fact which have to be tried.

S. C. G. *Appeal allowed. Case remanded.*

NOTES.

[See also (1899) 26 Cal., 460, (1905) 9 C W N., 795 2 C.L.J, 87; (1910) 14 C.W.N., 487; (1912) 16 C.W.N., 831; (1912) 17 C W.N., 340]

[25 Cal. 175]

The 1st June, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Doyamoyi Dasi........Judgment-debtor No. 5

versus

Sarat Chunder Mojumdar and others ....Decree-holders.*

Second appeal—Order refusing to confirm a sale—Subsisting decree—Code of Civil Procedure (Act XIV of 1882), sections 588, 316, 244.

A second appeal lies to the High Court against an order passed by a Judge refusing to confirm a sale, on the ground that there was no subsisting decree at the date when the confirmation of the sale was applied for, the order being not one provided for by section 588 of the Code of Civil Procedure, [176] and the question raised in the case being a question relating to the execution or satisfaction of the decree within the meaning of section 244 of the Code.

Prosunno Kumar Sanyal v. *Kalidas Sanyal* [(1892) I L. R, 19 Cal, 683: L R., 19 I. A., 166] referred to.

THE facts of the case are shortly those: One Koilash Chunder Bose obtained an *ex parte* decree against one Doyamoyi Dasi and others on the 26th July 1893. One of the judgment-debtors (Doyamoyi Dasi) on the 17th December 1894 applied for a rehearing, and on the 12th January 1895 the application

* Appeal from order No. 155 of 1896, against the order passed by Babu Debendra Lal Shome, Subordinate Judge of Backergunge, dated the 10th of December 1895, reversing the order of Babu Kalipada Mookerjee, Munsif of Patuakhally, dated the 16th of March 1895.

was granted, and the *ex parte* decree was set aside. Under the *ex parte* decree a certain property of the judgment-debtors was sold, and was purchased by a third party. The auction-purchaser applied to have the sale confirmed. The judgment-debtors as well as the decree-holder were made parties to the application. The judgment-debtors objected to the confirmation of the sale on the ground that as on the date when the application was made there was no subsisting decree, the sale could not be confirmed. The Munsif refused to confirm the sale and rejected the application of the auction-purchaser. On appeal, the Subordinate Judge set aside the decision of the first Court, and confirmed the sale. From this decision the judgment-debtor No. 5 appealed to the High Court.

Babu *Lal Mohun Das* for the Appellants.

Babu *Jyoti Prosad Sarvadhicary* for the Respondents.

Babu *Jyoti Prosad Sarvadhicary* took a preliminary objection to the hearing of the appeal, on the ground that no second appeal lay to the High Court.

Babu *Lal Mohun Das* for the appellant contended that the question raised in the case being a question relating to the execution or satisfaction of the decree within the meaning of section 244 of the Code of Civil Procedure, a second appeal would lie to the High Court, and he referred to the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* [(1892) I. L. R., 19 Cal., 683: L. R., 19 I. A., 166]. As to the merits he contended that though the *ex parte* decree was set aside at the instance of one of the judgment-debtors, the whole decree was set aside, and therefore no **[177]** decree was subsisting at the date when application for confirmation of the sale was made, and the sale could not be confirmed.

Babu *Jyoti Prosad Sarvadhicary* contended that the decree being set aside at the instance of one of the judgment-debtors only, the effect of it was that there was a subsisting decree, and the sale ought to have been confirmed.

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.)

Maclean, C.J.—I think that a second appeal lies in this case upon the short ground that the question to be decided is a question between the parties to the suit relating to the execution of the decree and possibly to the satisfaction of the decree within the meaning of section 244 of the Code of Civil Procedure. I arrive at this conclusion upon the ground that a sale has been ordered, the sale has been effected, and effected for the purpose of satisfying the decree. If the sale be held to be bad, that is a question which affects the decree-holder, and affects the judgment-debtor, both of whom are parties to the suit. This is a question between the parties to the suit, and the person claiming here is the judgment-debtor; the decree-holder is made a party to the appeal and also the auction-purchaser. The case, therefore, is within section 244 of the Code of Civil Procedure, and seems to me to come within the principle laid down by the Privy Council in the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* [(1892) I. L. R., 19 Cal., 683: L. R., 19 I. A., 166]. It is conceded that if the case be within section 244 a second appeal will lie.

Then as to the merits. The Judge in the Court below proceeded upon the ground that there was a decree, a subsisting decree, in a suit for rent. It was admittedly an *ex parte* decree. Under that *ex parte* decree the property was put up for sale, and sold, but one of the parties against whom the *exparte* decree had been made was successful in inducing the Court to discharge that decree under section 108 of the Code of Civil Procedure, the effect of which was, according to a recent decision of this Court - *Mahomed Hamidulla* v. *Tohurennissa Bibi* (*Ante*, p. 155)—to **[178]** discharge the decree, not only in

favour of the particular applicant, but as against all the defendants to the suit in which the decree was made. Therefore, when the *ex parte* decree was discharged, no decree in the suit remained. There was no decree existing in the suit, and if there were no decree, it is difficult, to my mind, to see how there could be any sale which could be confirmed when the decree under which it was made had ceased to exist; when the decree was discharged, the sale which purported to be made under that decree fell to the ground. The point arises upon an application to the Munsif to confirm the sale, which he refused to do, upon the ground that he should not confirm a sale under a decree which was not subsisting. The latter words of section 316 of the Code of Civil Procedure tend to show that the sale cannot be confirmed, if the decree under which it was effected has ceased to exist. In my opinion, the Munsif was right and the Subordinate Judge was wrong, and this appeal must be allowed with costs.

Banerjee, J.—I am of the same opinion. Upon the question whether or not a second appeal lies to this Court, I think it will be enough to say that this is not a case provided for by section 588 of the Code of Civil Procedure, the order complained of not being one of those that that section contemplates. The order here was an order refusing to confirm a sale, on the ground that the decree, in execution of which the sale took place, was not subsisting at the date when the confirmation of the sale was applied for. Then, I think, the question that was raised in this case may fairly be considered to be a question relating to the execution or satisfaction of the decree within the meaning of section 244 of the Code of Civil Procedure. Having regard to the observations made by their Lordships of the Privy Council in the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*, (1892) I. L. R., 19 Cal., 683: L. R., 19 I. A., 166. I think that the order complained of comes under section 244, and is therefore a decree as defined by section 2 of the Code; and so a second appeal lies.

Then upon the merits, the appellant contends that the Munsif was right in refusing to confirm the sale, while for the respondent it is said that there is no express provision in the Code directing [179] the Court not to confirm a sale when, at the date when such confirmation is applied for, the decree in execution of which the sale took place, ceases to be a subsisting decree. But the provisions of section 316 of the Code go to show that the Court ought not to confirm a sale, when at the time such confirmation is asked for, the decree had ceased to be a subsisting decree. In the present case, the decree, which was an *ex parte* decree, had been set aside by an order under section 108 of the Code. That being so, and there being no subsisting decree, the first Court was quite right in refusing to confirm the sale; and the Court of Appeal below was wrong in holding that the first Court was bound to confirm it.

S. C. G. *Appeal allowed.*

NOTES.

[See the Notes to 25 Cal., 155 *supra*.]

[25 Cal. 179]

PRIVY COUNCIL.

The 14th and 18th May, and 3rd July, 1897.

PRESENT:

LORDS HOBHOUSE AND MACNAGHTEN, AND SIR R. COUCH.

Moti Lal............Defendant

versus

Karrabuldin and others............Plaintiffs.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Sale in execution of decree—Rights of Purchasers—Two judicial sales of the same property, each in execution of a separate decree—Conflicting claims thereunder—Purchase, pendente lite.

The same property having been sold in execution of two different decrees, the result was that the two purchasers at the respective sales afterwards contested title to the property. The sale to the first purchaser was confirmed in November 1882 The sale to the second, who upon it obtained possession, took place in October 1884, the property having been attached under the second decree in March 1883. The first purchaser on the 29th July 1884 brought a suit, to which the second purchaser was not a party, to have that attachment declared invalid. By a decree of the 14th November to that effect the second purchaser was bound as a purchaser, *pendente lite*, and his possession was of no avail to him.

Held, that the attachment of March 1883, although it had preceded the institution of the first purchaser's suit of 1884, afforded no support to the second purchaser's claim, attachment under chapter XIX of the Civil Procedure Code merely preventing alienation, and not giving title.

Moreover, after the first sale in 1882 there had been no interest left to be sold to another purchaser, so that, without there having been the decree [180] of 1885, the second purchaser would still have had no title against the first There was no occasion for the setting aside the second sale within the meaning of articles 12 and 13 of schedule II of the Limitation Act (XV of 1877), nor was it set aside That sale was held not to affect the right of the first purchaser, there being a wide difference between setting aside a sale and deciding that a plaintiff's right was not affected by it.

APPEAL from a decree (26th May 1891) of the Judicial Commissioner of Oudh, reversing a decree (24th March 1890) of the District Judge of Lucknow.

The suit, out of which this appeal arose, was brought on the 29th June 1889 by the late Nawab Mulka Mukhaddara Usma Badshah Mahal Sahiba, the ex-Queen of Oudh, who died on the 3rd April 1894, and who was now represented by her grandson Mirza Karrab-ul-Din, her daughter Dilhand Begum, and her executor the Administrator-General of Bengal.

The issues, and this appeal, raised the question,—which of two purchasers who had each purchased at a separate judicial sale, was entitled to the proprietary possession of village Para Kuru in the Barabanki District The purchaser at an execution sale, in whose right the plaintiff, and, after her death, her representatives now respondents, claimed this property, was one Hakim Mahomed Masih, the ex-Queen's judgment-debtor, by a money decree, whose estate she had after his purchases caused to be attached in execution. The rival purchaser was Moti Lal, now appellant, who had purchased the same village at a sale in execution of another decree, that sale having taken place after the one at which Masih had bought.

On the 2nd November 1880, Mussamat Sahib-un-Nissa obtained a money decree against Ashgar Ali, who was the original owner and mortgagor of village Para. The subsequent charges and decrees, which affected that village, are mentioned in their Lordships' judgment, with all the other facts necessary to be known in this case. In satisfaction of Sahib-un-Nissa's decree, village Para was sold on the 21st August 1882, for Rs. 18,600 to the above mentioned Masih, on whose title, thus obtained, rested the claim of the present respondents. Masih obtained an order under section 318 of the Civil Procedure Code. But the proceedings of the second purchaser of Para interfered with him at this point.

[181] On the 3rd March, Para was attached in execution of a decree held by the heirs of Agha Hossein Khan, mortgagee, under one of the incumbrances above referred to; and Masih on the 21st July 1884 brought his suit against them to have it declared that the village was not subject to the attachment so obtained. While Masih's suit was pending, the heirs of Agha Hossein obtained, under the attachment of March 1883, an order for the sale of the village; and it was sold, on the 22nd October 1884, for Rs. 2,400, to the defendant Moti Lal, now appellant, who obtained possession. Masih's suit was dismissed in the Court of First Instance, but, on appeal, his heirs, he having died, obtained a decree, made by the Judicial Commissioner on the 4th November 1885, declaring the validity of the sale of the 21st August 1882 to Masih.

The prayer of the plaint in the present suit was for a declaration that the sale of the 22nd October 1884 was invalid as against Masih, and his heirs, through whom the plaintiff made title; also for a declaration that the possession held by the defendant Moti Lal was illegal; also, for a declaration that according to the decision of the 4th November 1885, between Masih, on the one side, and the heirs of Agha Hossein on the other, the village Para was the property of Masih; and that it was liable to attachment and sale in execution of the decree held by the plaintiff in this suit, in which execution the village had been attached on the 28th December, 1887, as such property.

Defences, amongst others, were that the property could not be claimed by the plaintiff upon Masih's title, as the sale of it to Moti Lal on the 22nd October 1884 had never been set aside, and could not by this suit be set aside with regard to the law of limitation; and that in effect the suit was barred by articles 12 and 13 of schedule II of the Limitation Act XV of 1877.

The District Judge upheld this defence, and dismissed the suit.

The Judicial Commissioner, with the Additional Judicial Commissioner, heard an appeal which was preferred by the representatives of the plaintiff from the decree of the District Judge, whose decision they reversed. They granted the decree claimed. In their judgment the suit was not barred by limitation, but was maintainable, without there having been any necessity for any [182] order, or any decree, setting aside the sale to Moti Lal. The main reason for this was that nothing had passed to him as a purchaser at that sale. In their opinion also (both of them delivering separate judgments on these points) the Judicial Commissioner's decree of the 4th November 1885, with regard to the date of the second sale, after the commencement of the suit in which that decree was made, was binding upon Moti Lal as a purchaser *pendente lite*. The principle was applicable here that a purchaser of the property contended for in a suit pending at the time of his purchase should not be free from the effect of the decision.

The Judges referred to *Saroda Prosaud Mullick* v. *Lutchmeeput Singh Doogur* [(1872) 14 Moo. I.A., 529 : 10 B. L. R., 214]; *Prangour Mozoomdar* v. *Himanta Kumari Debya* [(1886) I. L. R., 12 Cal., 597]; *Lalu Mulji Thakar* v.

Kashibai, (1886) I. L. R., 10 Bom., 400; *Janki Das* v. *Badrinath*, (1880) I. L. R., 2 All., 698; *Gobind Chunder Roy* v. *Guru Charan Kurmokar*, (1887) I. L. R, 15 Cal., 94; and *Saroda Churn Chuckerbutty* v. *Mahomed Isuf Meah*, (1885) I. L. R., 11 Cal., 376.

On this appeal by the representatives of the plaintiff,—

Mr. *J. H. A. Branson*, for the Appellant, argued that the purchase by Moti Lal on the 22nd October 1884 ought to have been held in the Court below to have carried the title to the purchaser. Masih's title was already not enforceable when the plaintiff in this suit attached the village as his property on the 28th December 1897. This was so in virtue of article 13 of the schedule II of Act XV of 1877, no suit having been brought to set aside the sale of the above date within one year. It had been decided below that, as a purchaser *pendente lite*, Moti Lal had been bound by the decree of 1885 in Masih's favour. But the distinction between voluntary alienation *pendente lite* and involuntary alienation, or transfer in due course of law, during the pendency of a suit, should be observed. He referred to the judgment in *Sedgwick* v. *Clerland* (1838) 7 Paige, New York Ch. Rep, 287, and to *Turner* v. *Wight*, (1841) 4 Beav., 40; [183] Story's Eq. Pleading, Chap. VII, para. 351; Mitford on Pleading by Jeremy, 73. But, even if it should be considered that the appellant's right was affected by the decree of the 4th November 1885, notwithstanding that he had not been made a party to it, still the appellant could rely on the attachment of March 1883, which was anterior to the commencement of Masih's suit in July 1884. Regarding articles 12 and 13, sched. II, Act XV of 1877, reference was made to *Sadagopa* v. *Jamuna Bhai Ammal*, (1882) I. L R., 5 Mad., 54; *Mahomed Hossein* v. *Purundur Mahto*, (1885) I. L. R., 11 Cal. 287. As to a suit to establish a right being distinct from a suit to set aside a sale, *Ayyasami* v. *Samiya*, (1884) I. L. R., 8 Mad., 82, and *Shivaji Yesji Chavan* v. *The Collector of Ratnagiri*, (1886) I. L R, 11 Bom, 429, were referred to. Regarding limitation generally in a suit by a purchaser at an execution sale—*Anundo Moyee Dossee* v. *Dhonendro Chunder Mookerjee*, (1871) 14 Moo., I A., 101 : 8 B. L. R., 122. As to attachment—*Kishory Mohun Roy* v. *Mahomed Mujaffar Hossein*, (1890) I. L R., 18 Cal., 188.

Mr. *J. D. Mayne*, and Mr. *A. Phillips* for the Administrator-General, Respondent, were not called upon.

Afterwards, on 3rd July, their Lordships' **judgment** was delivered by

Lord Hobhouse.—The plaintiff in this cause, now dead and represented by the respondents in the appeal, was formerly Queen of Oudh; and she sued to assert her right to a village in Oudh called Para Kuru. The Court of the Judicial Commissioner has maintained her suit, reversing the decision of the District Judge who dismissed it. The village has been the subject of almost incessant litigation, and of numerous judicial orders, during some twenty years, and its legal history is very complicated. But though it has been necessary to examine all the previous proceedings in order to ascertain the true effect of the orders and transactions which now govern the case, it will be sufficient for this judgment to touch only on a few of them.

In the year 1870 a Mahomedan gentleman named Asghar, being then the sole recorded proprietor of the village, mortgaged [184] it to one who in this discussion has been called Agha. Asghar afterwards granted the village by way of gift to his nephews Yusuf and Nasim, who again mortgaged it to Agha.

In the year 1879 one Sahib-un-Nissa filed a plaint against Agha and Yusuf, claiming to be a creditor of Asghar and to have a charge on the village

for her debt: and on the 22nd of November 1880 she obtained a decree to that effect. Under that decree a sale took place, at which Hakim Mahomed Masih purchased the right and interest of the judgment-debtor, who according to the heading of the sale-certificate was Asghar. Nasim was not made a party to the suit. This sale was effected on the 24th August and was confirmed on the 14th November 1882. On it the plaintiff founds her claim. Her right to recover the village if it was, and remained, the property of Masih, is not disputed. What the defendant contends is that Masih's title was destroyed by events subsequent to 1882.

On the 20th March 1883 Agha obtained a decree against Yusuf and Nasim on the mortgage effected by them; and he went on to enforce execution. On the 19th June 1883 Masih put in a claim which, being disallowed in execution, he had to enforce by suit Accordingly on the 28th July 1884 he instituted a suit against the heirs of Agha who was dead, and against Yusuf and Nasim. He prayed for a decree in these terms:—

"That a decree entitling and declaring the proprietary right of the plaintiff to the village Para Kuru ' ' ' be granted to the plaintiff to the effect that the village aforesaid is not liable to attachment and sale in the decree of Agha Haidar Husain deceased, dated the 20th March 1883, as the property of defendants Nos. 4 and 5, and that the defendants be made to pay the plaintiff's costs."

On the 4th November 1885 the Judicial Commissioner made an order by which a decree of the District Judge was reversed, and the plaintiff's appeal and original claim were decreed. Masih was then dead, but the suit had been continued by his heirs.

In the meantime the heirs of Agha had prosecuted their proceedings in execution of his decree of 20th March 1883. On the 22nd October 1884 the village was put up for sale, and was purchased by the defendant Moti, who either was then in [186] possession or obtained it afterwards. It is contended by the defendant that this sale must be set aside before the plaintiff's right can be established.

It may be as well here to dispose of a very extraordinary contention set up for the defendant. He bought whatever interest belonged to the heirs of Agha who were mortgagees, and to Yusuf and Nasim who were mortgagors. But three months before he bought, Masih had instituted his suit against those very persons to establish his title against them, and it was established by the decree of November 1885. Is it possible for the defendant to allege that, as against Masih or his heirs, the heirs of Agha or Yusuf or Nasim had any interest to convey to him? The District Judge holds that the defendant is free from the decree because he was no party to the suit, and because the transfer to him was made prior to the decree. If that were law, it is difficult to see in what cases a pending suit would be any protection; and Mr *Branson* very properly declined to argue in support of that view. But then he could not assign any reason for avoiding the force of the decree except that Agha's attachment was prior to Masih's suit. Attachment, however, only prevents alienation, it does not confer title; and even if it did, the interest so acquired would be that of Agha or his heirs, who were defendants in Masih's suit. It is too clear for argument that the decree of November 1885 binds the interests of Agha, Yusuf and Nasim, and of all persons claiming under them by transfer subsequent to the 28th July 1884.

After Masih's death litigation broke out among his heirs, and an order in execution proceedings was made for placing one of them named Amina in

possession of one-third of the village. Under colour of that order she disturbed the possession of Moti, and he applied in the execution proceedings to protect it. The District Judge by order, dated 1st November 1886, allowed Moti's application, saying that the decree of 1885 was not binding on Moti "at any rate in the present execution proceedings in a suit between heirs." His language, though elliptical, points to a sound ground for his decision. It was obviously irregular and illegal for Amina to use an order made as between her and her co-heirs, for the purpose of dispossessing one who was a stranger to Masih's [186] estate and to the litigation between his heirs. The decree of 1885 had nothing to do with the matter.

The cause was heard first before the District Judge who decided adversely to the plaintiff. First he held that the suit is one to set aside the order of November 1886, and that so it falls within article 13 of the Limitation Act and, not being brought within a year of the order is barred by time. But the suit does not pray, and the plaintiff need not pray, any relief of that sort. The order remains wholly unaffected. It was quite right to hold in November 1885 that Amina had wrongfully disturbed Moti's possession; but the right of Masih or of anybody claiming under him to bring a suit within any time allowed by law for suits to recover property was quite unaffected by that.

Then the learned Judge holds that the suit is barred by article 12 of the Limitation Act, because it is, or ought to be, one to set aside the sale of 22nd October 1884. But the suit is founded on the fact that prior to that sale a valid sale of the same interests had been made to Masih, and that Moti took nothing because nothing was left to pass to him. The sale is not set aside, but is found not to affect the rights of the plaintiff derived from Masih. The sale does not purport to pass the rights of Masih or of the plaintiff, but those of the mortgagee Agha and the mortgagors Yusuf and Nasim, against whom Masih established his prior rights. Between setting aside a sale and holding that the plaintiff's rights are not affected by it, there is a wide difference.

The Judicial Commissioner and Assistant Judicial Commissioner have concurred in holding the District Judge's views to be erroneous, and as their Lordships are of the same opinion they will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs of the Administrator-General of Bengal who defended this appeal.

Appeal dismissed.

Solicitors for the Appellant Messrs. *Barrow & Rogers.*

Solicitor for the Respondent, the Administrator-General of Bengal: Mr. *J. F. Watkins.*

C. B

NOTES.

[I. ATTACHMENT—

Attachment prevents alienation but does not confer title.—[(1914) 25 I.C., 759 (Mad.)—mere attachment before charge for maintenance does not create any right or title in the attaching creditor]; (1914) 24 I.C., 667 (death of coparcener after attachment does not affect the availability of his interest for satisfaction of the decree), discussing 32 Mad., 429; 30 Mad. 413; (1906) 11 C.W N., 163 : 5 C.L.J., 80 (*ibid*); (1903) 26 Mad., 673 (Official Assignee has priority over attaching creditor); (1902) 29 Cal., 428 (*ibid*); (1903) 25 All., 347 (right of an attaching creditor to apply that property cannot be attached by another).

II. LIS PENDENS—

The doctrine of *lis pendens* is applicable to sales in execution:—(1899) 26 Cal., 966; 1900) 28 Cal., 23: 4 C.W.N., 740 (although no appeal was actually pending at the time);

(1900) 22 All. 60; (1902) 26 Mad., 230; (1902) 27 Bom., 266; (1904) 28 Bom., 861; (1905) 11 C. W. N., 828; (1908) 9 C. L. J., 96 : 18 C. W. N., 226; (1910) 14 C.W.N., 677 : 11 C.L. J., 528.

III. There is a wide difference between setting aside a deed as void and holding that a person's rights are not affected by it:—applied in (1902) 26 Bom., 577; (1900) 24 Bom., 485; see also (1902) 24 All., 467; (1905) 29 Bom., 480; (1906) 8 C.L.J., 470.]

[187] *The 8th July, 1897.*

PRESENT:

LORDS HOBHOUSE, MACNAGHTEN, AND MORRIS, AND SIR R. COUCH.

Sumbhu Nath Santra Mahapatra and others............Plaintiffs

versus

Surjamoni Dei and others............Defendants.

[On appeal from the High Court at Fort William in Bengal.]

Privy Council, Practice of—Cause of respondents—Printed cases—Ex-parte *hearing.*

The respondents in four appeals, which were consolidated and heard as one, filed their printed case, and did not appear at the hearing, which was *ex-parte.*

Held, that the respondents, notwithstanding their non-appearance, were, on the dismissal of the appeal, entitled to the costs thereof up to, and including the filing of their printed case; and also to the cost of applying for those costs.

FOUR consolidated appeals from four decrees (13th September 1890) of the High Court, affirming four decrees (31st December 1887) of the Subordinate Judge of Cuttack.

The questions arising in all the four suits were identical, and in the order of the High Court admitting the last three appeals it was recorded that the plaintiff (appellant) undertook that the decision of them would depend upon the orders passed in the first appeal.

The suits were filed by the same appellant, on dates from 1886 to 1891, to establish his right to the possession of the estate of Bonomali Mahapatra, who died in 1863, the husband of Srimati Surjamoni Dei. Litigation after his death as to that estate took place, and a suit was dismissed, which is reported in L. R. I. A. Sup. Vol. 212, and 12 B. L. R., 205.

In these suits the allegation was that Bonomali, on the day of his death, gave an oral authority to Surjamoni to adopt a son, and that she adopted Sumbhu Nath; but that she afterwards without right made sales of the family estate. The respondents in the last three suits were alleged purchasers of portions.

The three principal issues, relating to the authority to adopt, and the fact of adoption, were treated by the Courts below as questions of fact, and they concurred in holding that the affirmative had not been proved in any one of them.

[188] On this appeal, which was heard *ex parte*, Mr. *C. W. Arathoon* appeared for the Appellant.

The respondents had filed their printed case, which, among other defences, submitted that there was nothing to take the appeal out of the ordinary

rule as to the effect of concurrent judgments on questions of fact, and referred to section 596 of the Civil Procedure Code.

The appeals were dismissed.

Afterwards, Mr. *Herbert Cowell*, for the Respondents, applied, on notice to the appellant, that the costs of the printed case should be borne by the appellants. He cited *O'Shanassy* v. *Joackim*, (1876) L. R., 1 App. Ca. (H. L.) 82 (90).

Their Lordships' **judgment** was delivered by

Lord Morris.—In this case appeals have been lodged on the part of the appellants although there have been concurrent findings of two Courts in India, the District Court and the High Court, on matters of fact. There were three questions submitted. First whether the widow Srimati Surjamoni Dei was the donee of a power of appointment by her husband, Bonomali Mahapatra, to adopt a son; second whether she had adopted a son (that of course was on the assumption that she had a power to adopt, for it must have been a valid appointment); and, thirdly, whether she had treated the appellant as her adopted son. Both Courts have found there was no power of adoption granted by her husband. The alleged power to adopt was said to have been given orally, and the witnesses were examined in support of that allegation, but they were not believed, and consequently it must be taken that the widow had no power. The contentions Nos. 2 and 3 of themselves can give no estate to the appellant, because if this lady had no power to adopt she could not validly adopt. As to the further contention attempted to be raised namely, that by the lady having treated the appellant for a great many years as an adopted son she is, as it is alleged, estopped from disputing that he is her adopted son and that she had a valid power of adoption—whatever value it may have as regards the question whether she did adopt as a matter of fact, it is no [189] evidence at all to show that she had been entrusted by her husband with a power of adoption; that depended on evidence entirely outside the question of her acts. Otherwise any widow could, by a system of treating an alleged adopted son as such, validate a transaction which she had no power of entering into.

Now at the bar it has been urged that the widow has treated Sumbhu Nath Santra in such a manner that she should be considered during her life to have placed him in her own position as the owner of this property. Supposing it would be so considered (upon which they refrain from giving any opinion) there has been no such allegation made in the plaint. There is no such question indicated either before the District Judge or in the Court of Appeal and therefore the question cannot be raised here.

Their Lordships must therefore humbly advise Her Majesty that these appeals should be dismissed with the costs of the respondent Srimati Surjamoni Dei up to and including the lodgment of the case, and the appearance of Mr. *Cowell* on this occasion to ask for those costs.

Appeals dismissed.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Barrow & Rogers.*

C. B.

[25 Cal. 189]

The 9th July, 1897.

PRESENT:

LORDS HOBHOUSE, MACNAGHTEN AND MORRIS, AND SIR R. COUCH.

Dharam Chand Lal............Plaintiff

versus

Bhawani Misrain and another............Defendants.

[On appeal from the High Court at Fort William in Bengal.]

Privy Council, Practice of—Concurrent judgments on fact—Hindu Law—Alienation by one of two co-widows—Want of legal necessity.

Two widows of the same husband, each having inherited her undivided share in the inheritance, disputed as to their rights therein. They then settled their dispute by a compromise, in which it was agreed that each had obtained "absolute proprietary right" in her share as a co-widow, and that division had been made between them. Having no power by this to affect the rights of the successor to the estate, on their deaths, each was entitled to her share for her widow's estate only. Upon a mortgage made by the elder widow before her death, the mortgagee now claimed, not only the interests of [190] both the widows, and thus to deprive the younger who had survived the other, of her interest during her life, but also claimed a charge on the estate of inheritance in the land mortgaged.

Against the competency of the elder widow to charge the estate of both and to bind the reversioner, both Courts below had decided. They had found that there had been no justifying necessity established by the evidence for the mortgage.

These concurrent findings having been accepted by the Judicial Committee as correct in regard to the absence of necessity for the mortgage, they saw no occasion to say anything about any other questions, as to the competency of the elder widow to mortgage the whole estate in the way in which she did.

APPEAL from a decree (13th June 1893) of the High Court, affirming a decree (26th November 1891) of the District Judge of Purneah.

The appellant, a *mahajan* in Purneah, brought this suit on the 13th April 1891 against Keswanand Misser, executor under the will of Mussamat Saraswati Misrain, who died in 1890. A co-defendant with this executor was Bhawani Misrain, co-widow with Saraswati, of their late husband Sobh Nath Misser, who died in 1870. Keswanand did not appear in this suit, which was defended by Bhawani alone; and she was now sole respondent. After the death of Sobh Nath, who left land in Purneah chiefly held in *putni* tenure, the two widows, disputing as to their rights, were litigants as to whether Saraswati had once borne to her husband a son, who lived but a short time, or not. In the former case, as heir to her son, Saraswati would have taken a life-estate in the whole of her husband's property. In the latter case, which was decided upon by decree on a compromise between them, the widows took shares in the family estate. This was agreed to, while the suit between them was pending in the High Court, which made a decree, in accordance with the terms arranged between the parties, on the 2nd May 1871, Saraswati taking a ten-anna and Bhawani a six-anna share. Each in her share, as far as their agreement could declare, was to have complete proprietary right. Their agreement on this point is set forth in their Lordships' judgment, where all the facts appear.

On the 12th May 1884, Saraswati executed, and presented for registration by her nephew and agent Bansi Lal Jha, a mortgage [191] bond, securing

repayment of Rs. 7,000 to Dharam Chand Lal in one year with interest at 12 per cent. mortgaging specified lands of the estate. Again, on the 6th May 1885, she executed a similar mortgage to him for Rs. 4,000. These in identical terms recited the necessity of paying off, out of the money so to be raised, the rent of *putni mehals* for the second period of the Bengali year 1291, and to pay off debts due to *mahajans* at higher rates of interest.

Saraswati, who died in 1890, had made a will appointing Keswanand Misser her executor. After her death there was a contest between Bhawani Misrain, who, as surviving widow, claimed administration of the share that had belonged to Saraswati, and Keswanand, who claimed it under the will, as part of the estate of Saraswati. This was decided in the District Court of Purneah in a suit brought by Bhawani against Keswanand, which ended in a decree in Bhawani's favour, dated the 25th April 1891. It was decreed that Bhawani was entitled by right of survivorship to succeed to what might be left of the estate that had devolved from their husband Sobh Nath in Saraswati's possession at her death, his property having been inherited by the two widows for their lives. It was also decreed that Bhawani was entitled to a grant of administration of the property left by Saraswati.

In 1891 the plaintiff brought the present suit against Keswanand and Bhawani to enforce his claim for Rs. 22,748, against the property which Saraswati had purported to mortgage. Bhawani Misrain, who alone appeared, filed a written statement, in which she alleged, among other defences, that there were no circumstances of necessity to justify Saraswati's mortgages of her deceased husband's estate.

The issues are stated in the judgment on this appeal.

The District Judge dismissed the suit. He rested his judgment on three grounds: *First*, that the mere existence of a debt would not justify a loan binding the reversionary estate, without evidence of a necessity properly justifying it, or of inquiries made, and representations offered, in which such a case had been put forward and believed. *Secondly*, that the terms of the bonds did not indicate any intention by Saraswati to pledge any estate beyond her own *Thirdly*, that no act by one widow, with-[192]out the consent of the other, could defeat the survivorship of that other.

On the appeal of Dharam Chand Lal against this decree, the High Court (O'KINEALY and AMEER ALI, JJ.) affirmed the judgment of the Court below, finding as a fact, in concurrence with that Court, that there had been no evidence of any legal necessity, nor of any inquiries by the plaintiff as to the existence of such necessity for the loan.

Dharam Chand Lal appealed.

Mr. *A. Phillips* and Mr. *C. W. Arathoon*, for the appellant, contended that the evidence showed that in advancing the mortgage money the mortgagee had, on reasonable grounds, given credit to the assertion that the money was wanted by the widow Saraswati for one of the recognised necessities, justifying a mortgage by a widow, which therefore became binding on the whole estate mortgaged. The estate of Bhawani for her life was chargeable in respect of any sums that might be found to have been used, after having been raised on Saraswati's mortgages, for paying off rent due on her share of the *putni* tenures, and joint liabilities having been satisfied, the life-estate of Bhawani Misrain was chargeable.

At the conclusion of the argument for the appellant, their Lordships, without calling on Mr. *J. D. Mayne*, who appeared for the respondent Bhawani Misrain, affirmed the judgment of the High Court.

Their Lordships' **judgment** was delivered by

Sir R. Couch.—The facts in this case are that one Sobh Nath Misser died about twenty years ago—the precise date of his death does not appear—and left two widows, one Saraswati Misrain and the other Bhawani Misrain. After his death disputes arose between the widows as to their rights, and a compromise was come to, the terms of which are stated in a previous judgment which is set out in the proceedings and which seems to have been taken admittedly as correct. The statement is this: "And in respect of our respective shares each party has obtained absolute proprietary right of every sort and division has been made and will be made as below, and, except in respect of the matter noted [193] below, neither party has any claim against any other." This compromise could only apply to the shares to which the two widows were entitled as widows. They had no power, by a compromise between themselves, to affect the rights of the successor to the estate on their death, and so far under the compromise they simply were entitled to their shares as for what is called the widows' estate.

Saraswati died in 1890, and the suit is brought against her executor and the surviving widow Bhawani upon two mortgage bonds amounting together to Rs. 11,000, but the amount now claimed, including the arrears of interest, being Rs. 22,748. The prayer of the plaint is that an order may be given that if the defendants do not pay within a certain time, the properties mortgaged and pledged in the bonds may be sold, seeking to charge, not only the interest of the widows who made these mortgages, but the whole estate, and to affect the right of the persons who on the death of the surviving widow would be entitled to the estate, and also to deprive Bhawani, the surviving widow, of her interest during her life.

The issues were framed raising expressly the two important questions in the case. The first was whether the bonds were duly executed, as to which there was no question. The second and third raised the real questions: "Do the bonds, by reason of legal necessity or other cause, bind the estate of the late Sobh Nath Misser, or only the personal estate of the executant? Is Mussamat Bhawani Misrain liable for the claim, and to what extent?" Upon these issues the District Judge found very expressly. He says: "Here plaintiff fails to show that there was any real necessity for the advances or that any one told him that there was such real necessity, and that the tenures could not be saved without the loans" Upon that finding he dismissed the suit as against Bhawani and made a decree against the executor of Saraswati, and if Saraswati left any property it may be available to pay the claim of the plaintiff.

From that decree there was an appeal to the High Court, and in their judgment, after saying that it had been urged that legal necessity had been fully established, from which it is plain [194] the learned Judges had that present to their minds, they say: "There is nothing to show that at the time these sums were borrowed there was no money in the coffer or what had become of the large amount Saraswati had admittedly received upon the death of their husband." Then they go on to consider the question whether an inquiry had been made by the plaintiff, and they find that he did not make the inquiry which it was necessary for him to make in order to establish his right to recover the money in case there had been in fact no necessity. Both questions are distinctly found by the High Court against the plaintiff, and the decree of the District Judge dismissing the suit is affirmed.

That disposes of the whole of the questions in the case. It is unnecessary to say anything about any other question that might arise with regard to the

competency of Saraswati to mortgage the whole of the property in the way in which she did. The case is clearly one in which upon the material questions of fact both Courts concur in finding against the plaintiff and very properly dismiss the suit.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal, and the appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the second Respondent Mussamat Bhawani Misrain: Messrs. *Miller, Smith & Bell.*

NOTES.

[See also (1907) 6 C.L.J., 490; (1913) 18 I. C., 953 (Mad.).]

[25 Cal. 194]

The 30th June and 24th July, 1897.

PRESENT:

LORDS HOBHOUSE, MACNAGHTEN AND MORRIS, AND SIR R. COUCH.

Manmatha Nath Mitter and another............Plaintiffs

versus

The Secretary of State for India in Council and others............Defendants.

[On appeal from the High Court at Fort William in Bengal.]

Land Acquisition Act (X of 1870), sections 13, 24, and 25—Valuation of land acquired for public purposes—Time of acquisition—Award of compensation.

When land has been acquired, under the provisions of the Land Acquisition Act, 1870, changes in its condition, between the time of such acquirement and that of the actual conclusion of the award of compensation, are not to increase, or lessen, the valuation.

[195] The provision in section 25 points to ascertaining the value at the time when the land is acquired, the right to compensation being simultaneous with the right to the land attaching to the Government.

At the time when, according to the claim, the right to certain plots of land attached to the Government, the sub-soil had no market value, because the surface was in use for public roads, having been so for about half a century.

Held, that, even if the claimants had proved a title in themselves to the sub-soil of the plots underneath the roads, still no market value had been shown to belong to that sub-soil within the meaning of sections 13 and 24 of the Land Acquisition Act, 1870, at the time of the right therein attaching to the Government for a public purpose: therefore, compensation had been rightly disallowed.

APPEAL from a decree (8th May 1895) of the High Court, reversing a decree (22nd March 1893) of the First Subordinate Judge of the 24-Pergunnahs.

This suit was brought by the plaintiffs, appellants, upon the refusal by the Commissioner to order compensation to them for four plots of land acquired by the Government under the Land Acquisition Act, 1870, in 1886, for part of the area occupied for the docks at Kidderpore. The defendants, respondents, were: (1) the Government, under their statutory title, and (2) the Commissioners for making improvements in the Port of Calcutta. The plots aggregating

19 bigahs, 9 cottahs, and 3 chittacks, were alleged by the plaintiffs to have originally been part of their *mouza* Dakhin Sherpur, within their zemindari, and within the revenue-paying lands thereof, settled with their ancestor at the Permanent Settlement, they having succeeded to the zemindari under the will of their grandfather. With the exception of about 68 bighas the whole of the *mouza* had been acquired by the Government for the construction of the docks. The notification issued in 1886, under the Land Acquisition Act, 1870, apparently included the plots now in question. But the surface of these plots at the time of their being thus acquired for the above purpose, had, for at least about fifty years, and one of them for a longer period, formed part of four public roads respectively, *viz.*, of the Sonye, the Jola, the Taligunge, and the Budge-Budge roads. Thus the surface of the plots had been in the possession of the Government. Two [196] or more of them had been in recent years made over to the Suburban Municipality.

In the Courts below, questions of (1) limitation, (2) of the original title in the zemindar to the plots, and (3) of the value to the plaintiffs of the soil under the roads, were raised. On this appeal the principal question was whether the sub-soil had any value or had no value at the time of the acquisition by the Government, who were then already possessed of the surface in use for roads. And the decision of this in the negative rendered it unnecessary to decide the other questions.

On the 15th October 1890, the Commissioner finally rejected the claim for compensation in respect of all the four plots. The plaint, filed on the 4th November 1891, claimed Rs. 11,210 as the value of the land, with Rs. 3,340 for interest.

The answer of the first defendant put the plaintiffs to proof of their titles; and stated that the Sonye, Jola, and Taligunge roads were "Ferry Fund Roads" from an early date in British administration; and had been made over to the Suburban Municipality about the year 1864. That the Budge-Budge road was made about 1835 40 All the plots were handed over to the Port Commissioners between 1886 and 1888. Act XLII of 1850 was referred to as a defence.

The Port Commissioners answered that possession was given to them of the plots, having been public thoroughfares, for fifty years. The plot in the Taligunge road had never been part of the zemindari. They referred to the general law of limitation, and to Acts XLII of 1850 and Bengal Act III of 1890.

The issues related to limitation, title, and value. Those now material were—"Was the Collector under Act X of 1870 justified in refusing compensation,"—and another relating to compensation "for the value of the land."

The Subordinate Judge decreed in favour of the plaintiffs, allowing compensation in respect of the plots in the Sonye and Jola roads only. He was of opinion that the suit was not barred by the general law of limitation, and that the claim in respect of the land in the Budge-Budge road was [197] barred by sections 9 and 10 of Act XLII of 1850, providing that "when any land has been or shall be taken by the Government for any public work otherwise than according to Regulation I of 1824, such land, after the lapse of five years, without any claim preferred for the recovery thereof in any competent Court, or under the said Regulation I of 1824, or this Act, shall vest absolutely in the East India Company, freed and discharged from all other claims thereto." As regarded the plot in the Taligunge road the Subordinate Judge held that it had not been shown to lie within the plaintiffs zemindari. In this finding the High Court concurred. As to the other plots, he decided that only the one in the Budge-Budge road had been brought by the

evidence within the Act of 1850, and that, therefore, in respect of the plots in the Sonye and Jola roads there must be a decree for the plaintiffs. The amount he assessed at Rs. 4,112-1-4 being at the rate of Rs. 20 a cottah.

The Subordinate Judge was of opinion that the plaintiffs as zemindars of Dakhin Sherpur had a *primâ facie* title to all the land in that *mouza*, and that the presumption was that it was *mal*, or revenue-paying land, part of the assets of the zemindari. As to this he cited *Perhlad Sein* v. *Durga Pershad Tewari*, (1869) 12 Moo. I. A., 275; 2 B. L. R., P. C., 111. This case, however, the High Court pointed out, had no application here, relating to a question of intermediate title. On the question as to the property in the soil underneath a highway, the Subordinate Judge pointed out that the decisions were that it remained in the zemindar after the dedication of the surface for public rights of way. He referred to the English cases on this subject (Smith's L. C., 6th ed., 136), and also to those decided in India, which are mentioned below in the argument on this appeal.

From this decree the defendants appealed, on the ground that the entire claim should have been dismissed. The plaintiffs cross-appealed on the ground that their claim as to the plot in the Budge-Budge road should have been decreed, as well as for a larger area in respect of the plots in the Sonye and Jola roads.

On the defendant's appeal, a Division Bench of the High Court [198] (MACPHERSON and BANERJEE, JJ.), dismissed the suit with costs, dismissing the cross-appeal.

Their judgment stated the facts, and continued as follows:—

"The settlement proceeding has not been put in, and there could of course be no evidence as to the possession of the plaintiff's or any one else, for public roads were constructed on the land at a time unknown, but certainly not less than forty or fifty years ago.

"The plaintiffs were put to strict proof of their title, and on the above ground alone their case must fail as regards the whole of the land. It is unnecessary, therefore, to consider the other and more difficult questions raised.

"Assuming, however, that the land is not *lakheraj*, it is by no means clear, in the absence of any proof of the time when the roads were constructed, that the land forms part of the plaintiffs' permanently-settled estate. The survey map of 1841 shows that the three roads were then in existence. There is nothing to show when, by whom or under what circumstances, the Sonye and Jola roads were constructed. The correspondence put in shows that the Budge-Budge road was part of the main line of communication between Calcutta and Cuttack, the construction of which was sanctioned in 1826, and that the part of the road from Calcutta to Budge-Budge, which was then in existence, was to be utilized. For all that is known, all the three roads may have been constructed as public roads by the ruling power before the Decennial Settlement; and, if so, the mere circumstance that the land lies within their *mouza*, is in itself an insufficient foundation for the assumption that it forms part of their permanently-settled estate. The case might be different if it was proved that the roads were constructed after the Decennial Settlement, or if we knew what the settlement was. The questions whether the plaintiffs have lost their title to the land, and whether the land, when it ceased to be used as a road, would revert to them, only arise when it is determined that they had a title. It is unnecessary, therefore, to discuss the meaning and effect of sections 9 and 10 of Act XLII of 1850, and the application of the cases cited. If, however, those sections apply to the Budge-Budge road, it is difficult to see why they should not also apply to the other roads. The difference between them appears to be, that the Budge Budge road has for many years been what may be called an Imperial road, maintained out of Imperial revenue, while the other roads are what may be called local roads maintained out of local funds : but what they were when constructed it is impossible to say.

"Even if the plaintiffs had succeeded in establishing their title to the land, we should have held that the sum allowed as the value of it was excessive. The Subordinate Judge has valued it at the price fixed for some of the adjoining land. The land as road land had no separate market value; at [199] least no value is proved. The value of the adjoining land was undoubtedly enhanced from its vicinity to the roads, and in that enhanced value it may fairly be considered the plaintiffs have obtained the value of the road land.

"Taking the adjoining land and the road land as one plot, it would be difficult to say that the value of the two together was greater than the value of the former alone, and that the value of the one was not included in that of the other.

"We need not, however, in the conclusion at which we have arrived, consider what the value would be."

The plaintiffs appealed.

Mr. *J. Graham*, Q. C., and Mr. *J. D. Mayne*, for the appellants, argued that the decision of the High Court against their title was wrong. That Court had also erred in dating the roads from the early period assigned by them; and in throwing upon the plaintiffs, who had shown title as zemindars to the *mouza* Dakhin Sherpur, the burden of proving that the plots were an asset of the zemindari, taken by them by devise from their ancestor. The presumption was that the plots were originally part of the permanently-settled lands of the zemindari, and the suggestion that the roads, one or some of them, might have existed before the Decennial Settlement, was not supported by any sufficient evidence. The ground taken by the Subordinate Judge should be supported, at all events, as to the conclusion that, as there was no date established for the making of the roads, there was a presumption of a dedication to public use by the original owner; and that when the land was used for purposes other than those of highways, the ownership of the plots reverted to the successors of the grantor. Thus the plaintiffs would be entitled, when this suit was brought, to compensation, the roads having been, at the time of its being awarded in respect of the adjoining land, already broken up, and the plots having been set free from the original dedication. Compensation, refused in the ordinary course, was claimable in this suit, and had been rightly assessed in the first Court, at the same average value as that of the adjoining land. It had been rightly adjudged in the first Court that he who dedicates to the public a way for their use retains to himself the land below the surface, unless the property is vested by some [200] enactment in another person—*The Mayor of Tunbridge* v. *Baird*, (1896) L. R., 4 Ap. Ca., H. L., 434, and in the Court below, 2 Q. B., 867, 883. Reference was also made to *Vestry of St. Mary Newington* v. *Jacob*, (1872) L. R., 7 Q. B., 47; *Vestry of St. George the Martyr* v. *Roll*, (1880) L. R., 14 Ch. D., 780; *Nihal Chand* v. *Azmat Ali Khan*, (1885) I. L. R., 7 All., 362; *Tota* v. *Sardul Singh*, (1888) I. L. R., 10 All., 553; *Chairman of Naihati Municipality* v. *Kishori Lal Goswami*, (1886) I. L. R., 13 Cal., 171.

Mr. *A. Cohen*, Q.C., and Mr. *A. Phillips*, for the respondents, supported the decree of the High Court, relying mainly on the construction of the Land Acquisition Act (X of 1870) as to the assessment of compensation upon the value of the property acquired under it. That value should be the market value of such land at the time of the acquisition of the plots. The question was raised by the issues. The value was not to be taken from what the property might have been worth at a date subsequent to its acquirement by the Government, but at the period when the surface was still in use for roads. Of that subsoil, according to the evidence, there was no market value; and, therefore, no compensation could be assessed thereupon. In order to make good their claim, as laid by them, the appellants should have

shown that before the acquisition under Act X of 1870, the public use of the roads had been abandoned, so as to have set free, from the dedication of the surface to the use of the public, their original title to the subsoil. There had been no evidence of this having happened before the acquisition. The Act on a true construction of sections 24 and 25 provided for compensation based upon value at the time of the acquisition, but whatever was done, in the way of the change the mode of using the plots, was done after they had been acquired by the Government. Reference was made to *Stebbing* v. *The Metropolitan Board of Works*, (1870) L. R., 6 Q. B., 37.

Mr. *J. Graham*, Q. C., replied.

Afterwards on the 24th July their Lordships' **judgment** was delivered by

[201] Lord Hobhouse.—The question raised in this appeal is whether the appellants, who were plaintiffs below, are entitled to compensation for land taken by the Government of India for the purpose of making a dock. The land consists of three plots, being respectively portions of three public roads within the ambit of a *mouza* belonging to the plaintiffs. A large quantity of the plaintiffs' land in the *mouza* has also been taken and their compensation awarded. The land now in question is less than 20 bighas. The evidence shows that the roads were in use, two about fifty years ago, and one about 70; how much longer is left to conjecture.

The Subordinate Judge decided partially against the plaintiffs and partially in their favour. As to some 7 bighas in the Budge-Budge road, he held there was evidence to show that it was "taken" by the Government within the meaning of Act XLII of 1850, and that the title of the Government became indefeasible five years after the taking. As to the remaining 13 bighas in the two other roads, he held there was no such evidence, and that they formed part of the assets of the village included in the settlement with the plaintiff's predecessors. He further held that as there is no evidence of the origin of the roads, there must have been a dedication of the land by the owner for the purpose of a highway; and that theory has been supported at this bar by the plaintiffs' Counsel. From that he infers that when the land was otherwise used, viz., for the purpose of a dock, it reverted to the grantors, and that they are entitled to recover possession as in fact they ask by their plaint. His decree, however, is not for possession but for the money equivalent of the land. That he assessed at Rs. 4,112, being the same average value as that of the adjoining land, of which the plaintiffs had full enjoyment.

Both parties appealed to the High Court; the plaintiffs in respect of the Budge-Budge road, and the defendant in respect of the two other roads. The High Court thought that, as there is no evidence that the roads were made subsequently to the Permanent Settlement, the plaintiffs had shown no title, and the speculation of the Subordinate Judge as to dedication and reverter of the land had no foundation. They also held that the Subordinate Judge was wrong in his valuation; that the land as road **[202]** had no separate market value, or at all events that none was proved. Reversing the decree, they dismissed the suit with costs.

Their Lordships think the High Court so clearly right on the questions of value that they do not enter into the questions affecting the plaintiffs' title. The land was taken for a public purpose under the provisions of the Land Acquisition Act, 1870, and the plaintiffs' right is not to recover the land but to claim compensation for it. By sections 13 and 24, the market value of the land at the time of awarding compensation is to be taken into consideration. It is not suggested that there is any market value of these lands as roadways.

Mr. *Graham* argues that when the compensation was awarded in this case the roads had been broken up, and therefore the Subordinate Judge rightly valued the land as belonging absolutely to the plaintiffs, free from the burden of the roads and capable of being used for any purpose. In their Lordships' opinion that would be a very unreasonable construction of the Act. There is an express provision in section 25 that the Assessor shall not take into consideration any increase to the value of the land acquired likely to accrue from the use to which it will be put. That points to the time when the land is acquired as the time for ascertaining its value. Independently of that provision it would lead to very strange and capricious results if changes in the condition of the land between the time when it was taken and the actual conclusion of the award were to increase or to lessen its value. The time of awarding compensation must be construed as meaning the time of compensation, the time at which the right to compensation attaches. At that time these plots of land were roadways; and the plaintiffs are claiming for a supposed loss of value which had no existence when the ownership of the land was changed.

Their Lordships will humbly advise Her Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitor for the Appellants: Mr. *Augustus C. Bell.*

Solicitors for the Respondents: Messrs. *Sanderson, Holland, Adkin & Co.*

C. B.

NOTES.

[See also (1906) 33 Cal., 1230 : 10 C.W.N., 1014 : 4 C.L.J., 343; (1909) 13 C.W.N., 1046; (1904) 31 Cal., 839.]

[203] APPELLATE CIVIL.

The 1st May, 1897.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE STEVENS.

Pryag Singh............Decree-holder

versus

Raju Singh and others............Judgment-debtors.*

Limitation—Application for ascertainment of mesne profits—Decree for possession and mesne profits—Effect of striking off application for execution—What are proceedings and orders "in execution of decree."

An application for delivery of possession of land decreed and for ascertainment of mesne profits was made in 1892, more than three years after a previous application for the same purpose, and was "struck off" for non-service of notice. On a fresh application for ascertainment of mesne profits in 1895,

Held, that that portion of the proceeding or order of 1892 which related to mesne profits was not one "in execution of decree;" that under the circumstances the present application

* Appeal from Order No. 340 of 1896, against the order of D. Cameron, Esq., District Judge of Tirhoot, dated the 15th of June 1896, affirming the order of Babu Joya Prosad Panda, Munsif of Somastipur, dated the 31st of March 1896.

was not barred by that proceeding or order ; and that the application was not barred by limitation, although the claim to possession was barred.

Puran Chand v. *Roy Radha Kishen*, (1891) I. L. R., 19 Cal., 132, followed; *Bunsee Singh* v. *Nusuf Ali Beg*, (1874) 22 W. R., 328, distinguished.

THIS appeal arose out of a decree for possession of land and mesne profits finally confirmed by the High Court on the 10th August 1886. The first application for delivery of possession and mesne profits made on the 27th November 1888 was rejected. The next application was found to have been made on the 21st August 1892 more than three years after the previous one was made. This application, however, was "struck off" for want of proof of due service of notice on the judgment-debtors. The last application was for ascertainment of mesne profits only, and was made on the 20th August 1895. The judgment of the District Judge on appeal was as follows :—

[204] "It seems to me that the application is out of time. The decree-holder admittedly never got possession of the land for which mesne profits are claimed. It is urged for the judgment-debtor that until possession is obtained the application cannot be entertained—*Bunsee Singh* v. *Nusuf Ai Beg*, (1874) 22 W. R., 328, and that the decree-holder no longer had a right to obtain possession. I think this contention is sound. It appears that on the 21st August 1892, the decree-holder applied for possession as well as for mesne profits, and that the application was dismissed. This order for dismissal is final."

The decree-holder appealed to the High Court.

Babu *Uma Kali Mookerjee* for the Appellant.

Dr. *Asutosh Mookerjee* for the Respondents.

The **judgment** of the High Court (**Trevelyan** and **Stevens, JJ.**) was as follows :—

The facts necessary to narrate for the determination of this case are not many. A suit was brought for possession of a certain property, and a decree was made on the 10th August 1886 giving a right to obtain possession of 1½ bighas of the property claimed and mesne profits. On the 27th November 1888 an application for execution was made, and on the 21st August 1892, according to the facts found by the Court below, the next application was made. That was an application for possession and for an inquiry as to mesne profits. Our decision must in reality turn on what took place on that application. A notice was issued and rightly so, inasmuch as more than a year had expired since the date of the decree, and inasmuch as the defendant was entitled to notice of an application for an inquiry as to mesne profits. This application, we may observe, was partly an application in execution of decree, that is to say, in so far as it sought for possession of the property. But as pointed out by the decision of the full Bench in *Puran Chand v. Roy Radha Kishen*, (1891) I. L. R. 19 Cal., 132, so far as regards *wasilat*, it is not an application for execution, but an application in the suit, not in execution of the decree but in pursuance of the decree. A proceeding in execution is a proceeding enforcing a decree made requiring a party to do or to abstain from doing some particular thing. It may be that the decree provides for possession or the payment of money. A proceeding in execution means a proceeding to enforce an order [205] already made. The order made in this case was not an order to do a particular thing, as a result of the decree, but an order in the suit directing an inquiry into the mesne profits. That is not a proceeding in execution of the decree. To that extent, therefore, the application was not an application in execution of the decree. The order was as follows : "Notice could not be served on account of want of identifier ; no further step is taken. The case is, therefore, struck off."

It is a common practice in the Courts in the districts, when no steps are taken in execution proceedings, to strike off the case from the file. It is necessary in each case to see what is meant by an order striking off the case. If the object is only for the convenience of the Court's work and to ascertain the number of pending cases by taking the case off the list, then such order does not prevent a fresh application. But, on the other hand, if the intention of the Court was thereby to determine a matter in issue between the parties, then it might be that the effect of striking off the case would be to prevent further proceedings. As far as we can see the District Judge has treated this matter as if it was entirely a proceeding in execution of decree, and did not realize the distinction between the two portions of the claim, and that there was one portion which was not a proceeding in execution.

If that was so, it was not his intention to determine the question between the parties. The question remains whether this would operate as a bar to further proceedings in regard to the inquiry into mesne profits. In our opinion it does not. If there had been anything approaching to a determination of the question, then the removal of the case from the file might have operated to prevent a re-consideration of that question ; but, in our opinion, in this case nothing of the kind was done.

A further application was made for the ascertainment of mesne profits on the 20th August 1895. It is quite clear that, having regard to the decision of the Full Bench in *Puran Chand* v. *Roy Radha Kishen*, (1891) I. L. R., 19 Cal., 132, this application is not barred by limitation.

The learned Vakil for the respondent says that we ought not **[206]** to accept a construction of law which would result in keeping alive such applications for an indefinite time. But, unless there is any limitation provided by the law, it is not for us to make one. There might be, apart from the limitation which has been contended for, a limitation applicable to a case of this kind. At any rate, it is quite clear that the Court would have power to prevent the abuse of its processes. Every Court has the power to do that. Following the decision of the Full Bench in *Puran Chand* v. *Roy Radha Kishen*, (1891) I. L. R., 19 Cal., 132 we hold that this application was not barred. That disposes of the main portion of the argument.

The learned District Judge has acted on a decision of PHEAR and MORRIS, JJ.—*Bunsee Singh* v. *Nuzuf Ali Beg*, (1874) 22 W. R., 328,—and has held that the application could not be made because the applicant has lost his right to possession to the property. That was a decision upon a section of Act VIII of 1859, section 196, which differed from the terms of section 211 of the Code of Civil Procedure, which is the law now in force. Section 196 of Act VIII of 1859 is in these terms : "When the suit is for land or other property paying rent, the Court may provide in the decree for the payment of mesne profits or rent on such land or other property from the date of the suit until the date of delivery of possession to the decree-holder with interest thereupon at such rate as the Court may think proper."

The law on the subject now in force, section 211 of the Code of Civil Procedure, runs thus : "When the suit is for the recovery of possession of immoveable property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made or until the expiration of three years from the date of the decree (whichever event first occurs) with interest thereupon at such rate as the Court thinks fit ;" so that as matters stand at present, the plaintiff cannot obtain mesne profits for more than three years after decree. PHEAR

and MORRIS, JJ., after referring to the words they had used in the case of [207] *Fuzeelun* v. *Keramut Hossein*, (1874) 21 W. R., 212, say this: "And applying these words to the present case, it is plain that the steps for the estimating or assessing or adjusting of mesne profits, from the date of suit up to the date when the plaintiff obtained possession, could not have been instituted until that possession was obtained; that is, could not have been instituted until the 18th January 1870. And the application of the 8th November 1872 was not even three years distant from this date." The reasons for this decision are inapplicable to the present law.

The result of the argument in this case would be that, because a defendant refuses to obey an order of the Court and deliver over possession to the plaintiff, the plaintiff must lose his right to mesne profits. We cannot say that this argument commends itself to us.

In the result we are of opinion that the plaintiff is entitled to an enquiry in accordance with the decree, as to mesne profits, and we decree the same.

The appellant is entitled to his costs in this appeal. In the lower Court each party will pay his own costs.

S. C. C. *Appeal allowed.*

NOTES.

[This was not followed in (1899) 24 Bom., 149; but see (1904) 26 All., 623; (1903) 25 All., 385; (1910) 5 I.C., 272 (Cal.); (1913) 20 I. C., 635 (Cal.); (1913) 24 M.L.J., 96; (1911) 21 M.L.J., 546.]

[25 Cal. 207]

APPELLATE CRIMINAL.

The 6th July, 1897.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE WILKINS.

Kashi Nath Naek...........Appellant

versus

Queen-Empress...........Respondent.*

Forgery—Abetment of forgery by writing out the deed—Unregistered document purporting to be a valuable security—Penal Code (Act XLV of 1860), sections 109, 114, and 467.

The accused was not only the writer but also took an active part in the preparation of a document, the alleged executant of which was dead before the date of the document, and the person who really had an interest under the document was convicted under section 82 of the Registration Act (III of 1877). But evidence was wanting to show that the accused took any part in the forgery of the name of the alleged executant.

[208] *Held*, that the accused could not be convicted of the offence of forgery under section 467 of the Penal Code. There being nothing on the record to show that the accused was a party to, or took any part in, the actual forgery of the document, or that he was present on the

* Criminal Appeal No. 308 of 1897, made against the order passed by H. R. H. Coxe, Esq., Sessions Judge of Midnapore, dated the 22nd of March 1897.

occasion when it was forged, the proper section to convict him under would be section 467/109 that is of abetment of forgery and not section 467/114.

An unregistered document, though it may not be a valuable security until the registration is completed, still "purports" to be a valuable security within the meaning of section 467 of the Penal Code.

***Queen-Empress* v. *Ramasami* [(1888) I. L. R., 12 Mad., 148], approved of.**

THE facts of the case for the purpose of this report sufficiently appear from the judgment.

Babu *Sarat Chunder Rai Chowdhry*, for the Appellant.

The *Officiating Deputy Legal Remembrancer* (Mr. *Abdur Rahim*) for the Crown.

The **judgment** of the High Court (**Ghose** and **Wilkins, JJ.**) was as follows :—

The appellant before us, Kashi Nath Naek, has been convicted by the Sessions Judge of Midnapore of offences under sections 467 and 467/114 of the Indian Penal Code, and section 82, clause (*d*) of the Registration Act. The document which is said to have been forged is a *Kobala*, bearing date the 16th March 1896, purporting to have been executed by one Khetter Nath Das in favour of a certain lady, the wife of one Kashi Nath Das. The deed was presented for registration to the Sub-Registrar ; but he, suspecting something wrong, refused registration. It is said, however, that the appellant before us made certain representations before the said Registrar in regard to the person who presented the document for registration, and asked that officer to register the document, saying that it was all right. A prosecution was afterwards started against Kashi Nath Das and the appellant, Kashi Nath Naek ; and it would appear from the record that Kashi Nath Das, the person who really had an interest under the document in question, was convicted by the Magistrate under section 82 of the Registration Act. As regards the appellant, Kashi Nath Naek, after certain proceedings had been taken against him by the Magisterial authorities, he was committed **[209]** to take his trial before the Sessions Court for offences to which we have already made reference, and he was convicted accordingly. It seems to be perfectly clear upon the evidence in the case that the alleged executant of the document, Khetter Nath Das, was dead before the date of the document in question ; and there can also be no doubt that the appellant, Kashi Nath Naek, was not only the writer of it, but was also the person who took an active part in the preparation of the document ; but the evidence is wanting to shew that he took any part in the forgery of the name of Khetter Nath Das, the alleged executant of the document ; and we are of opinion that it is almost impossible to convict the appellant before us, upon the materials upon the record, of the offence of forgery. It appears to us, however, at the same time that whoever the forger of the document might have been, Kashi Nath Naek abetted the act of forgery ; and in that view of the matter we think that he ought to be convicted under section 467/109 of the Indian Penal Code, namely, that he abetted the offence of forgery of the document. As we have already observed, there is nothing to indicate that the appellant was a party to, or took any part in, the actual forgery of the document ; nor does it appear that he was present upon the occasion when the document was forged. We, therefore, think that section 114* of the Indian

*[Sec. 114 :—Whenever any person, who, if absent, would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.] (Abettor present when offence is committed.)

Penal Code has no application to the present case; and that the proper section to convict him under would be section 467/109 of the Indian Penal Code.

As regards the offence said to have been committed by the accused under section 82, clause (*d*), of the Registration Act, the evidence, to our mind, is doubtful. The Sub-Registrar, who is a respectable and responsible officer of Government, distinctly swears that the appellant did not take that part at the time the document was presented for registration which has been attributed to him; and in the conflict of testimony which exists in this case, we think it would be unsafe to convict him under clause (*d*), section 82 of the Registration Act. We, therefore, set aside the conviction under the Registration Act, and convict him under section 467/109 of the Indian Penal Code only.

In the circumstances, we think that the justice of the case will be amply met, having regard to the terms of the section **[210]** of the Penal Code under which we convict him, by sentencing the appellant to two years' rigorous imprisonment.

We might add that a point was raised before us by the learned Vakil for the appellant to the effect that section 467 of the Indian Penal Code had no application to the present case; because the document, which was a *kobala*, was not actually registered, and, therefore, it could not possibly operate as a valuable security within the meaning of that section. We are, however, unable to accept this contention as correct; because the section in question runs thus: "Whoever forges a document which purports to be a valuable security or a will," and so on. The words are "*which purports to be*" and not "which is" a valuable security. The document may not be an effectual document so as to pass title until it is registered; but so soon as it is registered it takes effect from the date of execution thereof; and although it may not be a valuable security until the registration is completed, still it "purports" to be valuable security within the meaning of the section. We find that the Madras High Court in the case of *Queen-Empress* v. *Ramasami*, (1888) I. L. R., 12 Mad., 148, referring to the case in 2 East's Pleas, p. 955, took very nearly the same view which we have just expressed; and although the facts of the case were somewhat different from those of the present case, still the principle which is laid down therein equally applies to this case.

S. C. B.

[25 Cal. 210]

APPELLATE CIVIL.

The 14th July, 1897.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE AMEER ALI.

Gyannessa and others............Plaintiffs

versus

Mobarakannessa and others...........Defendants.*

Transfer of Property Act (IV of 1882), section 118—Exchange—Partition—Evidence Act (I of 1872), sections 21 (3), 11 (2)—Admissibility of petition and written statement filed in a previous proceeding.

Some of the co-owners possessing an undivided share in several [211] properties took by arrangement a specific property in lieu of their shares in all the properties.

Held, that this transaction was not an "exchange" within the meaning of section 118† of the Transfer of Property Act, but the completed transaction amounted to a "partition" which is not required by law to be effected by an instrument in writing.

Frith v. *Osborne* [(1876) L. R., 3 Ch. D., 618] referred to.

Where the plaintiffs and some of the defendants were co-owners of certain properties, the question at issue being whether there was a partition between them, and whether under that partition the defendants came to be in possession of a specific property in lieu of their shares in all the properties, a petition and a written-statement filed by the defendants in certain previous suits admitting the partition and the exclusive acquisition of the specific property were put in, but objected to as inadmissible in evidence:

Held, that the documents were admissible against those defendants under sections 11 cl. (2) and 21 cl. (3) of the Evidence Act.

Naro Vinayek v. *Narhari* [(1891) I. L. R., 16 Bom., 125] relied upon.

THE facts of the case fully appear from the judgments of the High Court.

Dr. *Rash Behary Ghose* and Babu *Upendra Nath Mitter* for the Appellants.

Mr. *C. Gregory* and Moulvie *Mahomed Mustafa Khan* for the Respondents.

The following **judgments** were delivered by the Court (MACPHERSON and AMEER ALI, JJ.):—

Macpherson, J.—The plaintiffs Nos. 1 to 3 and the defendants Nos. 2 to 4, being the descendants of one Naffar Mahomed, were the owners of the *jote* which is the subject of this suit and other properties. In June 1888, they entered into a written agreement called a *solenama*, by which the plaintiffs took a two-third share and the defendants a one-third share of the *jote*. The *solenama* is not before us, and we are not acquainted with its precise terms, but it is said to have effected a settlement of the disputes relating to all the family properties and to have provided for a partition of them. One provision admittedly was

*Appeal from Appellate Decree, No.147 of 1896, against the decree of R. R. Pope, Esq., District Judge of Dinajpur, dated the 7th November 1895, reversing the decree of Baboo Kali Prasanna Mukerjee, Subordinate Judge of that District, dated the 27th of June 1895.

† [Sec. 118:—When two persons mutually transfer the ownership of one thing for the ownership of another neither thing nor both things being money only, the transaction is called an "exchange".

"Exchange" defined.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.]

that, in the event of a partition, the defendants should take the whole *jote* as representing their share of all the properties.

[212] The plaintiffs claim a two-third share of the *jote* alleging a dispossession by the defendants in March or April 1892. The first defendant claims to have purchased the entire *jote* from the other defendants after the partition contemplated by the *solenama* had been made. The facts in issue are: (1) Whether a partition in accordance with the terms of the *solenama* had been effected; (2) whether after partition the first defendant had purchased the *jote* from the other defendants. The Lower Appellate Court deciding both those issues in favour of the defendant reversed the first Court's decree and dismissed the suit.

It is now contended that the transaction by which the vendee defendants obtained the *jote* being one of "exchange" under section 118 of the Transfer of Property Act, could only be effected by a registered instrument and that there was no valid transfer of the *jote* to them. Also, that the District Judge in finding a partition has improperly relied upon two documents which were irrelevant and not evidence against the plaintiffs.

The *solenama*, it may be observed, was registered, but there was no subsequent writing giving effect to the partition.

The learned pleader for the appellant relies upon the case of *Frith* v. *Osborne*, (1876) L. R, 3 Ch. D, 618, as showing that the transaction referred to was in substance an "exchange" as defined in section 118. There, an undivided moiety of lands was vested in *A*, *B* and *C* as trustees of a settlement, which expressly authorized a partition, and the other moiety was vested in *D*, *E* and *F* as trustees of a settlement with power to sell or exchange, and a partition deed was executed by the trustees of the two moieties. The question arose as to whether the power of sale and exchange given to *D*, *E* and *F* authorized a partition, and that involved the further question, which was then doubtful, of the power of tenants in common to effect an exchange of their respective moieties of the land held in common before they had made a partition. The Master of the Rolls held that such an exchange could be made, and that the power of exchange was properly exercised by a partition. In deciding a question such as that now raised, we must avoid getting involved in the intricacies of the law of England relating to real property.

[213] Assuming that there was what amounted to an "exchange" within the words of section 118 between the vendor defendants and the plaintiffs, the undivided interest of the former in all the other properties being exchanged for the undivided interest of the latter in the *jote*, the Transfer of Property Act does not apply to the transaction. The exchange was intended to and did effect a partition. The completed transaction was the partition by which the parties held in severalty the lands which had been before held in common. The law does not require a partition to be effected by an instrument in writing, and the right of partition being an incident of property held as this property was, the right is not, according to the second section, affected by any of the provisions of the Act. The Act, moreover, does not profess to deal with partitions or the way in which they are to be effected.

Treating, therefore, the transaction as a partition, although it may have been effected in a way which involved, as between the co-owners, a transfer of the ownership of parts of the undivided property amounting to an exchange, I hold that it does not come under section 118, and that it was not necessary to complete it by a registered instrument.

The documents objected to are Exhibits 9 and 43, the former being a petition, and the latter a written statement, put in by the vendor defendants

in certain suits, and they contain statements of those defendants that they were in possession of the entire *jote*. The District Judge says they were objected to before him as containing admissions made by the defendants which could not be proved on their behalf, and that is all we know about them.

The vendor defendants, who are charged in the plaint with colluding with the vendee, the first defendant, put in a verified written statement denying the partition and the sale, and one of them, it is said, was examined as a witness for the plaintiff. It is clear that they were supporting the plaintiffs' case, and I think the statements which went to show that there had been a partition and that they had changed their attitude could be proved as against them. The reference to section 157 is probably a mistake, but I think the Judge was right under the circumstances of the case in holding that the statements were admissible under section 21 (3) and section 11 (2) of the Evidence Act.

[214] The appeal is dismissed with costs.

Ameer Ali, J.—I am of the same opinion. Two questions were raised in this appeal: (1) That the District Judge was wrong in relying on certain documents referred to in his judgment as they were inadmissible in evidence against the plaintiffs; and (2) that, as the transaction by which defendants 2 to 4 are alleged to have acquired the property in suit was or amounted to an "exchange," under the provisions of section 118 of the Transfer of Property Act, it ought to have been effectuated by a registered document, and not having been so done, the defendants 2 to 4 could not acquire any title thereto or convey any title by their sale to the first defendant.

As regards the first point, it must be remembered that the question at issue in the case was whether or not there was a partition between the heirs of one Naffar Mahomed, viz., the plaintiffs and defendants 2 to 4, and whether under or in consequence of that partition, defendants 2 to 4 had acquired an exclusive right to the property in suit. The defendants 2 to 4, from whom the first defendant purchased the *jote*, denied in their written statement that they had exclusively acquired or were in exclusive possession of the property. They denied also the fact of the sale to the first defendant. It appears that the second defendant was examined on commission on behalf of the plaintiffs. Under the circumstances, therefore, it is clear that the defendants 2 to 4, though placed in the category of defendants, were exactly in the same position as the plaintiffs, and that their interests were more or less identical. The two documents objected to are a petition and a written statement filed in some previous proceeding or proceedings, in which the defendants 2 to 4 admitted the partition, and the exclusive acquisition by them of the *jote* in suit. These documents were, therefore, clearly admissible against them. But I go further and hold that, having regard to the position of the parties, the statements contained, in these documents are admissible generally in corroboration of the first defendant's allegation. The plaintiffs and defendants 2 to 4 were co-owners of certain property, and the fact in issue in the present case is, as already stated, whether there was a partition between them, and whether under that partition the defendants 2 to 4 acquired or came to be **[215]** in possession of a specific property in lieu of their shares in all the properties. Any act done or statement made by any of the co-owners which tends to corroborate the fact of partition would be relevant to the inquiry and consequently admissible in evidence. In *Naro Vinayek* v. *Narhan*, (1891) I.L.R., 16 Bom., 125, statements such as we find here were held to come under the provisions of section 11 of the Evidence Act. I am, therefore, of opinion that the petition and written statement, to the admissibility of whcih objection has been taken in this Court, are facts which by section 11 are

relevant as they make the existence of the partition, which is the fact in issue, highly probable, and that no error has been committed by the District Judge in relying on them.

As regards the second point the grounds of decision have been so clearly stated by my learned colleague that I have very little to add. I only wish to observe that English cases are of much assistance in elucidating genera principles and construing enactments when the Acts of the Indian Legislature happen to be in *pari materia* with English Statutes. But it would be dangerous, I think, to introduce into this country the complicated principles or incidents of the English law relating to real property. The question, however, is whether section 118 of the Transfer of Property Act is applicable to a transaction of the nature alleged, and found by the Judge to have taken place between the plaintiffs and the defendants 2 to 4. Section 118, in my opinion, is not applicable to cases where some of the co-owners possessing an undivided share in several properties take by arrangement a specific property in lieu of their shares in all. Section 118, as its language shows, refers to cases where two persons owning two specific properties transfer or convey their respective ownership one to the other.

In this country a partition between co-owners does not require to be effectuated or evidenced by a written document, and there is nothing in the Act or in the phraseology of section 118 to warrant the suggestion that the Legislature intended to make any alteration in the recognized law on the subject.

For these reasons I agree in dismissing the appeal with costs.

B. D. B. *Appeal dismissed.*

NOTES.

[A partition of joint property is not an exchange within sec. 118, Transfer of Property Act, 1882 :—10 C.L.J., 503 ; (1914) 16 M.L.T., 592 ; (1912) 18 I.C., 524 (Burma) ; see also (1901) 5 C.W.N., 724.]

[216] *The 3rd September, 1897.*

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE AMEER ALI.

Abdool Latif Moonshi and another............Judgment-debtors

versus

Jadub Chandra Mitter............Decree-holder, Auction-purchaser.*

Sale for arrears of rent—Application to set aside sale—Bengal Tenancy Act (VIII of 1885), section 174, clauses (1) and (2)—Deposit of decretal amount incorrectly calculated by ministerial officers of Court—Effect of deposit without a prayer in express terms to set aside the sale—Challans—Practice.

The judgment-debtor, within thirty days from the date of sale of his holding for arrears of rent, deposited in Court under section 174 of the Bengal Tenancy Act the decretal amount by a *challan* endorsed by the chief ministerial officer of the Court executing the decree. Subsequently it was discovered that the amount was short by 9 pies, which the judgment-debtor forthwith paid in, making up the deficiency, and presented a petition, praying that

* Appeal from Order No. 292 of 1896 against the order of R. R. Pope, Esq., District Judge of Dinajpur, dated the 11th of May 1896, affirming the order of Babu Debendra Nath Roy, Munsif of Dinajpur, dated the 22nd of February 1896.

"the execution case may be declared as finally closed," but without applying in express terms to have the sale set aside: *Held*, that under section 174 of the Bengal Tenancy Act the Court was bound to set aside the sale, notwithstanding that the applicant did not in express terms ask for that relief. *Ugrah Lall* v. *Radha Pershad Singh*, (1891) I. L. R., 18 Cal., 255, referred to.

Per AMEER ALI, J.—The fact of his depositing the amount was a sufficient indication of his intention to seek the relief.

Per MACPHERSON, J.—The *challan* which sets out the purpose of the deposit may be regarded as a sufficient application.

THE facts of the case sufficiently appear for the purposes of this report from the judgments of the High Court.

Syud *Shamsul Huda* for the Appellants.

Dr. *Rash Behary Ghose* and Babu *Jasoda Nandan Paramanik* for the Respondent.

The following **judgments** were delivered by the High Court (MACPHERSON and AMEER ALI, JJ.) :—

Ameer Ali, J.—It appears that on the 6th of January 1896 the holding of the appellant, who is a *raiyat*, was sold in execution of a decree obtained by his landlord, respondent in this Court, for [217] arrears of rent, and was purchased by the latter on the 3rd of February. The appellant deposited in Court, under the provisions of section 174 of the Bengal Tenancy Act, the amount recoverable under the decree, with costs and a sum equal to five per cent. of the purchase-money. On the 7th of February the decree-holder presented an application to the Munsif, stating that the judgment-debtor had deposited 9 pies too little, and praying that the sale be confirmed, whereupon the Court ordered that the judgment-debtor might apply to have the sale set aside. The Court did not express any opinion whether the statement made in the decree-holder's petition that the amount deposited was short by 9 pies was correct or not. From the form of the order it would seem that the Munsif did not consider it well founded. However that may be, on the same day, presumably in order to be on the safe side, the judgment-debtor presented the following petition to the Court:—

"That on account of the claim in the above case together with costs and damages a sum of Rs. 52-9-15 gds. was deposited on the 3rd February, but upon a calculation it has been found that the said amount of claim has been deposited less by 3 pice (15 gds.). It is therefore prayed that the Court may be pleased to allow the said deposit of 3 pice to be deposited and to declare the execution case as finally closed."

This petition does not appear to be dated, but the impression of the seal of the Court bears date the 7th of February. The 9 pies was thus brought into Court on the 7th of February, and was ordered to be received on the 10th of February by a *challan* of that date.

The lower Courts have refused to set aside the sale of the appellant's holding, on the sole ground that as he made no application it could not be set aside. The District Judge, in affirming the order of the Munsif, says that "subsequently on the 10th February the judgment-debtor deposited in Court the 9 pies necessary, but made no application to set aside the sale." It seems to me that the learned Judge is in error on both points; the 9 pies was brought into Court on the 7th of February at the latest and not on the 10th, and the judgment-debtor did apply by the petition of that day to have the sale set aside. No other meaning can reasonably be attached to the prayer of that petition.

The Courts below have rejected the appellant's application to [218] set aside the sale of his holding, apparently on the ground that under the law the judgment-debtor is bound to apply for that purpose in express terms.

Section 174 of the Tenancy Act, which gives to the *raiyat* the right of having the sale of his holding set aside, runs as follows :—

(1) "Where a tenure or holding is sold for an arrear of rent due thereon, then, at any time within thirty days from the date of sale, the judgment-debtor may apply to have the sale set aside on his depositing in Court, for payment to the decree-holder, the amount recoverable under the decree with costs, and, for payment to the purchaser, a sum equal to five per centum of the purchase-money.

(2) If such deposit is made within the thirty days, the Court shall pass an order setting aside the sale, and the provision of section 315 of the Code of Civil Procedure shall apply in the case of a sale so set aside."

The remainder of the section is immaterial for the purposes of the present case. The Act nowhere provides how or in what mode the judgment-debtor is to apply. There is nothing to compel the judgment-debtor to apply by a mukhtear or pleader, and in fact it is conceded that he might have applied verbally and in person. But it is said that the words "may apply" indicate that some sort of application is necessary. Suppose the judgment-debtor happens to be a dumb person, would he be debarred from having the benefit of this section, or would he be compelled to employ a proxy in the shape of a pleader or mukhtear? Surely this could hardly be the intention of the Legislature. In my opinion the fact of his depositing the amount is a sufficient indication of his intention to seek the relief which the law provides. He brings in the money with what object? Surely for no other reason but to have the sale of his holding set aside. And I think the provisions of sub-section 2 clearly support this view. It declares that if the deposit is made, the Court shall pass an order setting aside the sale. It shows that when the amount is deposited, it becomes the duty of the Court to set aside the sale. In my opinion the appellant did, as a matter of fact, apply to set aside the sale, and even if he did not, having deposited the amount he is entitled [219] to have the sale set aside, and the Court is bound (under sub-section 2 of section 147) to make an order to that effect.

This, as I have already stated, was the sole ground on which the lower Courts have refused to set aside the sale. In this Court it was urged that as the amount deposited by the appellant on the 3rd of February fell short by 9 pies, the sale ought not to be set aside. This point does not appear to have been pressed in either of the Courts below, for there is not the smallest reference to it in their judgments. And I do not feel disposed to entertain it in this Court. Nor are the circumstances of the case such as to induce me to do so. The auction-purchaser, who is admittedly the landlord decree-holder, incurs no loss: he seeks to tie the appellant down to the strict letter of the law. In that case he ought to have pressed the point in the Courts below.

So far as the question raised here is concerned, the present case is exactly similar to the case of *Ugrah Lall* v. *Radha Pershad Singh*, (1891) I.L.R., 18 Cal., 255, decided by PETHERAM, C.J., and myself. In that case also the *raiyat*, judgment-debtor, deposited within the month a certain amount which was found afterwards to be short of the exact sum required by a trifling amount, which was subsequently paid up. And we held that the Munsif had acted rightly in setting aside the sale

Assuming that the decree-holder, in a case like this, is entitled to urge the point here, I think that as the materials on the record are sufficient to enable the Court to form an opinion whether it is well founded or not, it would only cause harassment to the judgment-debtor to remand the case for further inquiry. Ordinarily a judgment-debtor has no idea of the amount of costs and the additional sum payable by way of damages or compensation, which is calculated on the basis of a percentage on the purchase-money. As a matter of well known practice the calculation is made in the office of the Judicial Officer executing the decree; and the aggregate amount is then entered in a *challan* or order to the Treasury Officer to receive and credit the same.

These *challans* contain three parts: The first part is to be filled in by the payer, the second is to be filled in by the Court [220] or under its orders, and the third part is to be filled in at Court by the cashier or the Treasury Officer. The first part of the *challan*, dated the 3rd February 1896, given to the appellant, runs thus:—

Name of person or persons on whose behalf the money is tendered.	Name of person or persons to whose credit the amount is to be placed in the Court's Book	Number of suit or date of judicial decree or order (if any) the amount is tendered.	Particulars of Receipts.	Amount tendered.	Remarks, if any.
1	2	3	4	5	6
Abdul Latif Munshee. Judgment-debtor.	Jadub Chunder Mitter. Decree-holder.	Rent Decree. No. 882 of 1895.	Mention in the sale proclamation. Rs. As. P. 48 15 5 Sale fee 1 1 10 Damages 2 7 0 52 7 15	Rs. As P 52 7 9	Fifty-two rupees seven annas and nine pies only.

(Not legible.)
Signature of Chief Ministerial officer.

Abdul Latif.
Signature of the person tendering the money.

It bears the endorsement of the chief ministerial officer, presumably to vouch the accuracy of the amounts entered in the 4th column; otherwise his endorsement would be meaningless.

The second part runs thus:—

Registered Number.	Registered Date.	Account to be credited whether Civil Court deposit fines or forfeitures, stamp duty and penalties, or miscellaneous or petty receipts.	As per Court's challan register.
1	2	3	4
1161	3rd Feb. 1896.	C. Deposit.	

[221] and contains the following order to the Treasury Officer, Dinajpur :—

To *
The Treasury Officer, Dinajpur.

(Not legible.)
Receive and credit the above if tendered to you before 3 P.M. to-day.
Signature of the Accountant, District Judge's Court, dated 3rd February 1896.
(Not legible)
Signature of the Judge in charge.

This order is signed by the Judicial Officer in charge, and is counter-signed by the Accountant of the District Judge's Court.

Part third runs thus :—

Received Notes. Received silver and copper.	*	*	*	Treasury Officer entered here number of notes.
Received Total Rupees...	52	7	9	

Signature (not legible) 3rd February 1896. Cashier of the Court, &c. (not legible) Accountant of the Treasury

It will be seen from the above that the amount which the appellant deposited was checked in the *sherishta* or office of the Judicial Officer executing the decree ; its accuracy is vouched by the chief ministerial officer; it is then placed before the Judicial Officer, and receives his sanction. With all those guarantees for accuracy the appellant goes and deposits the money. It can hardly be said under the circumstances that the appellant, a *raiyat*, is responsible for a mistake in calculation made in the office. He did what under the law he was required to do, viz., to obtain a *challan* for the amount that he had to deposit, for without the necessary *challan* he could not have paid the amount With that document he goes to the Treasury [222] and deposits the sum of money stated therein. The decree-holder (purchaser) then discovers the deficiency of three farthings, and as soon as the judgment-debtor comes to know of it he pays in that also.

To my mind it would be grievous under the circumstances to hold that he is disentitled to have the sale of his holding set aside.

For all these reasons, I would decree the appeal and set aside the orders of the Courts below, and would direct that the sale of the 6th of January 1896 be set aside with costs in this Court. We allow the appellant no costs in the Courts below.

Macpherson, J.—I agree that a separate and formal application for the setting aside of the sale under section 174 is not essential, and that if the necessary amount is deposited in due time the Court must set aside the sale. The *challans*, by which the amount is deposited with the Court's permission and which sets out the purpose of the deposit, may be regarded as a sufficient application. The decision of the lower Courts cannot, therefore, be supported on the ground on which it rests.

That being so, I am not prepared to dissent from the conclusion of my learned colleague, that the case is practically governed by the case to which he has referred.

B. D. B. *Appeal allowed.*

NOTES.

[As regards the effect of deficiency in deposit due to miscalculation by officers of the Court, see (1899) 26 Cal., 449 F.B.; (1906) 11 C.W.N.. 116.]

[25 Cal. 222]

MATRIMONIAL JURISDICTION.

The 6th September, 1897.

PRESENT:

MR. JUSTICE AMEER ALI.

K. M. Butt............Petitioner

versus

F. C. K. Butt...........Respondent.

Practice-- Divorce-- Withdrawal of petition for dissolution of marriage— Costs of petitioner, on what scale allowed —Divorce Act (IV of 1869), sections 7, 35 and 45.

The petitioner on the 2nd June 1896 presented her petition, in which she prayed for the dissolution of her marriage with the respondent on the grounds of adultery and cruelty. A commission was issued at her instance to examine witnesses in England on the charges of adultery and cruelty, and the result of their evidence was that the petitioner was satisfied that [223] the charges brought by her against her husband were wholly unfounded, and she on the 2nd September 1897 applied for leave to withdraw her suit, and for payment of her costs by the respondent. She contended that her costs should be paid by him as between attorney and client The respondent submitted he ought to pay costs as between party and party. *Held,* that the petitioner's costs, including costs of this application, be taxed as between party and party it being open for the attorney for the wife to sue the husband for the rest of the costs.

ON the 2nd June 1896 the petitioner Kathleen Mary Butt presented her petition, in which she prayed for the dissolution of her marriage with the respondent Frank Charles Kernot Butt on the grounds of adultery and cruelty, or in the alternative for a judicial separation and for the custody of her child. Subsequently a commission was issued at the instance of the petitioner to examine certain witnesses in England. Upon the return of the commission executed the petitioner found that the evidence taken thereunder did not support the charges made by her in her petition, and determined to withdraw her suit.

On the 2nd September 1897 she applied by petition for liberty to withdraw her suit, and for an order that the respondent should pay her costs of the suit to be taxed on such scale as the Court might direct.

Mr. *Garth* for the Petitioner.—The Petitioner withdraws her petition. The only question now before the Court is what the scale of costs should be. The respondent contends that he ought to pay costs as between party and party, whereas the petitioner's contention is that he ought to pay her costs as

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* Matrimonial Jurisdiction, Original Civil Suit No. 4 of 1896.

between attorney and client. The withdrawal of the petition is no reason why the solicitor should be deprived of his costs. The Court assumes the wife has nothing, and the solicitor is entitled to be paid his costs in full, and that would be costs as between attorney and client. In *Robertson* v. *Robertson*, (1881) L. R,. 6 P. D., 119, it was held that the costs of the wife payable by the husband were not limited to the amount paid into Court or secured by the husband for that purpose. *Otway* v. *Otway*, (1888) L. R., 13 P. D., 141, and *Holt* v. *Holt and Fleming*, (1858) 28 L. J., P. and M., 12, also support this contention. The Court would not allow the solicitor to lose costs due to him from his client, and the client under the circumstances is in reality the husband.

[224] Mr. *J. G. Woodroffe* for the Respondent.—There is express authority that the costs should be as between party and party; it was so held by the old Ecclesiastical Courts, and the same rule has been followed after the passing of the Matrimonial Causes Acts of 1857 and 1858. In an ordinary suit the costs would be as between party and party, costs as between attorney and client being allowed only when it is expressly provided for, as in a mortgage. The general rule, therefore, is that costs should be allowed as between party and party. There is nothing in matrimonial causes to take them out of the general rule. Sections 7, 35 and 45 of the Indian Divorce Act (IV of 1869) are the only sections which apply to costs, and they seem to indicate that the Courts in India should act on the principles of the English Courts of Divorce. The general principles of taxing costs against a husband in a matrimonial cause are the same as in other cases,—Browne on Divorce, 5th edition, p. 361. In England formerly the wife was allowed costs as between party and party up to the setting down of the case for trial,—Browne on Divorce, 5th edition, p. 342. Can it be said that the principle is different after the case is set down for trial as to the recovery of costs reasonably incurred by the wife? [See Browne on Divorce, 5th edition, pp. 359 and 360—*Ottaway* v. *Hamilton* (1878, 3 C. P. D., 393)]. The Matrimonial Causes Acts of 1857 and 1858 do not contain provisions for costs as between attorney and client. That shows that the costs should be taxed as between party and party. If a case can be made out with reference to the other costs so as to bring them in as necessaries, then the remedy is by suit properly framed; those costs cannot be proved before the taxing officer—*Allen* v. *Allen and D'Arcy*, (1860) 2 Sw. & Tr., 107, *Stocken* v. *Pattrick*, (1873) 29 L. T., (N. S.,), 507. There is no doubt on the English authorities that the scale of costs should be as between party and party. The only authorities in the Indian Law Reports are *P.* v. *P.* (1872) 9 B. L. R., Ap., 6, and *Natall* v. *Natall*, (1885) I. L. R., 9 Mad., 12. They appear at first sight to be against this contention; but in the first case the point was not alluded to in the judgment, and in the second case the point was not raised.

[225] Ameer Ali, J.— This was a wife's petition for dissolution of her marriage on the ground of the respondent's cruelty and adultery. A commission was taken out to examine witnesses in England, and the result of their evidence is that the petitioner is satisfied that the charge of adultery brought by her against the husband was wholly unfounded. She therefore applied to withdraw the suit, and by consent an order was made to that effect on the 2nd September instant. I, however, reserved for consideration the question of the principle on which the petitioner's costs to be paid by the respondent should be taxed. On her side it has been argued that the costs should be taxed as between attorney and client. On the respondent's side it has been urged that they should be taxed as between party and party. So far as can be gathered from the reports this is the first case in which the question has been expressly

raised in this country, and as it involves a principle of some importance it is necessary that it should be carefully and fully considered.

The Indian cases cited at the bar do not afford much assistance. In the case before MACPHERSON, J., in *P.* v. *P.* (1872) 9 B. L.R.,Ap., 6, the prayer was that the petitioner, who was the attorney for the wife, should have his costs taxed as between attorney and client. The learned Judge, after dealing with the facts and circumstances of the case, made the following order:—

"Therefore, although I shall order the petitioner's costs to be taxed and to be paid by the respondent to her attorney (he being substantially entitled to such an order), her attorney must personally bear his own costs of this application. The petitioner's costs will be taxed on scale 2."

There is in the ordering part no reference to the prayer in the petition that the costs should be taxed as between attorney and client. The inference is that that portion of the prayer was not acceded to.

In *Natall* v. *Natall*, (1885) I. L. R., 9 Mad., 12, it was directed that the costs of the wife should be taxed as between attorney and client, but it does not appear that the point was argued or considered.

[226] The Indian Divorce Act (section 7) provides: "That subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts, and gives relief."

Section 35 deals with the question of costs, but does not lay down any rule regarding the mode in which the costs of the wife should be taxed. Section 45 declares that "subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure."

Under these circumstances I must, having regard to the provisions of section 7 of the Act, look for guidance to the English cases.

Mr. *Garth* for the petitioner has contended that as the husband has to pay the wife's costs, it follows that he must pay what she is liable for to her attorney, and he has referred to *Robertson* v. *Robertson*, (1881) L. R., 6 P. D., 119. This was an appeal from the judgment of the Divorce Court, and one of the questions raised was whether the costs of the wife payable by the husband were not to exceed the amount paid into Court or secured by him. It was held that such costs were not limited to the amount paid into Court or secured by the husband, and the conclusion come to is thus expressed by the Master of the Rolls at p. 123:—

"It appears to me, therefore, that when the defence is fairly and reasonably conducted the solicitor ought to be paid in full his costs, that is his costs properly incurred."

In *Otway* v. *Otway*, (1888) L. R., 13 P. D., 141, a similar question came up for consideration. In that case the wife was found guilty of adultery, and the question was whether the husband was liable to pay the costs reasonably incurred by her in the Appellate Court, and it was held that he was. No question as to the mode of taxation was considered or decided in either of those two cases.

[227] The cases cited for the respondent bear more directly on the question. In *Stocken* v. *Pattrick*, (1873) 29 L. T., (N. S.) 507, the solicitor brought an action at common law for the recovery of his costs from the husband, and Chief Baron KELLY, in dealing with the questions raised before him

expressed himself in terms which clearly indicate the principle on which I ought to act in this Court. The husband, who was the defendant in that action had taken various objections to the suit of the solicitor, and in dealing with one of them, the Chief Baron says at p. 509:—

"Then there is another defence set up on behalf of the defendant which Mr. *Griffiths* argued with much earnestness and considerable ability. He says, and says truly, that where a suit of this nature is instituted by a wife against her husband, it must be carried on through the medium of an attorney, and the attorney may, under certain circumstances, call for his costs from day to day. That is the rule in the Divorce Court having jurisdiction over causes of this nature, and no doubt he is entitled to claim his costs from day to day. Moreover, if the suit is proceeded with and the result is a decree, he may claim the costs in that suit, if the suit has terminated in favour of the wife. No doubt it is in the discretion or judgment of the Court to allow them and decree to the wife the costs of the suit; but whether the plaintiff shall recover and so be held entitled to the costs of suit, or whether, as it may be, the suit may be found against her and no costs are allowed,—if the costs are allowed, no doubt the attorney may obtain these costs, but only costs between party and party, and they have nothing to do with the costs as between attorney and client any more than in any action of debt in this Court. The attorney may recover those costs. He is nevertheless entitled to sue his client on whose behalf he has carried on the suit for the extra costs between attorney and client, and recover them subject to the deduction of any money he may have received on account."

This shows that in the Matrimonial Court the wife's costs are taxable as between party and party, and that the attorney may recover the rest of the costs in an action at law against the husband.

Another case *Ottaway* v. *Hamilton*, (1878) L. R., 3 C. P. D., 393, bears still more distinctly on the subject. There also the wife's attorney had brought an [228] action for his extra costs not covered by the taxation in the Matrimonial Court. The nature of the claim is thus stated by the Judge in the first Court: "The costs of the wife against the defendant as between party and party had been taxed upon the application of the wife, but the costs for which the plaintiff sued defendant in this action had been disallowed, and the plaintiff sought to recover them as costs which would be properly allowed as between attorney and client, and as such being necessaries supplied to the wife." And holding that they were necessaries the Judge decreed the plaintiff's claim.

On appeal by the defendant, Lord Justice BRAMWELL observed as follows: "I cannot see that because the plaintiff has obtained from the Divorce Division such sums as are allowed upon taxation, he is to be debarred from recovering the extra costs by an action against the husband."

The rule applied to taxation in the Divorce Division is indicated here, but it is more clearly expressed in Lord Justice THESIGER'S judgment at p. 401. He says:—

"I now come to the question whether, under the Divorce Acts, taxation is the only remedy which the wife or the solicitor appointed by her has for the recovery of extra costs. If it could have been established that these statutes provide for the taxation of a wife's costs against her husband as between solicitor and client, there would have been great force in the argument that the remedy to be adopted is the use of the process of the Divorce Division to obtain payment of them. At all events the contention would have been well founded that where a wife, or a solicitor employed by her, applies to the Divorce Division to tax the costs, there would be such an election as to prevent either of them suing subsequently in an action at law." Then, after referring to

section 51 of the Matrimonial Causes Act, 20 and 21 Vict., Chapter 85, he proceeds: "These words seem to confer only the power of giving costs as between party and party, and in many cases the jurisdiction of the Court ought to be thus confined, for it has to deal, not only with husband and wife, but also with other parties, at least where the husband is the petitioner."

I may here observe that the power over costs contained in the Code of Civil Procedure is given to the Matrimonial Jurisdiction [229] of this Court by section 45 of the Indian Divorce Act, and that this section is thus in effect similar to section 51 of the Matrimonial Causes Act, and points to the same conclusion.

Lord Justice THESIGER also refers to *Allen* v. *Allen and D'Arcy*, (1860), 2 Sw. & Tr., 107, as showing that the Matrimonial Courts tax the costs of the wife payable by the husband between party and party.

In this case it was taken for granted that the wife's costs are taxed as between party and party, but the Judge Ordinary pointed out that in applying the rule a liberal construction should be put upon it. He says: "This taxation must certainly be reviewed. The question of the principle on which costs are to be taxed in matrimonial suits has not yet been settled, but I apprehend that I must adopt, as far as I can, the principles on which the Ecclesiastical Courts proceeded. I am informed that the principle of taxation in those Courts was as between party and party; but that term had a very different construction from that put upon it in Common Law Courts, because there they only allow the costs of such issues as are found for the persons who are to receive costs." He then proceeds to state the grounds on which a liberal construction should be put on the rule.

The result is, that I must follow the English rule, which seems clear. It will be open to the attorney of the wife to sue the husband for those costs which may not be allowed as between party and party. My direction is that the petitioner's costs, including the costs of this application, be taxed as between party and party, but liberally according at [to ?] the meaning put upon the scale in *Allen* v. *Allen*, (1860) 2 Sw. & Tr., 1071. The conclusion at which I have arrived is, I find, in accordance with the practice followed in this Court. Mr. Belchambers, the Taxing Officer, has at my request furnished a note, in which he says · "The wife's costs in a matrimonial suit are taxed as between party and party on a liberal scale, full costs properly incurred being allowed." See note at pp. 291 and 292, Belchambers' "Rules and Orders."

Attorneys for the Petitioner: Messrs. *Morgan & Co.*

Attorneys for the Respondent: Messrs. *Sanderson & Co*

H. W.

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[230] APPELLATE CRIMINAL.

The 23rd September, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

Ali Fakir............Appellant

versus

Queen-Empress............Respondent.*

Charge to Jury—Misdirection by the Judge—Erroneous verdict owing to misdirection—Failure of justice—Criminal Procedure Code (Act X of 1882), sections 418, 423 (d) and 537.

On a charge of rape the Judge in his charge to the jury said: "You will observe that this sexual intercourse was against the girl's will and without her consent, &c.," instead of saying, as he ought to have done, "you will have to determine upon the evidence in this case, whether the intercourse was against the girl's will, &c.," and the charge went on in the same style of stating to the jury what had been proved instead of leaving it to them to decide what in their opinion was proved. In the concluding sentence of the charge the Judge said: "You have seen the witnesses, and I have no doubt that you will return a just verdict."

Held, that such a charge amounted to a clear misdirection, and that the verdict was erroneous owing to such misdirection. Even the concluding sentence did not satisfy the requirements of a proper charge.

The provisions in section 423 (*d*) and section 537 of the Criminal Procedure Code do not require that the Court is to go through the facts and find for itself whether the verdict is actually erroneous upon the facts.

THE accused in this case was charged under sections 376 and 354 of the Penal Code. The jury returned a verdict of guilty, and the Judge accepting the verdict sentenced the accused to transportation for life. The accused appealed against this finding and sentence on the ground that there was misdirection to the jury, and that the verdict was erroneous in consequence of such misdirection, and also on the ground of severity of sentence.

No one appeared for the accused.

The *Officiating Deputy Legal Remembrancer* (Mr. *Abdur Rahim*) appeared for the Crown.

The **judgment** of the High Court (**Banerjee** and **Wilkins, JJ.**) was as follows:—

[231] The appellant in this case was tried by jury before the Sessions Court of Dacca on charges of rape and assault to outrage female modesty, punishable under sections 376 and 354 of the Indian Penal Code. The jury returned a verdict of guilty, and the learned Sessions Judge accepting the verdict has sentenced the accused to transportation for life. Against this finding and sentence the accused has appealed; and the appeal lies on a matter of law only (see section 418 of the Code of Criminal Procedure) and also on the question of the severity of the sentence which, as the section just referred to provides, is to be deemed a matter of law. Clause (*d*) of section 423 further provides: "Nothing hereinafter contained shall authorize the Court to alter

* Criminal Appeal No. 629 of 1897, against the order passed by F. S. Hamilton, Esq., Additional Sessions Judge of Dacca, dated the 2nd of August 1897.

or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him." Therefore, before a verdict can be interfered with, we must be satisfied that such verdict is erroneous owing to a misdirection by the Judge or a misunderstanding on the part of the jury as to the law laid down by him. In the present case, the law has been clearly laid down by the Judge, and no question can be raised as to the law laid down by him being misunderstood by the jury. The question, therefore, which really arises for our consideration here is whether the verdict is erroneous owing to a misdirection by the Judge; and that question resolves itself into two other questions, *first*, whether there was any misdirection by the Judge in this case, and, *secondly*, if there was any misdirection by the Judge, whether it can be said that the verdict was erroneous owing to such misdirection, or, in other words, whether within the meaning of section 537 of the Criminal Procedure Code the misdirection has occasioned a failure of justice.

With reference to the first question, we observe that the learned Judge's charge to the jury is vitiated by this material misdirection, that it never once tells the jury that it is for them to consider whether upon the evidence adduced in the case the offences are established as a matter of fact. After having explained the law to them, the learned Judge says to the jury: "You will observe that in this case the sexual intercourse was against the girl's will [232] and without her consent, or, at any rate, with only such consent as she gave under fear of the accused's threats of violence to her," instead of saying, as he ought to have done, "you will have to determine upon the evidence in this case whether the sexual intercourse was against the girl's will, etc.," and the charge goes on in that same style of stating to the jury what has been proved, instead of leaving it to them to decide what, in their opinion, is proved. This amounts to a clear misdirection. The view taken upon this point is fully supported by the case of the *Queen-Empress* v. *Bepin Biswas*, (1884) I. L. R., 10 Cal., 970, where the learned Judges observe: "It was certainly open to the Judge to express his own opinion regarding it" (that is, the evidence), "and he did so when he stated that he was unable to attach any weight to it. He should, however, have been careful to add that it was for the jury to form their own opinion on this evidence;" and we may add that the same view is taken by PHEAR, J., in the *Queen-Empress* v. *Raj Kumar Bose*, (1873) 10 B. L. R., Ap., 36

Our attention was called by the learned Deputy Legal Remembrancer to the concluding sentence of the charge, in which the learned Judge says: "You have seen the witnesses, and I have no doubt that you will return a just verdict." Even that does not in our opinion satisfy the requirements of a proper charge. The learned Judge there does not tell the jury to form their own opinion upon the evidence. The passage just quoted in our opinion means no more than this, that the learned Judge expects the jury to return a verdict which, in his opinion, as indicated throughout the charge, was the just verdict, or, in other words, a verdict of guilty.

We are, therefore, of opinion that the first question, namely, whether there has been any material misdirection by the Judge, must, in this case, be answered in the affirmative.

Then there remains the question, whether, owing to such misdirection, the verdict is not erroneous, or, in other words, there has not been a failure of justice. On this point the view we take is this, that both clause (*d*) of section 423, and section 537 of the Code of Criminal Procedure, require that before the verdict of a jury [233] can be reversed on the ground of a misdirection by the

Judge, this Court must be satisfied that the misdirection was of a nature such that it may reasonably be supposed that the verdict was erroneous by reason of such misdirection; or, in other words, that there has been a failure of justice by reason of such misdirection. But the two provisions of the law just referred to do not in our opinion require that this Court is to go through the facts, and find for itself whether the verdict is actually erroneous upon the facts. The view we take on this point is in accordance with that taken by this Court in the case of *Wafadar Khan* v. *Queen-Empress*, (1894) I. L. R., 21 Cal., 955.

Having regard to the nature of the misdirection pointed out above, it is impossible for us to say that the verdict has not been erroneous, that is, is not vitiated, by reason of the misdirection. We must, therefore, set aside the finding and sentence and order the case to be retried.

S. C. B. *Conviction set aside.*

NOTES.

[See also (1902) 26 Mad., 1.]

[25 Cal. 233]

CRIMINAL REVISION.

The 29th October, 1897.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

Choa Lal Dass... ....Petitioner

versus

Anant Pershad Misser...........Complainant Opposite party.*

Revision—Power of Interference by the High Court —Test as to whether case is of exceptional nature or not—Practice in Criminal Case.

The High Court will not interfere in a case during its pendency in a subordinate Court unless it is of an exceptional nature, and one test of its being of such a nature is that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that the case is a fit one for its interference at an intermediate stage. *Chandi Persad* v. *Abdur Rahman* [(1894) I. L. R., 22 Cal., 131] discussed.

THE accused in this case was charged with having committed criminal trespass. He moved the High Court to set aside the proceedings of the Deputy Magistrate, including the charge framed, on the ground that upon the facts stated by the com-**[234]**plainant the trespass complained of was not criminal but civil trespass.

Mr. *Sinha* and Babu *Dasarathi Sanyal* for the Petitioner.

Mr. *P. L. Roy* and Babu *Romesh Chunder Bose* for the Opposite Party.

The **judgment** of the High Court (**Banerjee** and **Wilkins, JJ.**) was as follows :—

We are asked to set aside the proceedings in this case including the charge that had been framed against the petitioner, on the ground that upon the facts stated by the complainant, the trespass, which is the offence complained of, was not criminal trespass, and could only be civil trespass, if trespass it could be called; and in support of the contention that we ought to interfere in this case,

* Criminal Revision No. 597 of 1897 made against the order of Babu H. M. Sandyal, Sub-Deputy Magistrate of Soopale, dated the 30th of July 1897.

three cases have been referred to, namely, *Ishur Chunder Karmokar* v. *Seetul Dass Mitter*, (1872) 17 W. R., Cr. 47, *Shumbhu Nath Sarkar* v. *Ram Kamal Guha*, (1883) 13 C. L. R., 212, and *Chandi Pershad* v. *Abdur Rahman*, (1894) I. L. R., 22 Cal., 131.

The first question that arises for consideration is whether we ought to interfere at this stage of the case. The learned Counsel for the petitioner contends upon the authority of the last mentioned case that we ought to interfere.

No doubt we have the power to interfere in any case and at any stage of it; and we quite assent to the proposition enunciated in the case of *Chandi Pershad* v. *Abdur Rahman* that "there can be no doubt whatever that we have the power to interfere at any stage of the case, and when it is brought to our notice that a person has been subjected to harassment of an illegal prosecution, it is our bounden duty to interfere." But whilst on the one hand it is our bounden duty to prevent the harassment of parties by illegal prosecutions, on the other hand it is our duty to allow proceedings in the subordinate Courts to go on and take their natural course, unless there is any exceptional ground for our interference; because if the rule was not limited in this way, the result would be, that it would be open to every person accused of an offence before a subordinate Court to come up [236] to this Court at any stage of the case, and as often as he likes in the course of the trial, and ask us to put a stop to further proceedings. Such a thing the Legislature could never have intended by any provision in the Code of Criminal Procedure, and such a thing would seriously impede the speedy administration of justice. The learned Counsel for the petitioner very properly concedes that the cases for our interference during their pendency in the subordinate Courts must be of an exceptional nature. The question then is, what should be the practical test to apply, to determine whether any particular case is of that exceptional nature. Without meaning to lay down any hard and fast rule, which it is impossible as it is undesirable to do upon a question like this, we think we may say that one safe practical test would be this, namely, that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince this Court that it is a fit one for its interference at an intermediate stage. The learned Judges who decided the case of *Chandi Pershad* v. *Abdur Rahman* thought in the exercise of their judicial discretion that the case before them was of a nature such that their interference was justified. In the present instance, without prejudging it in any way, and without pronouncing any opinion upon its merits, we must say that the case does not fulfil this test. The contention of the learned Counsel that upon the facts alleged by the complainant the offence of criminal trespass is not at all made out, may be perfectly sound; but as we have said above, we do not think it necessary for us at this stage of the case to go into that question, if it has to be determined upon any lengthy or elaborate argument.

In this view of the case, and for the reasons stated above, the rule must be discharged.

S. C. B. *Rule discharged.*

NOTES

[See also 26 Cal., 786; (1910) P.R., 33. 10 A.L.J., 144; 38 Cal 68.]

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[236] APPEAL FROM ORIGINAL CIVIL.

The 14th January, 1897.
PRESENT :
SIR FRANCIS MACLEAN, KT., CHIEF JUSTICE, MR. JUSTICE O'KINEALY, AND MR. JUSTICE TREVELYAN.

Mohendra Lall Mitter and another............Plaintiffs
versus
Anundo Coomar Mitter and others...... .....Defendants.*

Letters Patent, High Court, 1865, clause 15—Order refusing application to commit for contempt—Appeal—Judgment.

An appeal lies from an order refusing an application to commit for contempt of Court.

THIS was an appeal against a decision of Mr. Justice SALE, made in suit No. 522 of 1882 on the 13th August 1896. The JUDGMENT was as follows :—

SALE, J —"I think the circumstances clearly show that this is not a case where the Court ought to commit the parties on whom the rule was served for contempt.

The rule was obtained on these grounds, that the Receiver was in possession of the estate of Durga Churn Mitter, and that in 1895 his possession had been interfered with by the persons named in the rule, and that that interference amounted to a contempt.

The parties on whom the rule was served have appeared to show cause "why they should not be committed to jail for contempt for interfering with the possession of the Receiver of this Court and Receiver appointed in this suit of the zemindaries belonging to the estate of Durga Churn Mitter, deceased, in the pleadings in this suit named."

The whole question is whether, on the materials before me, I am prepared to say that it has been proved that the parties showing cause have been guilty of contempt. The affidavit which has been filed on behalf of the persons showing cause places a complexion on the case very different from that which it bore when the rule was obtained.

The decree in the suit was made so far back as 1884. By it the Receiver was appointed Receiver of the estate of Durga [237] Churn Mitter. There was a very long delay in completing the decree. That was not done until 1889, and no steps appear to have been taken by the parties to the suit to put the Receiver in possession till June 1895, and it is quite clear that the Receiver has never succeeded in getting complete possession of the estate. He found what one would have expected him to have found after all these years of delay, that the parties to the suit had been busy in transferring their shares to outsiders, and that these outsiders denied all knowledge of the appointment of the Receiver, and claimed that they had paid good consideration for leases executed in their favour, and insisted on their right being recognised. The result was that there was a struggle between the Receiver on the one side and the lessees on the other; and the assistance of the Criminal Courts appears to have been invoked by both sides. Now, while it is very difficult to say that the Receiver has succeeded in obtaining possession of the estate, it is

* Appeal from Order No. 44 of 1896, against the decision of Mr. Justice Sale, dated the 13th August 1896.

beyond doubt that he is entitled to possession; and if the usual steps had been taken in the proper time, I should have given him every assistance in obtaining possession.

It seems to me he would have been well advised if, instead of going to the Criminal Courts, he had applied to this Court for its assistance and for an order for possession against the persons who dispute his title. It is impossible, in a proceeding of this kind, finally to determine the question whether or not these transfers set up are valid or merely *benami*, and executed for the purpose of resisting the Receiver. But having regard to the nature of the dispute and the steps taken for the purpose of ousting the lessees, it seems to me it would be an injustice to visit the lessees with the punishment for contempt. In order that the Court should exercise its powers of punishment for contempt, it must first be shown clearly that the Receiver is entitled to possession of the property, and next that that possession is interfered with by some person who has no *bonâ fide* claim to a superior title. That is not the sort of case which, under all the circumstances, can be fairly said to have been established here.

The rule must be discharged with costs. I have been asked to make an order for possession as against the lessees If the rule served on them had called on them to show cause why such [238] an order should not be made, I should, as at present advised, have been inclined to make the order; but I cannot do so now, as they have not been called on to show cause against any such order. They are here merely to show cause why they should not be committed to jail."

The plaintiffs appealed

Mr. *T. A. Apcar* and Mr *Chowdhry* for the Appellants.

Mr. *Dunne* and Mr *Avetoom* for the Respondents.

Mr. *Dunne* raised the preliminary objection that there could be no appeal from such an order as this. There can certainly be no appeal under the Civil Procedure Code; if there be any appeal it must be under the Charter. But the order is not a 'judgment' within the meaning of clause 15 of the Charter. The persons sought to be committed are not parties to the suit, and there is no final decision as to any right or liability. There can be no appeal from such an order as the present one because it is the mere exercise of a discretion. *Mohabir Prosad Singh* v. *Adhikari Kunwar*, (1894) I. L R, 21 Cal, 473, 475; *Kishen Pershad Panday* v. *Tiluckdhari Lall*, (1890) I. L. R., 18 Cal, 182; *Lutf Ali Khan* v. *Asgar Reza*, (1890) I. L. R, 17 Cal., 455 The case of *The Justices of the Peace for Calcutta* v *The Oriental Gas Company*, (1872) 8 B. L. R., 433, shows what a "judgment" is, and that case has always been followed. [O'KINEALY, J., referred to *Achaya* v. *Ratnavelu* (1885,) I. L. R., 9 Mad., 253 to *In re Rajagopal* (1886,) I. L R., 9 Mad, 447 and to *Banno Bibi* v. *Mehdi Husain* (1889,) I. L. R., 11 All., 375.] Section 591 of the Code prohibits an appeal in such a case as this. And in England it has been held that no such appeal will lie, *Ashworth* v. *Outram*, (1877) L. R., 5 Ch. D., 943.

Mr. *T. A. Apcar* for the Appellants.—According to the usual practice of this Court, this question has never been considered arguable. The cases cited by Mr. *Dunne* were all under the [239] Code this is not. It is a matter falling within the general jurisdiction of the Court, and the Court is invested with all the powers of the Queen's Bench Division and Chancery Division in England—*Martin* v. *Lawrence*, (1879) I. L. R., 4 Cal., 655. In *Jarmain* v. *Chatterton*, (1882) L R, 20 Ch. D., 493, it was held that there is an appeal from a refusal to commit, as it is not purely a matter of discretion, and that decision was followed in *Bristow* v. *Smyth*, (1885) 2 Times L. R., 36.

The term "judgment" must be liberally construed, as in *DeSouza* v. *Coles*, (1868) 3 Mad. H. C., 384; and if the decision determines a question of right or liability, as this does, it is appealable, *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company*, (1872) 8 B. L. R., 433. An appeal lies from an order for committal for contempt because contempt is a kind of offence; and it is difficult to see why an appeal should not lie from an order refusing to commit.

Mr. *Dunne* in reply.

The Court (**Maclean, C. J., O'Kinealy, J.** and **Trevelyan, J.**) were of **opinion** that the order was appealable, and they accordingly heard and dismissed the appeal. [The rest of the decision, however, is immaterial for the purposes of this report.]

Attorney for the Appellants: Babu *Sitanath Das*.

Attorney for the Respondents: Babu *Bhuban Mohan Das*.

H. W.

[25 Cal. 239]

The 7th January, 1897.

PRESENT:

SIR FRANCIS MACLEAN, KNIGHT, CHIEF JUSTICE, MR. JUSTICE O'KINEALY, AND MR. JUSTICE TREVELYAN

The Secretary of State for India in Council............Defendant

versus

Rajlucki Debi and another...... .....Plaintiff and Defendants.*

Civil Procedure Code (Act XIV of 1882), section 424—Suit against the Secretary of State for India in Council - Notice— Public Demands Recovery Act (Bengal Act VII of 1880), sections 8, 9, 20—Sale for default in payment of costs of realising Government revenue— Common ground of appeal—Code of Civil Procedure, section 544.

Section 424 of the Civil Procedure Code provides that "No suit shall be instituted against the Secretary of State in Council, or against a public [240] officer in respect of an act purporting to be done by him in his official capacity, until the expiration of two months next after notice in writing has been in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the District" etc.

The plaintiff had instituted a suit against the Secretary of State for India in Council to set aside a certain sale of the plaintiff's property (possession of which had been given to the purchaser), but had not given him the notice prescribed by section 424 of the Civil Procedure Code. The first Court (AMEER ALI, J.) gave the plaintiff a decree.

Held, on appeal (reversing the decision of AMEER ALI, J.) that whether or not the words "in respect of an act purporting to be done by him in his official capacity" relate only to a public officer and not to the Secretary of State, no suit whatever is maintainable against the Secretary of State, unless the notice prescribed by section 424 of the Code of Civil Procedure has been given and that therefore the present suit could not be maintained.

A SUM of Rs. 4-1-0 was due from the plaintiff to the Collector of the 24-Pergannahs, by way of process fees incurred in the realisation of income-tax from the plaintiff. The plaintiff declined to pay that amount; and certain

* Appeals from Original Decrees, Nos. 22 and 23 of 1896, against the decision of Mr. Justice AMEER ALI, dated the 7th February 1896, in Suit No. 106 of 1894.

land of hers was sold by the Collector in default of payment, and purchased for Rs. 2,600 by the defendant Radharomon Shaw, who was put into possession. The plaintiff subsequently brought a suit against the defendants, in which she prayed, *inter alia*, that the sale certificate, and the sale and all proceedings connected therewith, might be set aside, and that the defendants, or one of them, might be ordered to pay the costs of the suit.

The suit was tried by AMEER ALI, J., who made a decree in favour of the plaintiff, directing that the sale certificate should be cancelled, that the purchase-money should be returned to the purchaser, and that the defendants should pay the costs of the suit. He held on the authority of *The Midland Railway* v. *Local Board of Wellington*, (1883) L. R., 11 Q. B. D., 788; *Waterhouse* v. *Keen*, (1825) 4 B. and C., 200; *Davies* v. *Mayor of Swansea*, (1853) 8 Exch., 808 : 22 L. J. Exch., 297; *Wilson* v. *Mayor and Corporation of Halifax*, (1868) L. R., 3 Ex. 114; *Flower* v. *Local Board of Low* **[241]** *Leyton*, (1877) L. R., 5 Ch D., 347, and *Bhau Balapa* v. *Nana*, (1888) I. L. R., 13 Bom., 343, that the qualification "in respect of an act purporting to be done by him in his official capacity," in section 424 of the Civil Procedure Code, related to the Secretary of State for India in Council, as well as to a public officer, and that in actions of tort no notice was necessary.

The Secretary of State appealed

Mr. *Dunne* (with him *The Advocate-General* Sir *Charles Paul*) for the appellant.—Notice of action as prescribed by section 424 of the Civil Procedure Code is essential. The qualification with regard to acts done in an official capactiy is not referable to the Secretary of State. The section is an absolute prohibition of a suit against the Secretary of State, without notice, whatever the nature of the suit may be. But in any event the sale, if it can be said to be the act of the Secretary of State at all, was an act done in his official capacity. In Act X of 1877, section 424, the words "in respect of an act purporting to be done by him in his official capacity" were not present; they were introduced by Act XII of 1879. But this latter Act also introduced the same qualification into two other sections, *viz.*, 428, 429, showing that it had reference only to a public officer; for section 428 relates only to a public officer, and in section 429 the Secretary of State is differentiated from a public officer. The case of *Bhau Balapa* v. *Nana*, (1888) I. L. R., 13 Bom., 343, was a totally different case; it was not a suit against any one in his official capacity, but only against the Collector as guardian of a minor's property.

Mr. *Hill* for the purchaser, Radharomon Shaw, supported the argument of Mr. *Dunne*, and urged that the sale could not be set aside, unless the certificate of sale also was set aside, so that the purchaser could only be made a party if the plaintiff sought to set aside the sale as well as the certificate.

The plaintiff did not appear on the appeal either in person or by Counsel.

The following **judgments** were delivered by the Court (MACLEAN, C. J., and O'KINEALY and TREVELYAN, JJ.):—

[242] Maclean, C. J.—It is unfortunate that in this case we have not had the advantage of the plaintiff being represented by Counsel, so that we might have heard from him the arguments by which he sought to maintain the judgment of the learned Judge in the Court below. The point which we have to decide is a very short one, nor does it strike me as one of any real difficulty.

The suit was instituted by the plaintiff against the Secretary of State for India and another gentleman, who is the purchaser under a certificate of sale following a decree under which certain property was put up for sale, and sold

to meet the claim of the Government in respect of certain moneys due from the plaintiff, to set aside that sale.

An objection is taken by the Secretary of State in Council that he has not been served with the necessary notice under section 424 of the Code of Civil Procedure to which he submits he is entitled before an action can be instituted. The question to my mind depends upon what is the true construction and effect of that section of the Code. The section runs as follows :—

"No suit shall be instituted against the Secretary of State in Council, or against a public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the District, and in the case of a public officer, delivered to him or left at his office, stating the cause of action," and so forth.

It is admitted that no such notice was given. In his defence the Secretary of State raised the point that such notice ought to have been given, and that in the absence of such a notice the action is not maintainable.

It was contended before the Court below, and it is contended here, that upon the true construction of section 424 the words "in respect of an act purporting to be done by him in his official capacity" do not apply to the case of the Secretary of State in Council. Looking, if one may look, at the punctuation of the section and at the section grammatically, I incline to take the view so submitted as the correct construction, but it is not really [243] material for the purpose of this decision, for it is clear that what was done in this case by the Secretary of State in Council was done and must be regarded as having been done by him in his official capacity. Therefore, whether the view suggested that those words do not apply to the Secretary of State in Council, but only to public officers, be sound or not, becomes immaterial.

Now, the language of that section, read according to its ordinary and natural meaning, is precise and clear It is a section dealing with procedure. We are asked to cut down the ordinary meaning of the words, and to hold that they mean something quite different from that which in their ordinary acceptation they do. The section says : "No suit shall be instituted." We are told we ought to confine the words to a particular class of suits, that is, to suits founded on tort, and claiming damages. I am unable to see why the section should be cut down as suggested.

A variety of cases were cited in the Court below,—English cases based upon English Acts of Parliament in which the language and the subject-matter is different. Upon this it is not out of place to refer to what has been said by Lord MACNAGHTEN in delivering the judgment of the Judicial Committee in a very recent case, *Narendra Nath Sircar* v. *Kamalbasini Dasi*, (1896) I. L. R., 23 Cal., 563 : L. R., 23 I. A., 26. It is true that in that case the Judicial Committee was dealing with the question of the construction of a will having regard to a particular section of the Indian Succession Act.

The judgment runs. "The learned Judges of the High Court have taken the line which was approved in the House of Lords. The Subordinate Judge followed exactly the opposite course. His judgment, with much display of learning and research, is a good example of the practice which Lord HERSCHELL condemns, and the mischief which the Indian Succession Act, 1865, seems designed to prevent. To construe one will by reference to expressions of more or less doubtful import to be found in other wills, is for the most part an

unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To search and sift the heaps of cases on wills which cumber our English law reports, in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and [244] brought up under different conditions of life, seems almost absurd."

It seems that substituting "English Acts of Parliament" for "wills" the observations of the Privy Council may be usefully applied to this case. In lieu of reading section 424 by the light of the decisions of the English Courts in cases under various English Acts of Parliament, where the language and in most cases the objects of the Acts are different, I prefer to read the section itself and try to arrive at a conclusion from the language used as to what the Legislature actually meant. But even if the true principle be that the statutory notice is only requisite in cases of tort, as I understand is the principle of Mr Justice AMEER ALI'S judgment, the plaintiff's suit in this case is based upon an alleged tort on the part of the Secretary of State, namely, in wrongfully selling the property, and asking for costs against him on the footing of such wrongful act.

If the object of such a section as 424 be that the notice is given so that, before an action is brought, the Secretary of State may have breathing time so as to enable him to determine whether reparation ought not to be made,—if that, I say, be the object,—I fail to see why the principle does not apply to the present case; if so, the notice was requisite. There is a short reference in the judgment to a decision of the late Master of the Rolls (Sir GEORGE JESSEL) in *Flower* v. *Local Board of Low Leyton*, (1877) L.R., 5 Ch. D., 347, to the effect that notice cannot be necessary where the object of the action is to restrain an immediate and irreparable injury. The materials before us do not enable us to say how far the present case comes within the principle laid down in the decision of Sir GEORGE JESSEL, though I notice that no injunction is asked for against the Secretary of State. It would appear, therefore, that he, at any rate, could not be described, and was not regarded by the plaintiff, as doing any immediate or irreparable injury, which necessitated, as against him, an immediate interlocutory order for an injunction. For these reasons it appears to me that upon the preliminary point the judgment of the Court below is erroneous, and I think the appeal must succeed with costs.

[245] **O'Kinealy, J.**—I agree in the judgment just delivered by the learned Chief Justice, because reading section 424 of the Procedure Code, I find that it declares that no suit can be instituted against the Secretary of State "until the expiration of two months next after notice in writing has been delivered to or left at the office of a Secretary to the local Government," and I can find no indication that any limitation has been put upon the word "suit."

Trevelyan, J.—I think it quite clear that the Secretary of State was entitled to notice of this suit for the reasons given by the learned Chief Justice.

Mr. *Hill.*—The purchaser is entitled to his costs against somebody, and in the view of this Court the Secretary of State certainly ought not to have been made a party. [MACLEAN, C.J.—Do you ask to have the suit dismissed as against the purchaser?] Yes: for, although he is only the respondent, he is entitled to take a ground common to all the defendants. The question of notice is common ground. Notice must be given in order that the suit may lie against the Secretary of State, and as the suit has been dismissed as against him, it should be dismissed as against the other defendant also. By the dismissal of the suit, the sale certificate is allowed to remain, and the purchaser's title is complete. If the suit is not to be dismissed as against the purchaser, the Court would be bound to direct the Secretary of State to refund. But it cannot do that, because, by the present decision of the Court, there is no suit

against the Secretary of State. [MACLEAN, C.J.—Is that a ground of defence common to you both within section 544 of the Code?] Yes, because it goes to the entire suit of the plaintiff.

Maclean, C.J.—The result of the judgment of the Court is that the suit is dismissed, not only against the Secretary of State for India in Council, but also against the defendant Radharomon Shaw with costs both in the Court below and in this Court.

We make no order as to the costs of the Appeal No. 23 of 1896.

Attorney for the Appellant: The *Government Solicitor* (Mr. *W. K. Eddis*).

Attorneys for the Respondent Radharomon Shaw: Messrs. *Dignam & Co.*

H.W.

NOTES.

[See also (1911) 35 Bom., 362, (1910) 35 Bom. 42, (1914) 18 C.W.N., 1340; (1912) 17 C.W.N., 64; (1907) 34 Cal., 257: 5 C.L.J., 148; (1902) 30 Cal., 36 at 72, (1906) 10 O.C., 49; (1901) 4 O.C., 133.]

[246] APPELLATE CIVIL.

The 5th May, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Sarala Dasi and others............Plaintiffs

versus

Jogendra Narayan Basu and another............Defendants.*

Interest—Mortgage—Construction of Mortgage—Post diem interest, where none is stipulated for in the deed.

Where a mortgage-deed contained a covenant for payment of principal and interest at a fixed rate in two years, and further covenants not to transfer the mortgaged property until payment of principal and interest, and also on failure of payment of interest for "one year" to treat the amount after the lapse of that year, as principal.—

Held, upon the construction of the mortgage deed, the parties intended that if the principal were not paid by the stipulated date, interest should continue to run at the rate mentioned in the deed, and that the mortgagee was entitled to recover the principal with interest at the stipulated rate to the date of the decree of the first Court, and at the rate of 6 per cent. thereafter.

Mathura Das v. *Narindar Bahadur Pal*, (1897) I. L. R., 19 All., 39: L. R., 23 I. A., 138, referred to.

THIS appeal arose out of an action brought by the plaintiff upon a mortgage bond, dated the 25th *Falgoon* 1292 B. S. (8th March 1886). The bond amongst others, contained the following covenant:—

"We shall pay interest on the said amount at the rate of 1 per cent. per mensem, until the said principal and interest thereon are paid up; we shall not sell or make a gift of the said *mehal* or any way prejudice our rights . . . If we fail to pay the interest of one year, then, after the lapse of one year the said amount of interest will be considered as principal and we shall pay interest on it at the above mentioned rate. We shall repay the whole

* Appeal from Original Decree No. 150 of 1896, against the decree of Babu Beni Madhub Mitter, Subordinate Judge of Hooghly, dated the 31st of March 1896.

amount together with interest thereon in the month of *Chaitra* 1294 B. S. (March 1888) the time fixed for the payment of the same. If we cannot repay the principal amount together with the interest thereon within the fixed time, then you shall institute a suit against us and realize the whole amount by sale of the mortgaged properties; and if the whole sum fails to be realized by this means, then you shall realize it by the sale of our other moveable and immoveable properties standing either in our names or *benami*."

The only question material for the purposes of this report [247] was, what was the rate of interest (if any) the plaintiff was entitled to after the due date. The Subordinate Judge on this question observed:—

"I am of opinion that, although there is no express stipulation in the bond for payment of interest after the due date, still the plaintiff is entitled to claim damages for breach of contract from the defendants, from the due date to the date of the institution of this suit. Had the defendants paid the amount due to the plaintiff on the due date, then the plaintiff would be able to lend that amount to some other person and get interest from him. It has been already shown the defendants did not pay the amount due to the plaintiff on the date on which it was due, and caused the plaintiff to refrain from instituting a suit by their entreaties. Under such circumstances the plaintiff is entitled to get damages in the shape of interest, after the due date, at a rate at which moneys are lent with security. Neither party has adduced any evidence to prove the rate of interest of mortgage bonds in the locality at the time the due date expired. Under these circumstances I think the Court ought to allow simple interest in lieu of damages to the plaintiff after the due date at the rate of 6 per cent. per annum."

From this decision the plaintiff appealed to the High Court, on the ground that, upon the construction of the mortgage bond, the Subordinate Judge ought to have allowed interest after due date at the stipulated rate.

Babu *Sarada Churn Mitter* and Babu *Haro Kumar Mitra* for the Appellants.

Babu *Nil Madhub Bose* and Babu *Shib Chunder Palit* for the Respondents.

The **judgment** of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows:—

Maclean, C.J., (BANERJEE, J., *concurring*).—The appellants complain that the Judge in the Court below has not given them the interest to which they are entitled on the mortgage created in their favour by the defendants, the realisation of which security was the subject matter of the present suit. The questions we have to decide are first, whether, upon the construction of the mortgage deed, the plaintiffs as mortgagees are entitled to *post diem* interest at the rate stipulated for in the deed.

If upon the construction of the deed, we arrive at a conclusion adverse to the plaintiffs, the appellants, then a further question would arise whether the plaintiffs are entitled to any and [248] what interest upon the mortgage money up to the date of payment.

In the view we take of the construction of the deed the second question does not arise. In my opinion, there is, though not an express, an implied, stipulation that *post diem* interest is to be paid and to be paid at the rate stipulated for in the deed. We can only determine the intention of the parties upon the question of interest from the terms of the deed itself. One deed cannot be construed by reference to the construction judicially put upon another deed, but it is impossible to avoid noticing the marked resemblance between the terms of the deed in this case and those in the deed in the case of *Mathura Das* v. *Narindar Bahadur Pal*, (1897) I. L. R., 19 All., 39: L.R., 23 I. A., 138, a case which has been much commented upon in the course of the present argument. But I refer to and rely upon that case, not by reason of the similitude of language between the deed in that and in the present case, but with

reference to the arguments upon which, in construing the deed in that case, the Privy Council relied and based their conclusion. The reasoning in that case appears to me to be very pertinent to the present. Looking at the provisions of the deed in this case, I think it was the intention of the parties,—and in a simple mortgage transaction it is not an unusual intention,—that if the principal money be not paid by the stipulated time, interest should continue to run, and run at the stipulated rate. Such a construction is consistent with the ordinary intention of mortgagor and mortgagee in an ordinary mortgage transaction.

I will now consider certain of the provisions of the deed itself. At the top of page 21 of the Paper Book, we find this, "we shall pay interest on the said amount at the rate of one per cent. per mensem." I pause there for a moment. There is nothing there confining the payment of interest only until the time stipulated for payment off of the principal. As regards time the payment of interest is unlimited. The deed then proceeds: "Until the said principal and interest thereon are paid up, we shall not sell or make a gift of the said *mehal*, or in any way prejudice our rights in the same." The "said interest" in that clause refers of necessity to the interest [249] mentioned in the preceding clause,—interest, as I have pointed out, unlimited as to the period over which it was to be payable.

Now I find, in the case to which I have referred, an almost similar provision in the deed in that case I find in that deed this clause: "Until the payment in full of this amount, principal and interest, I shall not transfer, either directly or indirectly, the mortgaged property to any one else, and if I do, such a transfer should be deemed false and inadmissible." Now what do their Lordships of the Privy Council say upon such a condition as that—"If it be true," they say, "that covenants not to transfer till principal and interest be paid are sometimes inserted, when the intention is only to secure interest for a single year, such intention must be gathered from other parts of the deed itself. If such a covenant, not being controlled by other parts of the deed, does not mean that interest is to run till payment, it is very difficult to say what it does mean." I may also rely upon the reasoning of their Lordships at page 145 of the report (I. L. R., 19 All., at p. 49), as applying with equal force to the present case.

There are other provisions in the deed which appear to me to support our present view. For instance there is the provision that, if the mortgagors fail to pay interest for "one year," then, after the lapse of that year, the amount was to be treated as principal. The time stipulated for repayment of the principal was at a date between one and two years from the date of the mortgage. This reference to the failure to pay one year's interest appears to me to indicate that it was in the contemplation of the parties that interest was to be paid until the principal was repaid, and that the transaction was not to be closed when the day fixed for payment of the principal arrived. Then the provision for sale in default of repayment of the principal sum "together with interest" thereon, the provision for realising "the whole amount," the reference to the non-realisation of "the whole sum," are expressions which appear to me to indicate that the interest referred to in the deed is interest up to the time of realisation. As I have pointed out before, such construction is in accordance with the usual intentions of parties to such a transaction. In my opinion, therefore, upon the construction of the mortgage deed the parties intended that if the principal were not paid by the stipulated [250] date, interest should continue to run at the rate mentioned in the deed. Being of that opinion I think the Court below was in error as to the amount of interest

allowed to the plaintiff, and the decree must be varied by directing that the plaintiff be entitled to principal with interest, at the rate mentioned in the mortgage-deed, up to the date of the decree in the first Court, and after that date at the rate of six per cent. per annum until payment. The appeal must be allowed with costs in proportion to the amount decreed and disallowed respectively. The costs in the Court below will be increased proportionately by the additional sum to be recovered on the security.

S. C. G. *Appeal allowed.*

NOTES.

[See also (1899) 23 Mad., 534 : 10 M.L.J., 101; (1901) 14 C.P.L.R., 49.]

[25 Cal. 250]

The 29th April, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Mohesh Chandra Bhuttacharjee and another............Opposite Parties

versus

Biswa Nath Bhuttacharjee............Petitioner.*

Probate and Administration Act (V of 1881), section 98—Act VI of 1889, section 15, Amending Act V of 1881—Construction of Act—Meaning of the words "an account."

The provisions of section 98 of the Probate and Administration Act, that an executor shall within one year from the grant of probate or letters of administration "or within such further time as the Court may from time to time appoint, exhibit an account of the estate," mean that one account is to be exhibited, and not a series of accounts from time to time; the words "from time to time appoint" relating to an extension of the period within which an account is to be exhibited.

THE facts of the case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgments of the High Court.

Mr. *W. C. Bonnerjee* and Babu *Horendra Narayan Mitter* for the Appellants.

Mr. *C. P. Hill* and Babu *Basanta Kumar Bose* for the Respondent.

The following **judgments** were delivered by the High Court (MACLEAN, C.J. and BANERJEE, J.).

[251] Maclean, C. J.—The point we have to decide is a short one, viz., as to the true construction of section 98 of the Probate and Administration Act V of 1881. The facts of the case lie within a narrow compass. The testator made a will on the 17th of July 1884, and the two appellants and the respondent, who is represented by Mr. *Hill*, were appointed executors. The testator died on the 14th September in that year leaving an adopted infant son, and on the 1st of June 1885 probate was granted to the appellants alone. On the 31st of January 1887, the appellants filed, I presume under the section I have referred to, their accounts from 16th September 1884, a day or two after the testator's death, to 30th September 1886. On the 10th of June 1887, by what I may call a somewhat short cut, the respondent's name was inserted into the

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* Appeal from Original Order No. 89 of 1897, against the order of S. J. Douglas, Esq., District Judge of Dacca, dated the 15th of January 1897, and Rule No. 140 of 1897.

probate as one of the executors, the other executors not objecting.* In 1888, the respondent brought a suit against the appellants for an account of the executorship, alleging that he was not allowed by his co-executors to interfere in the management of the estate. However, on the 8th of January 1889, the respondent withdrew that suit and admitted that the accounts were correct. In 1891, another suit, on behalf of the infant beneficiary was instituted by the mother, as his next friend, against the appellants for accounts from September 1884 to April 1891. I understand that the respondent in this appeal was not a party to that suit. I do not understand how an administration suit could be regarded as properly framed, one of the executors not being a party. Be that as it may, on the 31st of December 1891 that suit was compromised, the compromise being declared by the Court to be for the benefit of the infant. Matters rested thus until the 9th of September 1895 when the respondent applied to the District Judge of Dacca under section 98 of the Act to which I have referred, asking for accounts from the appellants from the 1st of December 1886 to the 31st December 1896. That application was resisted by the appellants, but on the 15th of January 1897, the learned Judge ordered the appellants to give accounts for the period which I have mentioned ; hence the present appeal.

These being the facts, the question turns upon the true construction of section 98 of the Probate and Administration Act, the [262] question admittedly being, whether the Court can under that section go on from time to time directing executors to deliver accounts, or whether, according to the true meaning of that section, that power can only be exercised once. The section has been read and I need not read it again ; but to my mind the language is reasonably clear It says first, that "the executor or administrator shall within six months from a certain date, or within such further time as the Court, which granted probate or letters of administration, may from time to time appoint, exhibit an inventory," and so on. Stopping there, I think it is clear that the words "from time to time appoint," relate to an extension of the period within which the inventory is to be exhibited, and if this be so, these words so used in this part of the section throw considerable light upon the meaning of the same words used in the subsequent part of the section The words "from time to time appoint," cannot mean, in the earlier part of the section, that the Court can go on, again and again, calling on executors to furnish an inventory. One inventory would be sufficient, but as, say in the case of a large estate, it might not be practicable to furnish that inventory within the time specified in the section, the Court is empowered to extend that period from time to time.

I now come to that part of the section dealing with the executor's account. The material words are, "and shall in like manner within one year from the grant, or within such further time as the said Court may from time to time appoint, exhibit an account [263] of the estate showing the assets," and so forth. The language used is identical in both parts of the section, and I am of opinion that the words in the latter part of the section "from time to time appoint"

* Section 98 (as amended by section 15 of Act VI of 1889), so far as is material to this report, is as follows:—

"An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may from time to time appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the grant, or within such further time as the Court may from time to time appoint, exhibit an account of the estate showing the assets which have come to his hands, and the manner in which they have been applied or disposed of."

relate to an extension of time for putting in the account, and does not authorize the Court to go on calling upon the executors to exhibit accounts from time to time, as often as the Court thinks fit. This view is emphasised by the consideration that the section speaks of "an account," that is one account, not a series of accounts. As I have pointed out there are good reasons for giving the Court a discretionary power of extending the time both for the inventory and the account. In the case of a large estate it might not be possible for the executors to exhibit an account of the assets within the time fixed. The Legislature, therefore, empowers the Court to extend that period. I see nothing in the language of the section, read in its ordinary sense and signification, to authorize the Probate Court to go on from time to time ordering executors to go on exhibiting their accounts. With respect to the suggestion that the respondent's contention, if successful, would have a useful result in ensuring that an estate is properly administered, the answer to that is, that the ordinary Civil Courts are the proper tribunals to which to apply if the parties interested are under the impression that the executors are not properly doing their duty.

Upon these grounds I think that the construction which the learned Judge has put upon the section is erroneous, and that the appeal must succeed, and be decreed with costs; and the appeal succeeding, it is admitted by Mr. *Bonnerjee*, who obtained the rule, that the rule becomes unnecessary That being so, the rule will be discharged with costs

Banerjee, J.—I am of the same opinion. Section 98 of Act V of 1881, so far as it is necessary to refer to it for the purposes of this case, enacts that "an executor or administrator shall within one year of the grant of letters of administration, or within such further period as the said Court may from time to time appoint, exhibit an account of the estate showing the assets which have come to his hands and the manner in which they have been applied or disposed of," and that means, evidently, that there [254] is to be a filing of accounts, and that is to be within one year from the granting of the probate or letters of administration, or within such further time as the Court granting probate or letters of administration may from time to time appoint. The section does not say that the filing is to be first within one year of the order, and then again within such further time as the said Court may from time to time appoint; but it speaks of the time of filing being within one year from the time of the probate or letters of administration being granted, or within such further time as the said Court may from time to time appoint. What is spoken of as taking place from time to time is not the filing of a series of accounts, but the appointment of the time within which the filing of the account is to take place; or, in other words, the clause relates merely to the extension of the time within which the filing of the account must take place

S. C. G. *Appeal allowed, and Rule discharged*

NOTES.

[See also (1904) 31 Cal., 628: 8 C.W.N, 578, (1913) 18 C.W.N. 153.]

[25 Cal. 254]

The 6th September, 1897.

PRESENT :

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Sarna Moyee Bewa............Petitioner

versus

Secretary of State for India in Council............Opposite Party.*

Hindu Law—Inheritance—Letters of Administration—Probate and Administration Act (V of 1881)—Prostitute—Succession to property of degraded woman.

In the absence of any local custom or usage to the contrary, a woman of the town is no heir to her deceased sister, who was also a woman of the town.

Sivasangu v. *Minal*, (1889) I. L. R., 12 Mad., 277, distinguished.

A woman of the town, who is a Hindu by birth, does not cease to be a Hindu by reason of her degradation, and succession to her property is governed by Hindu law.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Golap Chunder Sarkar*, and Babu *Gobind Chunder Deb Roy* for the Appellant.

[255] Babu *Ram Chunder Mitter* for the Respondent.

The **judgment** of the High Court (**Maclean, C.J.**, and **Banerjee, J.**) was as follows :-

This appeal arises out of an application for letters of administration to the estate of Sahachari Bewa by the appellant, who claims to be her sister and only heir. The application was opposed by the Secretary of State for India, who alleged that the deceased Sahachari Bewa was a woman of the town, that the petitioner was not her heir, and that the estate of the deceased had escheated to the Crown.

The Court below has disallowed the application, holding that the sister was no heir to the property of a woman under the Bengal School of Hindu law, and that the evidence was not sufficient to prove that the petitioner was the sister of Sahachari.

The petitioner has preferred this appeal against that decision, and it is contended on her behalf, *first*, that the learned Judge below is wrong in holding that the sister is no heir to a woman's property; and *secondly*, that the learned Judge below is wrong in holding that the evidence is insufficient to prove the relationship set up.

It is conceded, as it must be, that if the Hindu law governs this case, it must be the Hindu law of the Bengal School, and that according to the law of that School the sister is no heir. But the learned Vakil for the appellant seeks to make out the right of his client upon two alternative grounds.

In the first place, he argues that as the deceased Sahachari was a woman of the town, and the petitioner also belongs to the same class, the ordinary Hindu law does not apply to this case, and that it is governed by those

* Appeal from Original Decree No. 202 of 1896, against the decree of J. Pratt, Esq. District Judge of 24-Pergunnahs, dated the 31st of March 1896.

principles of natural justice not inconsistent with the Hindu law, according to which the sister, as a near consanguineal relation, should be held to be in the line of heirs; and in support of this argument he relies upon the definition of "heritage" in the Dayabhaga, Ch. I, para. 5, according to which the right of inheritance depends upon relationship with the former owner, and also upon the cases of *Myna Boyee* v. *Ootaram*, (1861) 8 Moo I A., 400; S.C. in High Court after remand (1864) 2 Mad. H. C., 196; *Sivasangu* v. *Minal*, (1889) I. L. R., 12 Mad., 277; *Narasanna* v. *Gangu*, (1890) I. L. R., 13 Mad., 133; and *Tara* [256] *Naikin* v. *Nana Lakshman*, (1890) I. L. R., 14 Bom., 90. And in the second place he contends that Sahachari Bewa should be considered as a person who was not a Hindu within the meaning of section 331 of the Indian Succession Act, that succession to her property should be held to be governed by that Act, and that her sister should therefore be held to be her heir.

The first branch of this argument is ingenious, but not sound. The passage of the Dayabhaga (Ch. I, 5) relied upon only shows at the most that every right to inherit is created by relationship with the former owner; but it does not establish the converse proposition that every relationship with the former owner creates the right to inherit. Moreover, it would be a strange anomaly, that though the sister is no heir to a female proprietor under the Bengal School of Hindu law, if they remain undegraded, yet if they both lapse into prostitution, the one becomes an heir of the other, quite apart from custom. The rule that of the ordinary heirs to a woman, those who remain undegraded are not competent to inherit her property, if she becomes degraded by leading the life of a prostitute, which has been laid down in several cases of which I may mention one, namely, *In the goods of Kaminey Money Bewah*, (1894) I. L. R., 21 Cal., 697, is based upon the principle that by her degradation the tie between her and her undegraded relations becomes severed; and this principle is unaffected by Act XXI of 1850, which only removes the disqualification by degradation of the person claiming the right to inherit. But that rule cannot help the petitioner in this case; for here there is no question of competition between a degraded and an undegraded relation; the question being whether the petitioner is an heir of the deceased at all. Nor is there any question here as to whether the petitioner is by custom an heir to the deceased, no custom being pleaded or proved. Of the cases cited, *Myna Moyee* v. *Ootaram*, (1861) 8 Moo. I. A., 400; S.C in High Court after remand (1864) 2 Mad. H.C., 196, has only a remote bearing upon the present case. In that case certain persons being the illegitimate sons of a Christian father by Hindu mothers, were brought up as Hindus, and lived as members of a joint Hindu family, and one of the questions raised was whether [257] any one of them could claim as heir the property of his uterine brother. The Courts in this country having answered the question as a point of Hindu law in the affirmative, their decision was reversed by the Privy Council, and the case was sent back for further inquiry, especially with reference to local custom or usage. After the remand, the Madras High Court re-affirmed the original answer, the learned Judges "feeling satisfied" as they said "that all the analogies of Hindu law and the plain rules of equity and justice are in favour of the evidence of heritable blood between the illegitimate sons." Whether this view is correct or not it is unnecessary for us now to consider. It will be sufficient to say that accepting it to be correct, it does not help the appellant before us, because in the case cited the party claiming to be the heir, the uterine brother of the deceased, was certainly his heir under the ordinary Hindu law, but for the stain of illegitimacy on the relationship between the parties, and all that the Madras High Court decided was that that stain did

not affect the heritable right of the plaintiff; whereas in the present case the appellant is no heir to the deceased under the ordinary Hindu law of the province, and what she has to make out is that the stain of degradation creates a new heritable right in her.

As for the other three cases relied upon, *Sivasangu* v. *Minal*, (1889) I. L. R., 12 Mad., 277, *Narasanna* v. *Gangu*, (1890) I. L. R., 13 Mad., 133, and *Tara Naikin* v. *Nana Lakshman*, (1890) I. L. R., 14 Bom., 90, they and other similar cases, of which there are several in our reports, are based more or less upon local custom and usage. It was ingeniously argued upon the authority of a text of the Skanda Purana cited in the Mitakshara in its Commentary on Yajnavalkya, Ch. II, v. 290 (see Sanskrit, Mitakshara, Bombay Edition, p. 265, Grish Chunder Tarkalankar's Translation, p. 231) which treats prostitutes as forming a fifth class or caste, that prostitutes belong to one caste or community all over India, and that if a degraded sister of a prostitute is her heir in Madras as has been held in *Sivasangu* v. *Minal*, (1889) I. L. R., 12 Mad., 277, the same rule should be held to be true for Bengal. One simple answer to this argument **[258]** is that in the case just mentioned, the deceased and her degraded sister lived jointly, and this circumstance is relied upon in the judgment, whereas in the case before us the appellant and her deceased sister lived in widely distant places, and did not since their degradation meet each other more than twice or thrice in the course of nearly a quarter of a century. And we need hardly add that a custom obtaining amongst any caste in Madras or Bombay cannot, in the absence of evidence, be assumed to govern the same class in Bengal.

The second branch of the argument advanced by the learned Vakil for the appellant is clearly untenable. The deceased Sahachari was clearly a Hindu by birth, and it is neither shown nor even suggested that she ever abjured Hinduism. By lapsing into prostitution she became an outcaste, but did not cease to be a Hindu. The passage of the Mitakshara referred to above fully supports this view. The Indian Succession Act cannot therefore apply to this case.

In the view we take that assuming the appellant to be the sister of the deceased, still she is no heir to her, it becomes unnecessary to consider the question whether the relationship set up has been proved.

The result then in our opinion is that the appeal fails, and must be dismissed with costs.

S. C. G. *Appeal dismissed.*

NOTES.

[It has been held by a Full Bench of the Calcutta High Court that prostitution does not sever the pre-existing kinship and that her heirship to others or the heirship of others to her is not as a general rule affected by the condition of prostitution—*Hiralal* v. *Tripura* (1913) **40 Cal., 650 F.B.**

See also (1907) 6 C.L.J., 372; (1906) 10 C.W.N., 1085; 38 Cal., 493.]

[25 Cal. 258]

The 27th July, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Kali Prosunno Basu Roy and others............Decree-holders

versus

Lal Mohun Guha Roy............Judgment-debtor.*

Limitation Act (XV of 1877), Article 179, schedule II, clause 3—Execution of decree—Order allowing amendment of a decree—Review of judgment—Code of Civil Procedure (Act XIV of 1882), sections 623, 624 and 206.

An order granting an application for amendment of a decree under section 206 of the Code of Civil Procedure is an order passed upon review of [259] judgment within the meaning of article 179,† schedule II, clause (3) of the Limitation Act; therefore an application for execution of a decree within three years from such an order is not barred by limitation.

Kishen Sahai v. *The Collector of Allahabad*, (1882) I. L. R., 4 All., 137, referred to.

THE facts of the case for the purposes of this report appear sufficiently from the judgments of the High Court.

Babu *Horendra Narayan Mitter* for the Appellants.

Babu *Bepin Behary Ghose* for the Respondent.

The following **judgments** were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.)

Maclean, C. J.—On the 18th November 1891, judgment was given in this case by the Subordinate Judge on an appeal to him. The effect of that judgment was to dismiss the suit against the defendants (the present appellants) with costs in that Court and in the Court below. It subsequently transpired that the decree drawn up, although it gave the defendants their costs before the Subordinate Judge, did not give them their costs before the first Court, and in consequence of that error the present appellants, on the 3rd of March 1894, made an application under section 206 of the Code of Civil Procedure to have the decree amended and made to harmonise with the judgment, and on the 10th March 1894 that application was granted. On the 26th February 1896, the appellants, who had thus obtained a judgment in their favour for their costs, took proceedings in execution for the purpose of recovering them. Their right to do so was disputed by the judgment-debtor, and disputed upon the

* Appeals from Order Nos. 144 and 145 of 1897 against the order of Babu Ram Gopal Chaki, Subordinate Judge of Dacca, dated the 16th of December 1896, affirming the order of Babu Paresh Chandra Banerjee, Munsif of Munshigunge, dated the 18th of April 1896.

† [Art. 179, cl. (3):—

Description of Application.	Period of limitation.	Time from which period begins to run.
For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, section 230.	Three years; or where a certified copy of the decree or order has been registered, six years.	* * * cl. (3.) (where there has been a review of judgment) the date of the decision passed on the review, or * * *]

ground that article 179 of the second schedule of the Limitation Act was a bar to their claim. The question we have to decide is whether his right to execution is or is not barred.

The question to my mind is not free from difficulty, but as the result of the argument we have heard I am of opinion that the appellants ought to succeed and to succeed upon the ground that the order of the 10th March 1894 was substantially an order passed upon a review of judgment within the meaning of article 179 of the second schedule to the Limitation Act, and that being so, the period would run, not from the 18th November [260] 1891, the date of the judgment, but from the 10th of March 1894, the date of the decision passed on the review. I have indicated what was the nature of the application, which resulted in the decree being amended on the 10th March 1894, and looking at sections 623 and 624 of the Code of Civil Procedure, it would appear that the terms "review of judgment" or "review of the decree" are applicable, not only to cases where there is something faulty in the judgment itself—I mean the actual judgment pronounced as opposed to the decree—but the cases where there is any mistake or error on the face of the record or any clerical error apparent on the face of the decree. This shows that the term "review of judgment" is not confined merely to cases where the judgment itself was to be reviewed. This, in my opinion, is the sense in which the term "review of judgment" is to be read under the above sections of the Code, and, if so, it is not unreasonable to suppose that the Legislature in the Limitation Act used the same term in the same sense, that is, in the sense in which it is used under the Code. I do not think that in this view I am placing too wide or too comprehensive a construction on these words as used in the Limitation Act. My opinion gains support from that expressed by the Allahabad High Court in the case of *Kishen Sahai* v. *The Collector of Allahabad*, (1882) I. L. R., 4 All., 137, where the Judges say this: "We consider that the proceedings under this application," which was an application practically similar in its nature to that made in this case in March 1894, "were substantially of the nature of a review of judgment, and will, under article 167, schedule II of Act IX of 1871, at the time in force, give a period from which limitation will run in respect of the subsequent application for execution which will therefore be within time."

Upon these grounds I think the appeal must succeed, and must be allowed with costs.

Banerjee, J.—I am of the same opinion. The question raised in this case is whether the application for execution of decree is barred by limitation. The Courts below have answered that question in the affirmative, and it is contended on appeal before us by the learned Vakil for the decree-holders that the Courts below are [261] wrong in holding that the application for execution is barred by limitation, because in the first place limitation should be reckoned in this case from the date of the amendment of the decree upon the application under section 206 of the Code of Civil Procedure; and in the second place, even if that contention fails, the decree-holders should be allowed to reckon time from the date of the application for amendment of the decree under clause 4 of article 179 of the second schedule of the Limitation Act.

In my opinion the second contention is not tenable, because the application that was made was not one to take some step in aid of execution of the decree within the meaning of clause 4 of the said article, the decree itself not having been such as it ought to have been, and the application really being one not for having any step taken in aid of execution, but for having the decree amended, so as to make it fit for execution by the decree-holder. But upon

the first contention I think, though not without some hesitation, that the view which the learned Vakil for the appellants asks us to adopt is the correct view.

The date of the decree must, no doubt, be taken to be the date of the judgment; and it is difficult to say that the date of the decree here was the date on which the amendment was made, when the date of the judgment remained unaltered. But, then, there was here an application for amendment of the decree, and for amendment on a most material point, the point being that the costs of the first Court should be made recoverable by the appellants before us. According to the directions contained in the judgment, the appellants before us were entitled to those costs. By some error in the preparation of the decree, this part of the direction in the judgment was left out of the decree. Was the amendment of the decree then a review of judgment within the meaning of the third clause of article 179? If it was, then the decree-holders are entitled to reckon time from the date of the decision passed on the review, and that date is within three years from the date of the application for execution. The expression "review of judgment" is not defined anywhere in the Limitation Act, and evidently the Legislature used that expression in the Limitation Act in the sense in which it is used in the Code of Civil Procedure. Now, in the Code of Civil Procedure, on referring to sections 623 and 624, [262] I find that the expression "review of judgment" is used interchangeably with the expression "review of decree," that is an amendment of the decree that does not necessitate any alteration in the judgment. If that is so, there seems to be good reason for thinking that a case like the present was intended to be covered by the third clause of article 179. It is not likely that the Legislature did not provide for a case like this, where a decree is substantially altered, although the procedure adopted for having the alteration effected was by way of an application under section 206, and not by way of an application under section 623 of the Code. There being no reason for taking the expression "review of judgment" in any limited or narrow sense, I think we may take it in a sense such as would include a case like the present; and this view receives some support from the case of *Kishen Sahai* v. *The Collector of Allahabad*, (1882) I. L. R., 4 All., 137.

S. C. G. *Appeals allowed.*

NOTES.

[In the Indian Limitation Act, 1908, Art. 182, clause 4, was added to the effect that (where the decree has been amended), the date of amendment should be the starting point of limitation. This sets at rest the previous conflict of case-law between decisions like (1901 24 Mad., 25; (1898) 25 Cal., 258; (1900) 28 Cal., 177; (1900) 5 C.W.N., 192; (1905) 9 C.W. N., 605; (1909) 32 Cal., 938; 10 C.L.J., 467 and those like (1891) 13 All., 124; (1905) 27 All., 575; (1907) 4 A.L.J., 469.]

[25 Cal. 262]

APPEAL FROM ORIGINAL CIVIL.

The 10th and 21st December, 1896.

PRESENT:

SIR FRANCIS MACLEAN, KNIGHT, CHIEF JUSTICE, MR. JUSTICE MACPHERSON, AND MR. JUSTICE TREVELYAN.

Gouri Sunker Panday............Plaintiff

versus

Abhoyeswari Dabee............Defendant.*

Execution of decree—Charge—Attachment without sale—Transfer of Property Act (IV of 1882), sections 67, 99, 100—Res judicata.

The plaintiff, a judgment-creditor, had in the High Court obtained a decree against the defendant, whereby it was ordered that the defendant should pay to the plaintiff a sum of Rs. 1,68,123, and that the said sum should be a charge on certain immoveable properties situated in the mofussil and specified in a schedule to the decree. In August 1894 the plaintiff obtained an order for transfer of the decree to a mofussil Court, and sent a copy of the decree for execution there. He obtained in that Court an order for attachment and sale of the property, but that order was reversed on appeal in May 1895, the High Court holding that the properties could not be sold in execution of the decree, but that a separate suit must be brought under [263] section 67 of the Transfer of Property Act†. The plaintiff then applied to the Court that passed the decree for an order for transmission of the decree to the mofussil Court with a view to execution. That application was refused by SALE, J., who held that the decision of May 1895 was conclusive as to the plaintiff's right to attach the property as distinct from a sale, or to sell it except after a suit under section 67 of the Transfer of Property Act.

Held, on appeal (reversing the decision of SALE, J.) that the application was not *res judicata*.

Held, also, that an order for attachment only as distinct from a sale could be made.

Aubhoyessury Dabee v. *Gouri Sunker Panday*, (1895) I. L. R., 22 Cal., 859, explained. *Chundra Nath Dey* v. *Burroda Shoondury Ghose*, (1895) I. L. R., 22 Cal., 813, referred to.

UNDER a decree of the High Court in its Original Jurisdiction, the plaintiff was the judgment-creditor of the defendant; and the decree directing payment also gave the plaintiff a charge on certain immoveable property belonging to the defendant, and situated in the mofussil. On the 22nd September 1893, the plaintiff obtained an order for sale; but that order was set aside on appeal. On the 7th August 1894 he obtained an order and sent a certified copy of the order to the mofussil Court for execution. The defendant put in objections, which, however, were disallowed, and an order was made for execution. An appeal was preferred from that order, and a rule was obtained on the 13th March 1895 to stay execution pending the appeal. On the 27th May 1895 the High Court (NORRIS and GORDON, JJ.) reversed the order for execution.† The plaintiff then applied to the High Court in its Original Jurisdiction for an order for transmission of the decree with a view to attachment of the property. The order was refused, SALE, J., holding that the matter was concluded by the decision of NORRIS and GORDON, JJ.

* Appeal from Order No. 9 of 1896, against the decision of Mr. Justice SALE, dated the 3rd March 1896 in suit No. 41 of 1892.

† See *Aubhoyessury Dabee* v. *Gouri Sunkur Panday* (1895) I. L. R., 22 Cal., 859.

The JUDGMENT of SALE, J., was as follows:—

This is an application for transmission of the decree of this Court for execution to a mofussil Court, that is to say, the Court [264] of the Judge of the 24-Purgannahs; and the application raises the question as to whether the plaintiff is entitled to proceed by way of execution for the purpose of realizing the amount due under the decree. Mr. *Apcar* has referred to section 99 of the Transfer of Property Act, and he has contended that that section contemplates the precise right which he says he desires to exercise—the right to attach the properties. The effect of the decree is to charge certain properties with the decretal amount, and it is admitted that the present application is a step in the procedure to enable the applicant to attach certain of the properties charged under the decree. Section 99 does not in terms give, nor was it intended thereby to give, to a person who has obtained a mortgage decree, a right to attach the mortgaged properties. The right to proceed by way of attachment must be dependent, I think, on the provisions of the Civil Procedure Code. The object of section 99 of the Transfer of Property Act is (in those cases where mortgaged property has been attached) to prevent the judgment-creditor from proceeding to sell that property, except in a particular way, viz., under section 67 of the Act; and it may be, as Sir *Griffith Evans* has suggested, that the section was framed in view of the practice which, though not recognized in this Court, certainly prevails in the mofussil, whereby mortgagees who have obtained money decrees are allowed to attach the mortgaged property. The same question was raised between the parties in the cases of *Aubhoyessury Dabee* v. *Gouri Sunkar Panday*, (1895) I. L. R., 22 Cal., 859.

Mr. *Apcar* has contended that that case does not conclude him on the point as to whether he has the right to attach. It is said that the case only decides that the plaintiff has not the right to proceed to sale of the property. And Mr. *Apcar* contends that he is entitled to put himself in the position contemplated by section 99, and that for that purpose he is entitled to an order for attachment.

But the order appealed against was in effect an order directing the attachment to issue against a portion of the property charged by the decree. The order was that the property, the subject-matter of the attachment, should be sold after attachment, which must mean that the property should be attached in the first [265] instance; there could be no sale in execution till after attachment. That order the Appellate Court said should be set aside. At page 864 of the report the learned Judges say: "If the plaintiff wishes to sell the properties charged, he must bring a suit." That seems to me to be a ruling to the effect that no step in execution can be taken for the purpose of realizing any portion of the money due under the decree. That being so, I have no option but to refuse the present application with costs.

The plaintiff appealed.

Mr. *Hill* (with him Mr. *Stephen*) for the Appellant.—The question for the Court is whether the plaintiff is entitled to have the decree transmitted. The matter is not *res judicata*. The Court has put an erroneous construction on the Transfer of Property Act, and the plaintiff is entitled to show that, and to ask for transmission of the decree. There is nothing in section 99 of the Transfer of Property Act prohibiting an attachment of this kind, nor is it necessary to bring a separate suit—*Chundra Nath Dey* v. *Burroda Shoondury Ghose*, (1895) I. L. R., 22 Cal., 813. Section 100 of the Transfer of Property Act does not apply to a charge created by a decree of the Court; it refers only to charges created by the parties or by operation of law. But this charge was created by the decree of the Court, and not the less so because that decree was a

consent decree. It is submitted that the decision in *Aubhoyessury Dabee* v. *Gouri Sunkur Panday*, (1895) I. L. R., 22 Cal., 859 is wrong. For the decree is something higher than any agreement between the parties; and it was not the agreement but the decree that created the charge. [MACPHERSON, J.—At present the effect of such an order is that you cannot execute the decree at all.] That is so. That decision is merely a precedent; and the decree in this case is a subsisting decree. [MACPHERSON, J.—Had the learned Judge any authority to say whether the mofussil Court could or could not attach these properties?]. I submit not. All that he was asked to do was to transmit the decree. We confessed that the object of the application was to attach with a view to sale; and because [266] he said that object could not be attained, he refused to make the order.

Mr. *Woodroffe* and Mr. *S. R. Dass* for the respondent.—The Court has declared that the decree made in this suit was a charge on the property. [MACPHERSON J.—Taking that order at its highest, all that it holds is that the Court would not attach and sell. It does not hold that the Court could not attach. Is that *res judicata* ?] Yes,—*Ram Kirpal Shukul* v. *Rup Kuari*, (1883) I. L. R., 6 All., 269: L R., 11 I. A. 37. In the present case, the appellant applied for a review of the decision of NORRIS and GORDON, JJ.; it was refused, and he has never appealed against it. He concedes that he cannot attach and sell the property, and the Court will not make an order which it knows will be of no effect. There is no such step known to the law as merely sending a decree from one Court to another; the sending is always for the purpose of executing the decree [MACPHERSON, J.—He could possibly benefit under section 295 of the Code by such an order.] That section applies only to the execution of decrees for money. This is not a money decree, it is a mortgage decree, and the execution of mortgage decrees is regulated by the Transfer of Property Act. The decree-holder cannot bring the property to sale otherwise than by a suit under section 67 of the Act,—*Jaduh Lall Shaw Chowdhry* v. *Madhub Lall Shaw Chowdhry*, (1893) I. L R., 21 Cal, 34; *Matangini Dassee* v. *Chooneymoney Dassee*, (1895) I. L R, 22 Cal., 903, *Azim-Ullah* v. *Najm-un-nissa*, (1894) I. L. R., 16 All., 415. If he does, the sale is invalid—*Durgayya* v. *Anantha*, (1890) I. L. R., 14 Mad., 74.

Whenever real property is to be dealt with in execution proceedings under the Code, sale is to be preceded by attachment. Thus, in sections 244 and 266 attachment and sale are treated as one process. In *Denonauth Ruckit* v. *Mutty Lall Paul*, (1863) Hyde, 158 it is laid down that the words "attachment and sale" are to be taken together, and not read distributively. Therefore, if an order for attachment be made, and the attachment effected under section 274, the Court may,—and 'may' in section 274 is declared in [267] *Kashi Nath Roy Chowdhry* v. *Surbanand Shaha*, (1895) I. L. R., 12 Cal.. 317 to mean 'shall'—order the sale of the property. Leaving aside prohibitory orders, which are clearly distinguishable, there is no provision in the Code, with respect to immoveable property, for attachment not to be followed by sale.

It is *res judicata* that the appellant is in the position of a mortgagee; he cannot now be allowed to contend that he has a mere money decree. [TREVELYAN, J.—Suppose a mortgagee has a decree on a claim entirely apart from the mortgage—say a decree in respect of work done—cannot he attach the mortgaged property without selling it?] No, because section 99 of the Transfer of Property Act says he shall not, whether the claim arises on the mortgage or not. [TREVELYAN, J.—Then he is in a worse position than any other person by the very reason that he is a mortgagee of the property.] Nor can he come in under section 295 of the Code, unless he has a mere money decree.

And as a sale of the property is barred by section 99 of the Transfer of Property Act, the Court will not issue a useless order for attachment merely.

Mr *Hill* in reply.—An order refusing execution does not make the matter a *res judicata*—*Delhi and London Bank* v. *Orchard*, (1877) I. L. R., 3 Cal., 47 : I. L. R., 4 I. A., 127; *Hurrosoondary Dassee* v. *Jugobundhoo Dutt*, (1880) I. L. R., 6 Cal., 203.

In the argument before NORRIS and GORDON, JJ., it was conceded that the attachment, without the order for sale, could go. It does not follow that, because a sale cannot be had without attachment, therefore an attachment must necessarily be followed by a sale. There are various sections in the Code which recognise an attachment apart from a sale; and this is intended for the protection of the judgment-creditor as against both the judgment-debtor and third persons. See, for instance, sections 235 (*j*), 274, with Form No. 141,—and the Forms are by section 644 of the Code made of statutory obligation. So in section 260 where the attachment of the property is put in the same category as imprisonment of the person, *i.e.*, as a means of exerting pressure [268] on the debtor. So, again, sections 275 and 284 show that a subsequent order is contemplated if a sale is desired.

Further, this decree is not a mortgage decree. It is a money decree combined with a charge created by the decree. But the fact that it is a money decree and something more does not make it cease to be a money decree; and it is recognised as such by NORRIS and GORDON, JJ. There are many advantages in having an attachment, whether the plaintiff is a first mortgagee or a subsequent incumbrancer. The judgment in *Aubhoyessury Dabee* v. *Gouri Sunkur Panday* did not decide that we could not have an attachment, but only that we could not sell. The learned Judge in the Court below is wrong in supposing that it did so decide Section 99 of the Transfer of Property Act clearly points to a recognition of the right to attachment quite apart from the right to sell.

C. A. V.

The following **judgments** were delivered by the Court (MACLEAN, C.J., and MACPHERSON and TREVELYAN, JJ.) :—

Maclean, C.J.—This case has been very elaborately argued, and many cases have been cited, and various sections of the Code and Acts of the Legislature referred to; but in my opinion the case is reduced to a short, and I do not think a really difficult, point.

The plaintiff is a judgment-creditor of the defendant, and the decree directing payment also gave him a charge upon certain property of the defendant I purposely refrain from expressing any opinion as to whether the plaintiff is a mortgagee within the meaning of section 99 of the Transfer of Property Act; in the view I take of this case it is immaterial to say anything as to that. Having obtained his judgment he not unnaturally wishes to obtain the fruits of it. He has made two unsuccessful attempts to do this. On the 22nd September 1893 he obtained an order from this Court for the sale of the property, but that order was reversed on appeal. On the 7th August 1894 he obtained an order to send a certified copy of the decree to the Judge of the Assam Valley Districts for execution, and then applied in that Court, for a sale after attachment of the property, to the Judge [269] of that Court, and on the 2nd March 1895 the Court made the order, notwithstanding the objection of the defendants, who urged that the properties could not be sold in execution of the decree, unless and until the plaintiff had instituted a suit for sale under the conjoint operation of sections 99 and 67 of the Transfer of Property Act.

It is clear that the point raised, discussed, and decided in the Court at Dhubri was, whether or not the property could be sold unless and until a fresh suit for sale had been brought under section 67 of the Transfer of Property Act. There is nothing in the judgment as to mere attachment as opposed to a sale. The judgment did not deal with that point in any way. The judgment-debtor appealed, and the appeal was heard before Justices NORRIS and GORDON, and their judgment was given on the 27th May 1895. It is quite clear from what is stated in that judgment that the point really argued on the part of the judgment-debtor was that no order for the sale of the properties could be made, until the plaintiff had instituted a suit under section 67 of the Transfer of Property Act. That was Sir GRIFFITH EVANS'S contention. The contention of the plaintiff, as stated in that judgment, is perfectly consistent with this view. He contended that the decree was tantamount to an agreement by the debtor that the properties should be sold in default of payment of the instalments. I have looked at the report of this case in I.L.R, 22 Calcutta series, page 859, and there is not a suggestion in the arguments on either side that the question whether a mere attachment could not issue as opposed to a sale was ever raised. The head-note of the case tends to show that the judgment was intended to deal only with the question of a right to a sale.

The learned Judges themselves say: "We are of opinion that Sir GRIFFITH EVANS'S contention must prevail." I have shown what his contention was. Again they say: "Unless the construction of the decree is such as Mr. *Hill* contends for, it is clear that the plaintiff cannot *sell* without bringing a suit." But for the somewhat loose expressions at the end of the judgment, the point would have been in my opinion quite unarguable. I will read the sentence.

"As the decree stands, the plaintiff can realize the instalments [270] by execution by sale and attachment of any property of the defendant's, but if he wishes to sell and attach the properties charged, he must bring a suit." I do not quite understand what is meant by the expression "by execution by sale and attachment," and the expression "to sell and attach."

Those expressions appear to me to put the cart before the horse. I could understand them if they were "attachment and sale," or "attach and sell." In my opinion these words "and attachment," "and attach," have slipped into the language of the judgment by mistake: they are at variance with the arguments in the case, and with the reasons given for, and with the previous portions of, the judgment and with the terms of the order as drawn up; and I do not think that by the use of those somewhat ambiguous phrases the Judges ever meant to decide, or that they ever did decide, that under the circumstances an order for attachment, as opposed to an order for sale, could not be made. In my opinion, by that judgment all that the Judges intended to decide and did decide was, that if the plaintiff wished to sell he must institute a suit.

In this state of circumstances, the judgment-creditor applied to the Court below that the case might be transmitted to the Court of the 24-Pergunnahs for execution by way of attachment. Mr. Justice SALE refused the application, holding that Justices NORRIS and GORDON had held, in the judgment I have criticised, that an attachment could not issue; that upon that point the matter was *res judicata*, and that therefore the Court would not transmit the case, as there would be no object in so doing if an attachment could not issue. Hence the present appeal It is clear from the case of *Chundra Nath Dey* v. *Burroda Shoondury Ghose*, (1895) I. L. R., 22 Cal., 813, (817), that the property could be attached; and it is clear to my mind from the various sections of the Code which have been referred to that certain advantages do accrue to a judgment-creditor from obtaining such attachment.

Mr. *Woodroffe* contends that attachment and sale constitute one step only in the path of execution. I am quite unable to accept that view. Attachment is one thing, sale is another. [271] There may be an attachment, not of necessity to be followed by sale, and there may be a sale not necessarily the result of an attachment. But the respondents urge, as they did in the Court below, that the matter is *res judicata* by reason of the judgment of Justices NORRIS and GORDON. I am by no means satisfied that, looking at what is now asked, and what was asked before Justices NORRIS and GORDON, the question of *res judicata* is not disposed of against the respondent by a mere comparison of what the two applications were, and that the question of *res judicata* ought not properly to have been left for decision, when, if at all, an application is made in the mofussil Court for an attachment. However, the point has been argued and decided in the Court below, and I will deal with it.

I need not lay down at this time of day what is necessary to constitute a *res judicata*, nor need I refer to section 13 of the Code. The principle is now, I think, well established. The only difficulty is as to its application to the particular circumstances of each particular case. The question here is, did the learned Judges intend to decide, and did they in fact decide, that an attachment, as opposed to a sale, could not issue? I have stated before what I think the real point before them was, and what they really decided and intended to decide. They were asked to direct a sale "after attachment," and they refused to do so; they were never asked merely to make an order for attachment. So far as I am aware no such application has ever been made in this Court. In my opinion the case is not one of *res judicata*. I think that Mr. Justice SALE has misapprehended the true purport and effect of the judgment of Justices NORRIS and GORDON, that his conclusion was consequently erroneous and that this appeal must be allowed with costs.

Macpherson, J.—I agree. The decision of the Division Bench of this Court does not, I think, prevent the plaintiff from attaching this property in execution of his decree. There was in that case an order for sale after attachment. The appeal was against the order for sale, and the contention before the Court was that as the present appellant had, by the decree which he sought to execute, a charge upon the property attached, he could not sell it without instituting a suit under section 67 of the Transfer of Property [272] Act. The contention prevailed, but I see nothing in the judgment to indicate that the Court considered or dealt with the appellant's right to attach the property under his decree as distinct from his right to sell it. There is certainly one loose expression at the end of the judgment, in which it is said "if he wishes to sell and attach the properties charged he must bring a suit," but the circumstance that the sale is referred to before the attachment indicates, as is apparent from the rest of the judgment, that the right to sell after attachment was the question which the Court was considering.

The question which the Court had to determine in the present case was whether the decree should be transferred to the District Court for execution under section 223 of the Civil Procedure Code. If the plaintiff has the right to attach the property within the jurisdiction of the Court to which he wishes the decree to be transferred, the Court was, I think, bound to make the order for transfer. Whether, having made the attachment, he can proceed further or can get anything out of the attachment, is a matter for the Court executing the decree to decide, and this may possibly to some extent depend upon events which may yet happen.

I see nothing in the law to prevent an attachment in execution of the money decree, even if before the property could be sold in pursuance of the attachment it is necessary for the appellant to take further proceedings.

Trevelyan, J.—I agree that this appeal should be allowed, and that the respondent should pay to the appellant the costs of the application and of the appeal.

There are two questions—(1) whether this application is barred by the law of *res judicata* ; (2) whether, if it be not so barred, the plaintiff is entitled to an order which can apparently lead to an attachment only, and not be followed by an order for sale.

On the first question I think that the right to an attachment *per se* has not been judicially determined between the parties.

The only question which arose in the matter which eventually came up on appeal before NORRIS and GORDON, JJ., was whether the judgment-creditor was entitled to obtain an order for sale. **[273]** This is, I think, clear from the memorandum of appeal and from the judgment. The whole judgment is directed to a consideration of the right to a sale, and it is only an expression at the end of it which can give any handle to the contention that the question is now barred.

There is no discussion in the judgment as to the right to an attachment independently of the right to a sale, and this right cannot be said to have been directly or substantially in issue, or to have been finally or at all decided. I read the judgment and the order as setting aside the attachment, only because it was ancillary to the sale.

I would, therefore, hold that the matter of the present application is not *res judicata*.

As to the second question I am exceedingly doubtful whether Mr. Justice SALE had any power to determine the question as to whether land situate outside the limits of the original jurisdiction was capable of being attached under this decree. It is not necessary to determine this question here; but it is capable of contention that the duty of the Judge transmitting the decree is confined to determining whether there is a *bonâ fide* application to transmit a live decree, and whether the conditions contained in section 223 of the Civil Procedure Code have been fulfilled.

Assuming that he had power to decide this question, I cannot agree with the view which he has taken of it.

An attachment and a sale are not so indissolubly wedded as never to be capable of separation. It is true that, as a rule, a sale is the ordinary consequence of an attachment, but a mere attaching creditor has certain rights apart from his right to a sale; for instance, he has a right to participate in the proceeds of sale under section 295 of the Civil Procedure Code, and he has a right to redeem the property under the Transfer of Property Act. The Code of Civil Procedure itself deals with an attachment as a proceeding separate from a proceeding to sell (see sections 235, 274, and 284). I am not prepared to say that if there is no right to sell there cannot, under any state of circumstances, be an attachment.

[274] Whether in this particular case the Court should allow an attachment is, in my opinion a matter to be determined only by the Court to which the decree is sent for execution. I would allow the appeal.

Appeal allowed.

Attorneys for the Appellant: Messrs. *Remfry & Rose.*

Attorney for the Respondent: Babu *Bhuban Mohan Dass.*

H. W.

NOTES.

[See also (1904) 7 O.C., 314.]

[25 Cal. 274]

CRIMINAL REFERENCE

The 21st September, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

Durga Charan Mali............Complainant

versus

Nobin Chandra Sil............Accused.*

Penal Code (Act XLV of 1860), section 183—Resistance to attachment—Lawful authority—Village Chaukidari Act (Bengal Act VI of 1870), section 26, section 27 and section 34.

Where a village chaukidar, without the preparation and publication of a list of defaulters, and without any written authority as required by section 26 and section 27 of the Village Chaukidari Act (Bengal Act VI of 1870), attached some property for levying the amount of arrears, *Held*, that resistance to such attachment was not an offence under section 183 of the Penal Code.

REFERENCE by the Sessions Judge of Mymensingh under section 438 of the Criminal Procedure Code in respect of a conviction and sentence under section 183 of the Penal Code by the Joint Magistrate of Mymensingh. The material portion of the letter of reference was as follows:—

"The petitioner has been convicted by the Joint Magistrate of Mymensingh under section 183 of the Indian Penal Code for offering resistance to a chaukidar, who was attaching a drum for chaukidari tax, and has been sentenced to a fine of Rs. 15, or in default to fourteen days' rigorous imprisonment.

"I think this conviction is illegal because the chaukidar had no "lawful authority" to take the petitioner's property. By the Chaukidari Act, section 2, the authority could only be in writing signed by the collecting member of the Panchayet. Moreover, by section 26 this distraint could only be made after [275] the preparation and publication of the list of defaulters. The Joint Magistrate finds there was no written authority to distrain and no publication of a list of defaulters. In my opinion section 34 of the Act has not the force the Joint Magistrate gives it. It is intended to protect the Panchayet and persons acting under his authority from prosecution or suit, except as therein provided for any act which is technically illegal. It does not, as I take it, render all irregular acts legal, so as to debar those who are affected by them from resisting them."

No one appeared in support of the reference.

The **judgment** of the High Court (**Banerjee** and **Wilkins, JJ.**) was as follows:—

Upon the facts found by the Joint Magistrate himself, the provisions of sections 26 and 27 of the Village Chaukidari Act (Bengal Act VI of 1870), had not been complied with, and the chaukidar had no authority to attach the property in question. Resistance to the attachment by him cannot, therefore, we think, constitute an offence under section 183 of the Indian Penal Code. This view is to some extent supported by the case of *Abdool Gaffur* v. *Queen-Empress*, (1896) I. L. R., 23 Cal., 896).

We, therefore, set aside the conviction and sentence, and order refund of the fine if it has been realized.

S. C. B.

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*Criminal Reference No. 259 of 1897, made by R. H. Anderson, Esq., Sessions Judge of Mymensingh, dated the 10th of September 1897.

[25 Cal. 275]

CRIMINAL REFERENCE.

The 12th September, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

Queen-Empress

versus

Beni Madhav Chakravarti............Accused.*

Penal Code (Act XLV of 1860), section 283—Obstruction in a public way.

The accused was charged generally with obstructing a public way, no danger, obstruction, or injury being alleged to have been caused to any person nor was there any clear evidence that the way was a public way. *Held*, that the conviction under section 283 of the Penal Code could not be sustained.

REFERENCE made by the Officiating Sessions Judge of Pubna and Bogra under section 438 of the Criminal Procedure Code in respect of a conviction and sentence passed by the Sub-Divisional Magistrate of Serajgunge on the 22nd of July 1897.

[276] The material portion of the letter of reference was as follows:—

"It appears that a road passed by the west of the petitioner's house which he blocked up ten years ago by building a house on it, and his brother Hem Chandra Chakravarti brought thereupon a suit in the Civil Court to have the road opened out. The case resulted in a compromise by which the petitioner agreed to deviate the road by his *bahirbari* or outer apartment, and he has now attached a gate to his deviated road, and is said to have caused obstruction to it. It is said that the petitioner keeps the gate open during day but closes it at night. The case originally arose from a complaint of some of the villagers and was supplemented by a report of the *chaukidar* who could not pass through the road at night on his round. It ultimately went to the Chairman of the Shahazadpore Union, the substance of whose report was that there was a road to the west of the petitioner's house from a very long period, that he constructed a house upon it about ten years ago and deviated the road through a portion of his outer apartment, which he has now blocked up by a gate.

"The Sub-Divisional Magistrate of Serajgunge, having treated those reports as complaints, and without proceeding under section 133 and the cognate sections of the Criminal Procedure Code, has convicted the petitioner under section 283 of the Indian Penal Code for obstructing the road, and has sentenced him to pay a fine of Rs. 50, and in default to undergo simple imprisonment for one month. He has also passed an order that the road must be cleared and left two cubits wide within three days.

"In order to sustain a conviction under section 283 of the Indian Penal Code it should in the first place be shown that some particular person or persons have been obstructed by the accused, and the accused cannot be charged *generally* with obstruction in a public way. In the present case the *chaukidar*, who is said to have been obstructed, has not been examined, none of the ladies said to have been obstructed has been examined, and all the witnesses speak of the general obstruction of the road, not of their personal case. I submit that under the circumstances the conviction cannot be sustained under section 283 of the Indian Penal Code. This has been clearly held in the matter of *Empress* v. *Ram Singh*, (1882) 11 C. L. R., 462, and in the case of *Queen* v. *Khader Moiden*, (1881) I. L. R., 4 Mad., 235. In the second place it must be shown that the road is a public way. The compromise petition by which the petitioner granted a deviation of the road to his brother is on the record. It does not show that the road in question was a public one. The road was granted by one brother to another only ten years ago, and, as it passed through the petitioner's outer apartment,

* Criminal Reference No. 246 of 1897, made by K. N. Roy, Esq., Officiating District Judge of Pubna and Bogra, dated the 30th of August 1897.

unless there be very good evidence it cannot be said that it is a public thoroughfare. In the report of the Chairman of the Union the road is not described as a public way. All that is said is that nearly [277] all the villagers pass through it to a *bil*, and its obstruction has caused inconvenience to the public and specially to the ladies of the Hindu families who have no other road to go to the *ghat*. The evidence of Sub-Inspector Bama Charan Sen is that the females of the village use the road from a long time for going to the *ghat*. Though, therefore, there can be no doubt that the road in question has been very much in use by the women of the village, I have doubts whether it was thrown open entirely to the public. The long use by the women of the village cannot make the road to be a public way—See *Sham Soonder Bhuttacharjee* v. *Monee Ram Doss*, (1876) 25 W. R., 233. Applying also the tests of Mr. Justice WILSON in the Full Bench case of *Chuni Lall* v. *Ram Kishen Sahu*, (1888) I. L. R., 15 Cal., 460, it is doubtful whether this road can be held to be a public way. The proper course for the Sub-Divisional Magistrate was to take proceedings under section 133 of the Criminal Procedure Code and the cognate sections, and give the benefit of a jury to the petitioner with regard to the question whether the road was public or private. The order directing the widening of the road could not be passed except under these sections. I, therefore, recommend that the conviction of the petitioner as well as the order directing the clearing of the road be quashed."

No one appeared in support of the reference.

The **judgments** of the High Court (**Banerjee** and **Wilkins, JJ.**) was as follows:—

We think the view taken by the learned Sessions Judge in this case is in the main correct. The accused has been convicted by the Sub-Divisional Magistrate of Serajgunge of an offence punishable under section 283 of the Indian Penal Code and sentenced to pay a fine of Rs. 50, and he has been ordered to remove within three days the obstruction complained of. But all that the learned Magistrate in his judgment has found against the accused is that he has blocked up altogether by a gate a road which, in his opinion, is a public road. This finding is not in our opinion sufficient to sustain the conviction. To warrant a conviction under section 283 of the Indian Penal Code for causing obstruction in a public way, it must be established that the act of the accused has caused "danger, obstruction, or injury" to some person; see *Empress* v. *Ram Singh*, (1882) 11 C. L. R., 462, and *Queen* v. *Khader Moidin*, (1881) I. L. R., 4 Mad., 235. But there is no finding to that effect in the **[278]** judgment of the Magistrate. Then, again, though the learned Magistrate in effect finds that the road in question is a public road, what the evidence shows is, to quote the words of the judgment, "that a road passed by the west of the accused's house which he first blocked up by building a house on it, and then deviating it over his *bari* blocked up altogether by a gate." The four witnesses examined for the prosecution all say, either expressly or in effect, that the road which has been obstructed is not the old road but the road passing through the *bahirbari*, or the compound of the outer house of the accused, which the accused opened after having closed the old road by building his house over it. The evidence leaves it very doubtful whether the way is a public way within the meaning of section 283 of the Indian Penal Code.

For these reasons we set aside the conviction and sentence and the order for removal of the obstruction complained of, and direct that the fine, if realized, be refunded.

S. C. B.

[25 Cal. 278]

CRIMINAL REVISION.

The 15th October, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

Preonath Dey and others............Petitioners

versus

Gobordhone Malo ....Opposite Party.*

Criminal Procedure Code (Act X of 1882), section 133 and 137—Reference by Sub-Divisional Magistrate to a second class Magistrate—Bonâ fide *question of title—Jurisdiction of Magistrate—Public nuisance.*

A Sub-Divisional Magistrate having made a conditional order under section 133 of the Criminal Procedure Code (Act X of 1882) against a person to remove an obstruction on a public thoroughfare, or appear and show cause before a second class Magistrate, the said person appeared as directed, and the order was made absolute under section 137. In revision, the High Court held that, having regard to the penultimate paragraph of section 133, the order was not illegal, on the ground that it was made absolute by a Magistrate with second class powers other than the Magistrate who made the conditional order. *In re Narasimha,* (1886) I. L. R., 9 Mad., 201, approved of.

[279] When a question of title is *bonâ fide* raised, the Magistrate ought not to make an order under sections 133 and 137 of the Criminal Procedure Code, but should allow the party an opportunity for the determination of the question by a Civil Court. The claim of title must, however, be *bona fide* and not a mere pretence to oust jurisdiction ; and it is for the magistrate to say whether the claim is a *bonâ fide* one or a pretence. *Luckheenarain Banerjee* v. *Ram Kumar Mukherjee,* (1888) I.L R., 15 Cal., 564), and *Queen-Empress* v. *Bissessur Sahu,* (1890) I. L. R , 17 Cal., 562, followed

Although no length of enjoyment can legalise a public nuisance—See *Municipal Commissioners of Calcutta* v. *Mahomed Ali,* (1871) 7 B.L.R , 499,—yet the long possession or enjoyment of what is said to be a nuisance may give to the objection of the person so possessing or enjoying it the character of a *bonâ fide* dispute as to title such as might have the effect of ousting the jurisdiction of the Magistrate under sections 133 and 137 of the Code, and making the question a proper one for the Civil Court.

THE petitioner moved against the order of a second class Magistrate passed under section 137 of the Criminal Procedure Code (Act X of 1882), making absolute an order under section 133 passed by the Sub-Divisional Magistrate for the removal of certain obstructions in a place alleged to be a public thoroughfare upon the grounds: (1) That the Magistrate who made the conditional order absolute had no authority to do so as he was a Magistrate with second class powers ; and (2) that the Magistrate had no jurisdiction inasmuch as there was a *bonâ fide* claim of private right as regards the land in dispute,

Babu *Atulya Charan Bose* for the Petitioners.

Babu *Boidya Nath Dutt* for the Opposite Party.

The **judgment** of the High Court (**Banerjee** and **Wilkins, JJ.**) was as follows :—

This is a rule calling upon the Magistrate of the district to show cause why the order complained of in this case should not be set aside upon the

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* Criminal Revision No. 623 of 1897 against the order of Babu Mano Mohan Chatterjee, Sub-Deputy Magistrate of Jehanabad, dated the 11th of August 1897.

ground that the Magistrate who made it had no authority to investigate the matter and to make the conditional order passed by the Sub-Divisional Officer absolute.

The order complained of is one passed by a second class Magistrate under section 137 of the Code of Criminal Procedure, [280] making absolute an order under section 133 passed by the Sub-Divisional Officer for the removal of certain obstructions caused by the petitioners in a place which was alleged to be a public thoroughfare.

The grounds upon which we are asked by the learned Vakil for the petitioner to set aside the order are: *first*, that the Magistrate who made the conditional order absolute under section 137 of the Code of Criminal Procedure had no authority to do so as he was a Magistrate with second class powers; and, *secondly*, that he had no authority to make the conditional order absolute in this case as there was here a *boná fide* claim of private right raised by the petitioners as regards the land in dispute.

As to the *first* ground, the penultimate paragraph of section 133 of the Code distinctly provides that the Magistrate who makes the order under the section may direct the person against whom it is issued "to appear before himself or some other Magistrate of the first or second class at a time and place to be fixed by the order, and move to have the order set aside or modified in manner hereinafter provided." The section itself, therefore, clearly authorizes a second class Magistrate to hear the objections of the party against whom an order under the section is made. It is quite true that clause (*b*) of section 135 provides that, where a party against whom an order under section 133 is issued applies for the appointment of a jury to try whether the order is reasonable and proper, such application is to be made to the Magistrate by whom the order under section 133 was passed; but the express mention of "the Magistrate by whom it" (*i.e.*, the order) "was made" in clause (*b*) itself goes to show that it is only when the party against whom the order is issued wants to avail himself of the alternative of having a jury appointed that his application must be made to the Magistrate by whom the original order was issued. Section 137, however, under which the order now complained against was made, does not require that the Magistrate who is to hear the objections and take evidence must be the Magistrate by whom the original order was made, but simply provides that if the party against whom the order is made appears and shows cause against the order, "the Magistrate shall take evidence in [281] the matter." That, in our opinion, evidently means the Magistrate to whom the proceedings may be referred under the penultimate paragraph of section 133; and, as that section distinctly provides that the case may be referred to a Magistrate of the second class, we think the mere fact of the Magistrate who made the order under section 137 being a second class Magistrate, does not show that he had no authority to make the order complained against. We may add that this view is in accordance with the decision of the Madras High Court in the case of *In re Narasimha*, (1886) I. L. R., 9 Mad., 201.

It remains then to consider the *second* ground upon which our interference is asked. The learned Vakil who appears to show cause contends that it is not open to the petitioner to raise the second ground, having regard to the terms of the rule. No doubt the matter is open to argument; but we are inclined to think that the rule, as it stands, is broad enough to admit of the second ground being urged. We may add that our taking this view cannot be said to have any prejudicial effect, as the learned Magistrate of the district who has shown cause in the explanation submitted by him, entered into matters relevant to the second ground as well as those concerned with the first.

Now, the law on the subject is laid down in a series of cases of which we need only refer to two, viz., *Queen-Empress* v. *Bissessur Sahu*, (1890) I. L. R., 17 Cal., 562; *Luckheenarain Banerjee* v. *Ram Kumar Mukherjee*, (1888) I. L. R., 15 Cal., 564). It is this, that when a question of title is *bona fide* raised, the Magistrate ought not to make an order under sections 133 and 137, but should allow an opportunity for the determination of the question by a Civil Court. The claim of title must, however, be *bona fide* and not a mere pretence to oust jurisdiction; and it is for the Magistrate to say whether the claim is a *bona fide* one or a pretence.

In the present case the Magistrate who made the conditional order absolute under section 137 has not considered the question whether the claim of title raised is a *bona fide* claim or a mere pretence. He has, it is true, found that the land in dispute is part [282] of a public thoroughfare; but that finding does not dispose of the question whether the dispute raised by the petitioners before us was or was not a *bona fide* dispute as to title; and one reason which induces us to take this view is that, although one of the petitioners urged that he had raised the embankment for over twelve years and had been in undisputed possession of it since then, and so the question of obstruction could not arise now, this is all that the learned Magistrate says with reference to this objection: "The last argument, however, cannot stand in the face of the ruling in *The Municipal Commissioners of Calcutta* v. *Mahomed Ali*, (1871) 7 B. L. R, 499, where it is laid down that no length of enjoyment can legalize a public nuisance." The Magistrate does not find that the allegation about the petitioners' enjoyment for twelve years and upwards is a mere assertion without any foundation for it; but he simply says, whether that was true or not would not affect the question. We are of opinion that he should have gone into the question and seen whether the fact of long possession did not give to the objection of the petitioners the character of a *bona fide* dispute as to title such as should have the effect of ousting the Magistrate of his jurisdiction under sections 133 and 137.

As the Magistrate has not considered the case from this point of view, we think the proper course to take in this case would be that taken by this Court in the case of *Queen-Empress* v. *Bissessur Sahu*, (1890) I. L. R, 17 Cal., 562, to which we have already referred; and we accordingly set aside the order under section 137, and direct that the Magistrate, after notice to both parties, do investigate the case *de novo*. If he is satisfied that the contention of the petitioners that the way is not a public way is a *bona fide* one, he should set aside the conditional order If, however, he finds upon proper reasons that the contention is not *bona fide*, he should affirm that order.

S. C. B.

NOTES.

[This was followed in (1906) 10 C.W.N., 845; see also (1904) 31 Cal., 979 : 9 C.W.N., 72; 6 C.W.N., 886.]

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[383] APPELLATE CIVIL

The 13th August, 1897.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE STEVENS.

Mahomed Abdul Hye............Judgment-debtor

versus

Gajraj Sahai ....Decree-holder.*

Public Demands Recovery Act (Bengal Act VII of 1880), sections 2 and 20—Limitation—Act XI of 1859, section 34—Execution of decree annulling sale—Decree of Privy Council—Decree for costs—Rate of exchange.

Section 2 of the Public Demands Recovery Act (Bengal Act VII of 1880) does not make the provision of limitation in section 34 of Act XI of 1859 applicable to the execution of a decree annulling a sale under section 20 of Bengal Act VII of 1880

In converting into Indian currency the amount of costs expressed in sterling in an order of Her Majesty in Council, the rate of exchange is the rate which prevailed at the time when the order was made.

Dakhina Mohan Roy Chowdhry v *Sarada Mohan Roy Chowdhry*, (1896) I. L. R., 23 Cal., 357, followed

THE facts material to the report in this case appear from the judgment of the High Court.

Sir *Griffith Evans*, and Dr. *Asutosh Mukerjee*, for the Appellant.

Babu *Lal Mohan Das* and Babu *Nalini Ranjan Chatterjee*, for the Respondent.

The **judgment** of the High Court (TREVELYAN and STEVENS, JJ.) was delivered by

Stevens, J.—This is an appeal from an order of the District Judge of Tirhoot, disallowing an objection by the judgment-debtor to the execution of the decree in respect of costs awarded against him by an order of Her Majesty in Council. The case in which those costs were awarded was one for the setting aside of a sale under the certificate procedure, Bengal Act VII of 1880. The contention was that, inasmuch as section 2 of Bengal Act VII of 1880 provides that that Act shall, as far as is consistent with the tenor thereof, [384] be construed as one with Act XI of 1859 passed by the Governor-General in Council and Act VII of 1868 passed by the Lieutenant-Governor of Bengal in Council, the provisions of section 34 of Act XI of 1859 apply to the present case. That section provides that "if a sale made under this Act" (*i.e.*, Act XI of 1859) "be amended by a final decree of a Civil Court, application for the execution of such decree shall be made within six months after the date thereof, otherwise the party in whose favour such decree was passed shall lose all benefit therefrom." Admittedly in the present case the application for execution was made more than six months after the date of the decree, and it is contended that under the provision of law which we have just quoted the decree-holder has lost all benefit from his decree.

We think that section 2 of Bengal Act VII of 1880 cannot have the effect of making the provisions of section 34 of Act XI of 1859, which relates to a decree annulling one class of sales, applicable to such a decree as is referred to in section 20 of Act VII of 1880, that is a decree setting aside a sale of

* Appeal from Order No. 329 of 1896, against the order of D. Cameron, Esq, District Judge of Tirhoot, dated the 8th of June 1896

another kind. We think that this is apparent from the fact that section 20 contains separate provisions applicable to the case of decrees setting aside sales in execution of certificates, those provisions not being consistent in some respects with the corresponding provisions of section 34 of Act XI of 1859 relating to a decree for the setting aside of a sale under that Act.

Another question which arises in this appeal is as to the time when the rate of exchange is to be calculated on the costs expressed in sterling in the order of Her Majesty in Council. Those costs have been estimated by the decree-holder at the rate of exchange which prevailed at the time when execution was applied for. It is contended that they should have been estimated at the rate which prevailed at the time when the order was made. In support of this contention a ruling of this Court, *Dakhina Mohan Roy Chowdhry* v. *Saroda Mohan Roy Chowdhry*, (1896) I. L. R. 23 Cal. 357, has been cited. This is a matter relating to the practice of the Court, and we think that we ought to follow that ruling, unless we were clearly of opinion that the point ought to be referred to a Full Bench. We must, therefore, vary the order of the Court below to this extent, that **[285]** the costs awarded in sterling by Her Majesty in Council must be converted into Indian currency at the rate of exchange for the time being fixed by the Secretary of State for India in Council at the time when the order of Her Majesty in Council was made. Subject to this variation of the order under appeal, the appeal is dismissed The appellant must pay the respondent's costs.

S. C. C. *Decree varied.*

NOTES.

[See also (1899) 26 Cal, 414 F B]

[25 Cal. 285]

The 30th August, 1897.

PRESENT.

MR. JUSTICE TREVELYAN AND MR. JUSTICE STEVENS.

Jagdeo Singh.... ......Defendant

versus

Padarath Ahir...........One of the Plaintiffs.*

Bengal Tenancy Act (VIII of 1885), sections 121 and 140—Suit for compensation for illegal distraint—Non-joinder of parties in an action on tort—Joinder when too late—Objection of non-joinder not duly taken, Effect of—Limitation Act (XV of 1877), section 22.

A suit for compensation for illegal distraint under section 121 of the Bengal Tenancy Act (VIII of 1885) was brought by one of two persons jointly entitled to the crops distrained. Objection being taken by the defendant at a late stage of the case on the ground of non-joinder of a party, that party was, on his own application, added as a plaintiff, but his claim was then barred by limitation *Held*—

(1) Section 140 of the Bengal Tenancy Act did not exclude a suit of this kind.

(2) The rule that persons having the same cause of action must sue jointly does not apply to actions on tort in every case in which persons have been damnified by the same tortious act.

* Appeal from Appellate Decree No. 704 of 1896, against the decree of Babu Madhub Chandra Chuckerbutty, Subordinate Judge of Shahabad, dated the 19th of December 1895, affirming the decree of Babu Mohim Chunder Sircar, Munsif of Arrah, dated the 21st of June 1895.

(3) If the objection of non-joinder of party in an action of tort be not taken at the time and in the way provided by law, the defendant is liable to such portion of the damages only as have been incurred by the plaintiff who originally brought the suit.

(4) The whole suit was not barred by limitation in consequence of the provisions of section 22 of the Limitation Act (XV of 1877).

THE facts and arguments of pleaders material to the report in this case appear from the judgment of the High Court.

Babu *Umakali Mukerjee*, and Babu *Makhan Lall* for the Appellant.

[286] Dr. *Asutosh Mukerjee* for the Respondent.

The **judgment** of the High Court (**Trevelyan** and **Stevens, JJ.**) was as follows :—

In the suit out of which this appeal arises, the plaintiff Padarath Ahir sued to recover Rs. 304-12-9 dams, which he had to pay into Court, in order to obtain the release of his crops from attachment, together with Rs. 7-0-9 dams, the costs alleged to have been incurred in making the attachment. The plaintiff's case was that the principal defendant Jagdeo Singh had wrongfully caused the crops to be distrained under colour of section 121 of the Bengal Tenancy Act, 1885, as the crops of the second defendant Anarath Rai, falsely alleging that the latter was the tenant of the plaintiff's holding on which the crops had been grown Both the Courts below have found in favour of the plaintiff on the facts

The plaint was filed within one month of the date when the attachment was made, but for some reason, which has not been explained to us, there appears to have been very great delay in disposing of the suit, and at a very late stage of the trial, some fourteen months after the filing of the plaint, a supplementary written defence was filed, in which for the first time the plea of defect of parties was taken. It was urged that inasmuch as Padarath's brother Kirtarath had an interest in the holding, he should have joined in bringing the suit. The obvious reply to this plea was that under section 34 of the Code of Civil Procedure it was not admissible at that stage of the proceedings, but the plaintiff unfortunately for himself attempted to cure the defect to which objection had been taken, and what was done was that Kirtarath applied with Padarath's consent to be added as a co-plaintiff. This was done with the result, which might have been expected, that a fresh plea of limitation, based upon section 22 of the Limitation Act, was at once taken by the defendants. That plea was allowed by the Court of First Instance so far as the interest of Kirtarath was concerned, and a decree was given only for one-half of the amount claimed, excluding the sum alleged to have been paid as the costs of the deposit, which was disallowed as not proved.

The defendant Jagdeo Singh appealed, and Padarath also [287] appealed in respect of the moiety disallowed as the share of Kirtarath, but both appeals were dismissed by the Lower Appellate Court.

The defendant Jagdeo Singh only has come up to this Court in second appeal. The grounds which have been argued before us are, first, that the plaintiff had no right of suit, and, secondly, that the whole of the claim ought to have been held to have been barred by limitation.

A preliminary objection was taken for the respondent that no second appeal lies in the case, inasmuch as it is in reality not a suit for compensation for illegal distress such as is contemplated by article (35) (j) of the second schedule of the Provincial Small Cause Courts Act, but is merely a suit for the recovery of the amount which the plaintiff-respondent had had to pay in order to procure the release of his crops from attachment. We think that objection

is untenable, because the claim was not only for the recovery of the sum paid, but also for damages, namely the cost alleged to have been incurred in paying it. It is therefore a suit for compensation.

We proceed to deal with the appeal.

It is contended in the first place that the suit will not lie at all because such a suit can be brought only under the provisions of section 140 of the Bengal Tenancy Act, and under that section a suit for compensation, where property has been distrained on an application made under section 121 of the Act, lies only in a case in which such an application is not permitted by the latter section. It is contended that in the present case the distraint was made on an application made under section 121 and permitted by the section. We think that there is nothing in section 140 to exclude an action of this kind in a case like that before us in which the landlord is found to have abused his power of distraint by distraining the crops which belong to the tenant on the pretence that they belong to another person in collusion with himself. There has been an invasion of the rights of the tenant for which he is entitled to a remedy, and if the case is not one of the kind contemplated by section 140 he is not, so far as we can see, deprived by the provisions of that section of the ordinary right of action [288] which any person who suffers from a tortious act has against the tortfeasor We may observe that this objection appears to have been taken for the first time in this Court.

With reference to the question of limitation we have first to see whether the addition of Kirtarath as a co-plaintiff was, in the circumstances of the case, legally made, looking to the provisions of section 34 of the Code of Civil Procedure. No doubt the objection taken by the defendants for want of parties was inadmissible under that section, as not having been made before the first hearing The difficulty is that that objection was not made in the proper manner, as we have already noticed, but Kirtarath made an application, with the consent of the original plaintiff Padarath, to be added as a co-plaintiff. Under the provisions of section 32 this could be done at any time, and we think that the validity of the act of the Court, which was done at the instance of Kirtarath and Padarath, cannot be affected by the fact that in moving the Court to do it they are influenced by the defendants having made an objection which was not sustainable and which Padarath might have successfully resisted on that ground. The addition of Kirtarath was perfectly legal in itself, and we think that Padarath and he are bound by their own act in causing it to be made.

The contention for the appellant on the point of limitation is that the two brothers had a joint cause of action upon which they could only sue jointly, and therefore the bar against Kirtarath's claim must apply to that of Padarath also. No provision of law has been cited in support of this argument, but we have been referred to the following reported cases, several of which appear to have been cited in the Courts below. *Obhoy Churn Nundi* v. *Kritartha Moyi Dossee*, (1881) I. L. R., 7 Cal., 284, *Ramsebuk* v. *Ramlall Koondoo*, (1881) I. L. R., 6 Cal., 815; *Ramdoyal* v. *Junmenjoy Coondoo*, (1887) I. L. R., 14 Cal, 791, *Imamuddin* v. *Liladhar*, (1892) I. L. R., 14 All., 524: *Jibanti Nath Khan* v. *Gokool Chunder Chowdry*, (1891) I. L. R., 19 Cal., 760, 764, and *Kalidas Kevaldas* v. *Nathu Bhagvan*, (1883) I. L. R., 7 Bom., 217.

[289] None of these cases seems to us to be in point. No doubt there are certain classes of cases in which persons having the same cause of action must sue jointly, such as suits upon a contract; but we are not aware of any

authority for the application of this rule to actions on tort in every case in which several persons have been damnified by the same tortious act.

The non-joinder of a plaintiff in an action for wrong independent of contract may be a ground for insisting on the person being joined as plaintiff; but if that objection be not taken at the time and in the way provided by law, the defendant is liable for such portion of the damages as have been incurred by the plaintiff alone.

We do not think that there was anything to prevent Padarath in the present case from suing alone for compensation for the illegal distraint, as far as he was injuriously affected by it, and in this view his claim, which was certainly brought in time, would not be barred by the subsequent addition of Kirtarath as a co-plaintiff.

We dismiss this appeal with costs.

S. C. C. *Appeal dismissed.*

NOTES.

[In suits for damages it is not necessary that all should join —(1911) 15 C L.J., 225, (1907) 6 C.L.J., 383; (1904) 2 C L J., 496, (1897) 2 C W N., 90]

[25 Cal. 289]

The 19th November, 1897.

PRESENT

MR. JUSTICE BANERJEE AND MR JUSTICE WILKINS

Behary Lal Mookerjee and another...... ... .Plaintiffs

versus

Basarat Mandal and others...... ..Defendants *

Landlord and tenant—Suit for rent—Deposit of rent by a tenant through the transferee of the holding from him, whether valid—Bengal Tenancy Act (VIII of 1885), section 61

A deposit of rent, though not made by a tenant himself, but made on his behalf by a transferee of the holding from him, is a valid deposit within the meaning of section 61 of the Bengal Tenancy Act

THE facts of this case are sufficiently stated in the judgment of the High Court.

Babu *Karuna Sindhu Mookerjee*, and Babu *Jogendro Chunder Ghose*, for the Appellants.

[290] Babu *Norendro Chunder Bose*, for the Respondents

The following **judgment** was delivered by the High Court (BANERJEE and WILKINS, JJ.)

Banerjee, J.—In this appeal, which arises out of a suit for arrears of rent, the question is whether the deposit of rent set up in the defence of the tenants-defendants was a valid deposit under section 62 of the Bengal Tenancy Act. The grounds upon which the learned Vakil for the plaintiffs-appellants asks us to hold that deposit to be invalid in law are, *first*, that the preliminary tender which was necessary in this case was not a valid tender as it was not

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* Appeals from Appellate Decrees Nos. 215 and 216 of 1896, against the decrees of Babu Dwarkanath Mitter, Subordinate Judge of 24-Pergunnahs, dated the 8th of November 1895, reversing the decree of Babu Bhoobun Mohun Ghose, Munsif of Basirhat, dated 19th of February 1895.

made by the recorded tenants, but was made by the transferees from them; *secondly*, that the deposit was made in respect of rent which had not fallen due at the time; and, *thirdly*, that the deposit was made, not by the tenant as required by law, but by the transferee from him.

The first objection is, in our opinion, concluded by the finding arrived at by the Lower Appellate Court, which is to the effect that the tender was made by two of the defendants, that is two of the recorded tenants.

As to the second objection, it does not appear to have been raised before either of the Courts below; and as it involves the determination of a question of fact, namely, whether at the date of the tender the amount tendered had or had not fallen due, we do not think we ought to allow the objection to be raised at this stage of the case, as it would necessitate a remand and protract the litigation.

As to the third objection, it is quite true that section 61 enacts that "the tenant may present to the Court having jurisdiction to entertain a suit for the rent of his tenure or holding, an application in writing for permission to deposit in the Court the full amount of the money then due." But the question is whether the law requires that the tenant must present the application to the Court in *person*. We do not think that it would be a reasonable construction of the section to hold that it requires that the tenant must present the application in person.

The application here was made on behalf of the tenant though it was presented on his behalf by the transferee of the holding from him.

[291] The Bengal Tenancy Act does not make any provision as to how applications, other than those in suits, are to be made by or on behalf of parties in a case like this. Neither section 115 nor section 183 applies to cases of this description. That being so, we think the view taken by the Lower Appellate Court, that an application, such as the one that was made in this case for the deposit of rent, was in substantial compliance with section 61, is a reasonable view.

The objections urged against the validity of the deposit all fail; and this appeal must consequently be dismissed with costs.

S. C. G. *Appeal dismissed.*

[25 Cal. 291]

CRIMINAL REFERENCE.

The 7th December, 1897.

PRESENT:

MR. JUSTICE HILL AND MR. JUSTICE STEVENS.

Bhiku Khan............Petitioner

versus

Zahuran............Opposite Party.*

Maintenance, Order of Criminal Court as to—Criminal Procedure Code (Act X of 1882), section 488—Imprisonment for default of payment of Maintenance—Warrant of commitment—Procedure.

An order of commitment to prison for default in payment of a wife's maintenance allowance cannot be made without proof that the non-payment was due to wilful neglect of the person ordered to pay. *Sidheswar Teor* v. *Gyanada Dasi*, (1894) I. L. R., 22 Cal., 291, followed.

The law contemplates a single warrant of commitment in respect of the arrears due at the time of its issue. Where six months' arrears were due, an order for separate warrants of commitment awarding a separate sentence of imprisonment of one month on each warrant, was therefore held to be bad in law.

As to the mode of computing the term of imprisonment the case of *Allapichai Ravuthar* v. *Mohidin Bibi*, (1896) I. L. R., 20 Mad., 3, followed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the High Court.

No one appeared at the hearing of the reference.

[292] The **judgment** of the High Court (**Hill** and **Stevens, JJ.**) was as follows:—

The order of the Magistrate of the 15th September last committing Bhiku Khan to prison for five months for making default in the payment of his wife's maintenance allowance cannot be maintained. It was decided in the case of *Sidheswar Teor* v. *Gyanada Dasi*, (1894) I. L. R., 22 Cal., 291, that before such an order can be made it must be proved that the non-payment was due to wilful neglect of the person ordered to make the payment. No evidence directed to this point has been taken by the Magistrate. This is the reason given by the Judicial Commissioner of Chota Nagpur for his recommendation that the order should be set aside.

But it appears to us that the order of the Magistrate is in another respect also contrary to law. The petition of Zahuran, dated the 30th January 1897, relates to the arrears of her maintenance for the six months from the 1st July to the end of December 1896. The Magistrate states that he directed Bhiku Khan to be imprisoned in the first instance for the arrears only of the month of July 1896. This order was made on the 18th June last. The next order in the matter is of the 12th July, and directs the issue of a notice to Zahuran requiring her to state whether she had been paid for any of the five remaining months of the year 1896. Zahuran made no answer to this requisition, and on the 17th July the following order appears in the order sheet: "File she is absent."

* Criminal Reference No. 308 of 1897, made by F. B. Taylor, Esq., Judicial Commissioner of Chota Nagpur, dated the 11th November 1897.

About this time it appears that Bhiku Khan was released from prison as a "jubilee prisoner." "Hence," the Magistrate states in his letter of explanation to the Judicial Commissioner, "I have now taken action on Zahuran's petition mentioned above" (the petition, that is, of the 30th January 1897) "for the five remaining months' balance separately for each." The "action" to which reference is here made is disclosed by the order of the 15th September 1897, the order that is which has been brought to our notice by the letter of the Judicial Commissioner. The order is in these terms: "As the defendant won't pay, he will go to prison on each of the five warrants for five months in all, one month in each case."

[293] This order was passed apparently without notice to Bhiku Khan, and, as has been already mentioned, it was made without any evidence having been taken to support it.

Leaving these considerations out of view, however, we think that the law contemplates a single warrant of commitment in respect of the arrears due at the time of its issue, and that for this reason as well as that already mentioned the order of the 15th September is bad in law. It was not, we think, intended that a person against whom an order for maintenance has been made under section 488 of the Code should be subject, when arrears have been allowed to accumulate before the aid of the Court is invoked, to a series of separate terms of imprisonment in respect of the arrears of each month, preceded, as all imprisonment under the section ought to be, by a separate inquiry and warrant of distress in each case.

The procedure contemplated by the Legislature in such a case seems to us to be that the Magistrate should in the first place satisfy himself by evidence that the non-payment complained of has been due to wilful neglect on the part of the person bound by the order. He should then issue his warrant for the levy of the whole amount due in the manner prescribed by the section. If after this course has been taken any part of the aggregate amount due remains unsatisfied, the Magistrate may sentence the defaulter to a proportionate term of imprisonment.

The mode of computing the term seems to us to have been correctly indicated by the High Court of Madras in the case of *Allapichai Ravuthar* v. *Mohidin Bibi*, (1896) I. L. R., 20 Mad., 3, where it is said: "The procedure contemplated by the Code appears to be to deduct the sum levied from the sum due, and then to ascertain how many months arrears the balance represents. The maximum imprisonment that can be imposed will then be one month for each month's arrears, and if there is a balance representing the arrears for a portion of a month a further term of a month's imprisonment may be imposed for such arrear."

These principles, we may remark, relate to the computation of the maximum term of imprisonment which may be awarded [294] under the section. It ought perhaps to be unnecessary to point out that before he inflicts the highest penalty of which the law allows, it is the duty of a Magistrate to satisfy himself judicially that the case is one in which the defaulter ought to be dealt with with marked severity. The Magistrate, however, in the present case does not appear to have given the question any consideration whatever, and indeed upon the materials before him any conclusion at which he might have arrived would have been of little value.

We set aside the order of the 15th September committing Bhiku Khan to prison and direct that he be set at liberty.

B. D. B. *Order set aside.*

[25 Cal. 294]

ORIGINAL CIVIL.

The 16th December, 1897.

PRESENT:

MR. JUSTICE SALE.

Enamul Huq

versus

Ekramul Huq.*

Inspection of Documents—Practice—Inspection by agent of a party.

When under an order giving liberty to a party to a suit, his attorneys and agents, to inspect and peruse the documents produced by the opposite party, inspection by an agent is contemplated, the order should be read in such a way as would give the Court some control over the persons to be appointed to inspect the documents. Such an order contemplates that the agent will be a person standing in the position of the party for the purposes of the suit.

Held, therefore, that the Court ought not to permit a person formerly in the service of the defendant to inspect as the plaintiff's agent the defendant's books, which had been in his charge.

THIS was an application, adjourned from Chambers, that the defendant should allow the presence of Abdul Jubbar, accountant, as the plaintiff's agent, at the inspection of documents under an order dated the 20th February 1897.

The plaintiff and the defendant owned a joint business, and the defendant also had a separate business: and the plaintiff now sought to have the assistance of Abdul Jubbar at the inspection of the [295] books of the joint business in respect of a period when the books were under the supervision of Abdul Jubbar.

The defendant alleged, in answer to the application, that in 1893 the books of the separate business were also under Abdul Jubbar's charge, and that he had subsequently dismissed Abdul Jubbar. The statement as to the dismissal was denied on affidavit by Abdul Jubbar. The application was adjourned into Court.

Mr. *Jackson* showed cause against the application.—It would be in the highest degree objectionable that a person who, according to the defendant, has been dismissed from his service for making away with his books, should be allowed to take inspection of the defendant's books on the plaintiff's behalf. The plaintiff wants Abdul Jubbar to make the inspection, or at least to be present at the inspection, because the books of accounts were kept under him while he was in the defendant's service.

This is not a mere objection of sentiment; it is a personal objection. While in the defendant's employment, Abdul Jubbar was giving the plaintiff information as to matters in this suit. If this application be granted, it will be open to a party to a suit to authorise any person whomsoever to inspect documents on his behalf. Even an independent professional accountant is not an agent for this purpose unless a special case is made out to justify his appointment—*Bonnardet* v. *Taylor*, (1861) 1 J. & H., 383. *Draper* v. *The Manchester, Sheffield and Lincolnshire Railway Co.*, (1861) 3 De G. F. & J., 23; *Bartley* v. *Bartley*, (1852) 1 Drewry, 233: and *Dadswell* v. *Jacobs*, (1887) L. R., 34 Ch. D., 278, were also cited.

Mr. *Dunne* in support of the application.—The rule which is said to apply in England has never been applied in India, and it is not possible for it to apply

* Original Civil Suit No. 5 of 1896.

here. One of the most ordinary modes of inspection in this country is inspection by some person on behalf of the party. Suppose, for instance, there are accounts between an English firm and a Marwari one, and the accounts, or some of them, are in Nagri, who could inspect the Nagri accounts on behalf of the English firm? From the very nature of the case the English firm would have to appoint some agent familiar with the [296] Nagri language to inspect the books on their behalf. *Dadswell* v. *Jacobs*, (1887) L. R., 34 Ch. D., 278 was not a case of inspection properly so called; for there a firm sought to compel their agent to produce certain documents relating to their business to the person who was a rival of that agent, and the only question was whether the defendant's objection to giving inspection of his books to a rival trader was a reasonable one. And whatever the case of *Bonnardet* v. *Taylor* may decide, there is in this country no rule that an agent *pro hac vice* may not be appointed to inspect documents. If such a rule were laid down in India, inspection would become impossible, and suits would never be ready for hearing. Besides, in *Bonnardet* v. *Taylor*, (1861) 1 J. & H, 383 it was sought to appoint a professional accountant to ransack the other party's books. That is not the case here. In this case the plaintiff will inspect the books; all he wants is to have Abdul Jubbar to sit by him and give such assistance as he can.

The case of *Draper* v. *The Manchester, Sheffield and Lincolnshire Railway Co.*, (1861) 3 De G F. & J, 23, is distinguishable; for there it was sought to appoint the accountant of a rival company to inspect the books. The cases cited against the plaintiff, therefore, have no real bearing on the present case.

Abdul Jubbar has filed an affidavit denying that he was dismissed from the defendant's service. He is certainly in the plaintiff's employment now, and is therefore entitled, under the order, to inspect the books on the plaintiff's behalf. He was in the plaintiff's service before the date on which inspection was sought, and the plaintiff offers to agree to any terms the defendant desires for the protection of his books.

The rule laid down by this Court is, that where there is any difficulty in the way of inspection, the proper place for inspection is the Court: let the books, therefore, be produced in Court.

Sale, J.—This is an application by the plaintiff for an order that the defendant, Ekramul Huq, to allow Abdul Jubbar, the plaintiff's agent, to be present at the inspection directed by the order of the 20th February 1897.

[297] The material portion of the order is as follows: "And the applicant, his attorneys and agents, are to be at liberty to inspect and peruse the documents so to be produced and left, and to take copies and abstracts thereof and extracts therefrom as the applicant shall be advised."

It is contended, on the part of the plaintiff, that the words of the order leave the Court no discretion, and that Abdul Jubbar is a person who answers to the description of the word "agent" as used in the order.

It is admitted that Abdul Jubbar was originally a servant of the defendant Ekramul Huq, and that he continued in his service until some time after the date of the order for inspection, and that up to his discharge some time in 1897 he was employed as an accountant and had charge of the books of the defendant Ekramul Huq. It appears to me that the words "attorneys and agents," as used in the order for inspection, should be read in such a way as would give the Court some sort of control over the persons taking part in the inspection of documents directed by the order. I think it is clear from the authorities cited that similar words are interpreted by the Courts in England in a restricted sense which permits the exercise of such control.

In accordance with these authorities the words "attorneys and agents" should be read as referring either to the applicant himself or to persons who stand in his position with reference to the suit generally. It is to be observed that in allowing a party to inspect, the Court gives him a privilege of a very important character, and it is the duty of the Court to see that the privilege is not exercised so as to operate prejudicially against his opponent.

It is said that to read these words in the exclusive sense contended for would render it impossible for inspection to be conveniently obtained in this country; but I think the Courts in this country, in permitting servants or agents of parties, other than those strictly falling within the words of the order, to take part in the inspection, would be disposed to exercise a reasonable discretion and would not prevent a party from employing a servant for the purposes of the inspection unless it was shown that there was some sufficient ground of objection as against him.

[298] It appears to me that the person whom it is proposed to employ in the present instance does not come strictly within the words of the order, and that the Court would be entitled to exercise a discretion in permitting him to act for the plaintiff in the matter of the inspection.

That being so, the question is whether the objection made as regards Abdul Jubbar is a reasonable one. It is, I think, something more than a mere sentimental objection. It is to be remembered that serious allegations are made against this person by the defendant Ekramul Huq; and, though I say nothing as to the truth of these allegations the admitted circumstances under which he left the service of the defendant and entered the service of the plaintiff are such as would expose him to a strong temptation to take undue advantage or make improper use of the knowledge he had gained while in the defendant's employ if he is permitted to take part in the inspection.

I think, therefore, I ought not to compel the defendant to admit Abdul Jubbar to the inspection, and the present application must be refused with costs.

Attorney for the Plaintiff: Babu *O. C. Ganguli.*

Attorney for the Defendant: Babu *G. C. Chunder.*

H. W.

[25 Cal. 298]

APPELLATE CIVIL.

The 25th November, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Basaraddi Sheikh............Plaintiff

versus

Enajaddi Maloah............Defendant.*

Vendor and Purchaser—Transfer of Property Act (IV of 1882), section 55, sub-section 2- -Implied covenant for title—English Conveyance Act of 1881, 44 and 45 Vic., ch. 41, section 7.

[299] In the absence of any contract to the contrary there is under section 55, sub-section 2 of the Transfer of Property Act, an implied covenant for title on the part of the vendor.

THE facts of this case, so far as they are necessary for the purposes of this report, are fully set out in the judgments of the High Court.

Dr. *Ashutosh Mookerjee*, and Babu *Mohendra Nath Bose*, for the Appellant.

Babu *Purno Chunder Shome*, for the Respondent.

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J):—

Maclean, C J.,—This appeal raises a short point of law, and the point of law is, whether, having regard to sub-section (2) of section 55 of the Transfer of Property Act, a vendor of immoveable property must be, in the absence of any contract to the contrary, taken to covenant for title. The facts in this case lie within a very narrow compass. The plaintiff bought a small piece of land of the defendant in the year 1295 B.S. (1888) and the consideration money was thirty rupees. A conveyance was duly executed and registered. It appears that subsequently, after the conveyance to the plaintiff had been executed and registered, a question arose as to the title of the defendant, and certain proceedings were taken in which it was virtually decided that the defendants had no title. I may here remark that, in his defence in the present suit, the defendant does not allege that he has a title to the property in question.

Under these circumstances the plaintiff sues the defendant, and asks, amongst other things, for the recovery of his purchase money and interest.

No doubt the plaintiff based his case in a great measure, if not entirely, upon allegations of fraud, which view has not been adopted by either of the Judges in the Courts below. But although he has so based his case, to my mind he is entitled to urge before us that, even if he cannot sustain a case of fraud, as a matter of law he is entitled to succeed upon the ground that there was a covenant for title on the part of the vendor. The learned District Judge has decided that in this case "the doctrine [300] of *caveat emptor* applies, and that therefore the plaintiff is not entitled to succeed." But it does not appear that the section of the Transfer of Property Act to which I have referred was called to the learned District Judge's attention. In my opinion, and having

* Appeal from Appellate Decree No. 436 of 1896, against the decree of J. Pratt, Esq., District Judge of 24-Pergunnahs, dated the 24th of December 1895, affirming the decree of Babu Priya Lal Pyne, Munsif of Diamond Harbour, dated the 15th of July 1895.

regard to that section, there was a covenant on the part of the vendor that the interest which he professed to transfer to the plaintiff subsisted, and that he had power to transfer the same. I have two or three times invited the learned Vakil to say what his answer was to that section, but my invitation was not accepted. This section is to some extent analogous to section 7 of the English Conveyance Act of 1881, and in my opinion, in the absence of any contract to the contrary, which is not suggested in the present case, sub-section 2 of section 55 * of the Transfer of Property Act must be taken as incorporated into the present contract between the plaintiff and the defendant, which in effect is tantamount to a covenant for title on the latter's part. I do not appreciate what that section can mean unless it means what I have indicated above. I think, therefore, that quite apart from the question of fraud, there was a covenant for title in this case on the part of the vendor, and that, in that respect, the learned District Judge has miscarried. The appeal must therefore succeed.

We think that the proper order to make as to costs is this: Inasmuch as the appellant launched and argued his case on the question of fraud in the Courts below he will get no costs (except the institution fees) in those Courts, but he must have his costs of this appeal.

Banerjee, J.—I am of the same opinion. The question that arises in this appeal is whether the effect of sub-section 2 of section 55 of the Transfer of Property Act is to imply a covenant for title in the absence of any contract to the contrary. I think that the question ought to be answered in the affirmative and in favour of the appellant who was the plaintiff in the Court below, and who brought this suit to recover compensation owing to the title of his vendor, defendant No. 1, having been found to be wanting in reference to the property conveyed to him.

The only grounds upon which the learned Vakil for the re-**[301]**spondent sought to meet the appellant's contention were, *first*, that the suit was based upon fraud, as to which the Courts below have found against the plaintiff; and, *secondly*, that having regard to the fact found by the first Court that the plaintiff knew, or was expected to know, all about the property conveyed to him, he is not entitled to succeed in a suit like this.

As to the first answer, though no doubt the plaint makes several allegations imputing fraud to the defendant No. 1, still the main fact now relied upon by the learned Vakil for the appellant is also alleged, viz., that it was found in a suit brought by the plaintiff against one Janadolla, a suit to which the present defendant No. 1 was also made a party, that the present defendant No. 1 had no title to the property in dispute. Having regard to that fact, and having regard to the absence of any allegation by the defendant No. 1 that he had a title to the property, we do not think that the first answer can avail the respondent.

As to the second answer, the only way in which it could possibly have availed the defendant was by showing that there were circumstances in the case from which a contract to the contrary might have been implied—a con-

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* [Sec. 55 (2) :—In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold.

Rights and liabilities of buyer and seller.

* * * *

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same;

provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

* * * *]

tract, namely, that the plaintiff took a conveyance with all defects in the vendor's title. We do not think that there has been any finding to that effect, and the second answer must in my opinion therefore also fail.

There can be no doubt as to the meaning of sub-section 2, section 55 of the Transfer of Property Act Its effect is clearly to imply a covenant for title somewhat in the same way as such covenants are implied according to the provisions of section 7 of the English Conveyance Act of 1881, 44 and 45 Victoria, Chapter 41

S. C. G. *Appeal allowed.*

NOTES.

[See also 15 M.L J., 396; (1900) 13 C.P.L.R., 97, (1905) 8 O.C., 345; 4 C.W.N., 63, as regards the implied covenant for title.]

[302] *The 1st September, 1897.*

PRESENT.

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Prohlad Teor and others...... .....Defendants

versus

Kedar Nath Bose and others .. ..Plaintiffs.*

Landlord and tenant—Encroachment by a tenant—Effect of such encroachment—Position of such tenant—Trespasser.

When a tenant encroaches upon the land of his landlord he does not by such encroachment become the tenant in respect of the land encroached upon against the will of the landlord.

THIS appeal arose out of an action brought by the plaintiffs to recover possession of certain land by ejectment of defendants Nos. 1, 2 and 3, as well as for apportionment of rent The allegation of the plaintiffs was that they held the disputed land under an *amalnama* dated 6th Baisak 1299 B S. (17th April 1892), and a *pottah* dated 7th Kartic 1299 B.S (22nd October 1892), granted by the present zemindar-defendant No 4, Peary Mohun Roy, and that they were dispossessed by the defendants Nos. 1, 2 and 3, by a proceeding under section 145 of the Criminal Procedure Code, which was decided in favour of the said defendants The defence of defendants Nos. 1, 2 and 3 was that they were in possession of the disputed land by virtue of a *pottah* granted on the 14th Baisak 1256 B S. (25th April 1849) by the previous zemindars, known as the Biswases They impugned the plaintiffs' lease as being one set up in collusion with the zemindar-defendant, and they also pleaded limitation. The zemindar-defendant supported the plaintiffs' case, but pleaded that no apportionment of rent could be allowed to them.

The Subordinate Judge, holding that the land in dispute was included within the lease set up by the defendants, and that the plaintiffs' claim was barred by limitation, dismissed the suit as against the defendants Nos. 1, 2 and 3, but allowed apportionment of rent as against the zemindar-defendant. On appeal by the plaintiffs, and on cross-appeal by the zemindar-defendant,

* Appeal from Appellate Decree No. 197 of 1896, against the decree of J. Pratt, Esq., District Judge of 24-Pergunnahs, dated the 22nd of October 1895, reversing the decree of Babu Hara Krisna Chatterjee, Additional Subordinate Judge of that District, dated the 27th of September 1894.

to the [303] District Judge, he reversed the decision of the first Court, and decreed the suit as against defendants Nos. 1, 2 and 3, but disallowed apportionment of rent.

From this decision the defendants Nos. 1, 2 and 3 appealed to the High Court.

Babu *Nil Madhub Bose*, and Babu *Shib Chunder Palit*, for the Appellants.

Babu *Saroda Churn Mitter*, and Babu *Hara Kumar Mitter*, for the Respondents

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

Maclean, C.J.—In this case the plaintiffs sue to recover from the defendants certain plots of land, a portion of which is covered with water. The defence was that these plots and expanse of water were included in a certain lease from the zemindar who is a defendant in the case, and who is a common lessor both of the plaintiffs and the defendants. It has been found as a fact by the lower Court that these plots of land and expanse of water are not included in the defendants' lease. That being so, the defendants fall back upon the contention that these plots belonged to their zemindar, the zemindar who was their lessor; that they have encroached upon these plots of their landlord, and that having so encroached upon his lands they are entitled to be treated as between themselves and their landlord as his tenants, not only of the land originally included in the lease, but also of this land and expanse of water upon which they have encroached.

That no doubt is their present contention, although that is not the contention they set up in their written statement. This contention is doubtless suggested by the exigencies of the appellants' case, the Court below having found that the plots in question were not included in the appellants' lease. What we have to consider is, whether, in point of law, such contention can prevail. I think not, and I do not think I can do better than adopt, as I do, the language of Sir RICHARD GARTH in the case of *Nuddyar Chand Shaha* v. *Meajan*, (1884) I. L. R., 10 Cal., 820 in which, in delivering the judgment of the Court, he [304] says: "It would indeed seem strange if, as a matter of law, a tenant were allowed, *without his landlord's permission*, to appropriate any land which adjoins his own tenure, and then when his landlord complained of the trespass, and required him to give the land up, he were allowed to take advantage of his own wrong, and insist upon retaining possession of it until the expiration of his tenure." Now, although the zemindar in this case is not the plaintiff, he is a defendant, and he supports the case of the plaintiffs who are tenants of the land in dispute, under the lease granted to them.

Reliance has been placed by the learned Vakil for the appellant upon the law as laid down in the case of *Gooroo Doss Roy* v. *Issur Chunder Bose*, (1874) 22 W. R., 246. I think the rule is laid down there too broadly, and I gather that the Court in the case of *Nuddyar Chand Shaha* v. *Meajan*, (1884) I.L.R., 10 Cal., 820 was also of that opinion. In fact the Judges who decided the latter case seem to have been so much impressed with the effect of that ruling that they apparently consulted Mr. Justice MITTER, who was one of the Judges who decided the case of *Gooroo Doss Roy* v. *Issur Chunder Bose*, (1874) 22 W. R., 246, for I find this passage in the judgment of the Court (I. L. R., 10 Cal., p. 882): "We have consulted our brother *Mitter* as to this," that is as to the ruling in the case of *Gooroo Doss Roy* v. *Issur Chunder Bose* (1874) 22 W. R., 246, "and we find that it was by no means the intention of the Court in that case to lay down the rule thus broadly." As regards the case of *Gooroo*

Doss Roy v. *Issur Chunder Bose*, (1874) 22 W. R., 246 I am quite unable to agree with what the Court there lays down as to what is the rule of English law in cases of encroachment by a tenant. I allude to the passage in which Mr. Justice MARKBY says: "The true presumption as to encroachments made by a tenant during his tenancy *upon the adjoining lands of his landlord* is that the lands so encroached upon are added to the tenure and form part thereof, for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own **[305]** benefit." If that be intended to lay down the rule of English law upon the point I respectfully dissent from it. The rule as there laid down is applicable to cases where the encroachment is upon waste land or land of third parties, but I am not aware of any authority in the English Courts which lays down that rule as applicable to the case of an encroachment by a tenant on *other lands of his own landlord*, or that if such encroachment be made the tenant can by that encroachment consitute himself the tenant of his landlord of the land he has encroached upon. It strikes me as an odd result that a tenant of plots A and B can by encroaching on plot C which also belongs to his landlord successfully claim by that action on his part to be entitled as between himself and his landlord to be treated by the latter as the tenant of the plot C; in other words by his own wrongful act to force himself upon his landlord *nolens volens* as tenant of plot C. I am aware of no authority for such a proposition, nor do I regard the proposition as in accordance with law. The appeal on this point of law fails and must be dismissed with costs.

Banerjee, J.—I am of the same opinion. I only wish to add this, that where a tenant encroaches upon the land of his landlord, though the landlord may, if he chooses, treat him as a tenant in respect of the land encroached upon, the tenant has no right to compel the landlord against his will to accept him as a tenant in respect of that land. No authority has been cited in support of the contention that the tenant has such a right, and it would be contrary to reason and common sense to hold that a tenant has that right.

S. C. G. *Appeal dismissed.*

NOTES.

[TENANT'S ENCROACHMENT -

1. "An encroachment made by a tenant from the adjoining waste of his landlord is *prima facie* made by him in his character as tenant; but it is open to the landlord to repudiate the relation, to treat him as a trespasser, and to evict him as such; on the other hand, it is open to the tenant to indicate at the time he encroaches, that he intends to hold the encroached lands for his own exclusive benefit and not to hold them as he held the lands to which they are adjacent; in this event, the landlord though willing to treat him as a tenant may be driven, by an assertion of a hostile title, to a suit to eject him as a trespasser: — *per* MOOKERJEE, J., in **(1905) 2 C.L.J., 128**. See also *per* SUNDARA AYYAR, J., in (1911) 21 M.L.J., 615.

2. An encroachment becomes adverse from the date of the landlord becoming aware of it—(1903) 31 Cal., 397; see however (1911) 21 M.L.J., 615.

3. The landlord having elected to treat the encroachment as a tenancy cannot afterwards treat it as a trespass—(1900) 4 C.W.N., 508.]

[25 Cal. 305]

The 26th November, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Binduhashini Dassi and others............Defendants

versus

Harendra Lal Roy............Plaintiff.*

Voluntary payment—Contract Act (IX of 1872), section 69—Arrears of rent—Payment made to save the putni *taluk from sale—Payment made by a mortgagee.*

[306] The plaintiff, who was the mortgagee of a certain *putni taluk*, obtained a consent decree for Rs. 35,000, on his mortgage bond, on the 13th August 1888. In the *solenamah* it was stipulated that if the decretal amount were not paid within a certain date, it was to be increased to Rs. 52,000. On the 14th March 1891 the plaintiff applied for execution of that decree and claimed the larger amount, as admittedly the smaller amount was not paid within the stipulated period. The Subordinate Judge allowed the plaintiff's claim. The defendant appealed to the High Court, and on the 31st September 1891, the order of the Subordinate Judge was reversed, and an inquiry was directed as to the conduct of the plaintiff in the matter. On the 31st August 1892, the Subordinate Judge held that the plaintiff had been guilty of misconduct and that the decree had been fully satisfied. The plaintiff appealed from this order to the High Court, and on the 4th January 1894 the appeal was dismissed, and he preferred an appeal to Her Majesty in Council. In the meantime, on the 13th May 1892, the plaintiff had paid a certain sum of money to protect the *putni taluk* from sale for arrears of rent due to the landlord. In a suit brought to recover from the defendant the amount so paid:

Held, that the payment was not a voluntary payment, and that the plaintiff was interested in the payment of the money, and therefore he was entitled to recover it.

THE facts of the case, so far as they are necessary for the purposes of this report and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Horendra Narayan Mitter* for the Appellants.

Dr. *Rash Behary Ghose*, and Babu *Akshoy Kumar Banerjee*, for the Respondent.

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.)

Maclean, C. J.—The question we have to decide upon this appeal is whether the plaintiff in this suit is entitled to recover a sum of Rs. 383 odd under the following circumstances. The plaintiff was the mortgagee of a *putni* tenure; the defendants were the mortgagors. On the 13th August 1888, the mortgagee having instituted a suit to enforce his mortgage security, a consent decree was made. The decree was for Rs. 35,000, but it went on to provide that, if that sum were not paid within a certain date which was mentioned in the *solenamah* which was embodied in the decree, the amount was to be increased to Rs. 52,000, which [307] the defendants were to be held liable to pay. On the 14th March 1891 the plaintiff applied for execution of that

* Appeal from Appellate Decree No. 537 of 1896, against the decree of Babu Chakradhur Proshad, Additional Subordinate Judge of Faridpore, dated the 18th of December 1895, affirming the decree of Babu Chundra Bhooshun Banerjee, Munsif of Madaripore, dated the 30th of March 1894.

decree upon the footing that the smaller amount had admittedly not been paid within the stipulated period, and consequently that the larger amount was due to the plaintiff.

The Subordinate Judge of Backergunge, who heard that application, made an order on the 14th March 1891, disallowing the defendant's objections, and in effect allowing the present plaintiff's claim. That order was appealed from, and, on the 31st September 1891, the High Court reversed that order and directed an inquiry as to the circumstances under which, as it was alleged, the plaintiff had prevented or obstructed the sale of certain property, and an inquiry as to the conduct of the plaintiff in the matter.

On the 31st August 1892 the Subordinate Judge held that the plaintiff had been guilty of misconduct and that the decree had been fully satisfied.

The present plaintiff appealed from that order to the High Court, and on the 4th January 1894 it was heard by this Court and dismissed. I understand from what has been said at the bar that that order is now under appeal to Her Majesty in Council.

In the meantime, on the 13th May 1892, the plaintiff had paid a sum of Rs. 318 odd to prevent the sale by the superior landlord of the *putni* interest which was included in his mortgage. That payment was made on the very day fixed for the sale, and it had the effect of stopping the sale. Admittedly the defendants were not in a position to make the payment, and if it had not been made, the sale would have gone on. If the auction sale had not been stayed the plaintiff, assuming he were entitled to the larger of the above sums, in other words that his contention was correct, would have lost the benefit of his security for the balance due to him, and the defendants their interest in the equity of redemption. The payment was for the benefit of the defendants. But it is contended that, inasmuch as the effect of the judgment of the High Court on the 4th January 1894 was that the plaintiff must be taken to have been paid in June 1891 all he was entitled to, he had no interest whatever in the payment of this money; that it was a voluntary payment, and therefore the defendants cannot be required to [308] repay it. This does not appear to me to be a very equitable contention, when the result of the payment was to benefit the defendants by saving their equity of redemption from being sold. It has not been suggested in argument before us that at that time the equity of redemption was of no value, or that it was not for the benefit of the defendants that the sale should be stopped. Can it be said that at the time the payment was made, the plaintiff was not interested in the payment of the money? The position was this. The Subordinate Judge in the first instant had decided in his favour. When the payment was made, no doubt an inquiry had been directed by the High Court by their order of the 31st September 1891, which inquiry was still pending. But the litigation was going on, the plaintiff was contending that he was entitled to the larger sum owing to the default of the defendants, and until the point which was then *sub judice* was decided, it can scarcely be said that he was not interested in the payment of this money. The point at issue was whether the plaintiff was entitled to the larger or to the smaller sum. If entitled only to the smaller sum, it is not contested that he had been paid off in June 1891. I am not prepared to hold that because after he had paid the money the judgment of the Court was against him he was not interested in the payment at the time he made it. I think he was interested in the payment of this money within the meaning of section 69 of the Indian Contract Act. If the decision had been, as yet possibly it may be, in his favour, the effect of the payment was to preserve his security. This view appears to me consistent with the law as laid down by

the Privy Council in the case of *Dakkhina Mohan Roy* v. *Saroda Mohan Roy*, (1893) I.L.R., 21 Cal., 142, and also consistent with the case of *Nobin Krishna Bose* v. *Mon Mohun Bose*, (1881) I. L. R., 7 Cal., 573.

On these grounds I am of opinion that the view taken by the learned Judge in the Court below was correct, and this appeal must be dismissed with costs.

Banerjee, J.—I am of the same opinion. The question raised in this appeal is shortly this, namely, whether the plaintiff who was the mortgagee of a *putni* tenure belonging to the **[309]** defendants, and who had paid a certain sum of money to save the *putni* tenure from sale under Regulation VIII of 1819, and to protect the interest he was then claiming as mortgagee, can recover that sum from the defendants, notwithstanding that it has since been found by the Court that the mortgage debt had been satisfied before the date of the payment.

Having regard to the facts of the case, I think this question ought to be answered in the affirmative. The provision of the law that governs this case in my opinion is section 69 of the Contract Act which says "A person who is interested in the payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be re-imbursed by the other."

There can be no question that the defendants were bound to pay the *putni* rent. In fact if they had not paid that money, the *putni* tenure would have been sold and lost to them The only point that is disputed before us is, whether the plaintiff can be said to have been, at the time of the sale, a person interested in the payment of the *putni* rent. It is argued that as upon the finding of the Court ultimately arrived at in the proceedings in execution of the mortgage decree which were then pending, it appears that the mortgage debt had been satisfied before the date of the payment by the plaintiff, we must take it that he was not interested in the payment of the money. Now, the circumstances under which the Court ultimately came to the finding that the mortgage debt had been satisfied, were of a somewhat peculiar nature. The compromise decree upon the mortgage bond provided that if a certain sum was paid within a certain time, the decree would be satisfied, but if that amount was not paid within that time, a larger amount would be recoverable by the mortgagee. As a matter of fact the smaller amount was not actually paid within the stipulated time; but what was found was this, that by reason of the acts and conduct of the mortgagee, decree-holder, either in not helping the mortgagor, judgment-debtor, or in actively opposing him, in selling the mortgaged property with a view to realize money for the payment of the mortgage debt, the decree-holder had become disentitled to recover the larger amount; and it was by reason of this decision, arrived at some time after the payment now in question, that the **[310]** learned Vakil for the appellants contends we must hold that the mortgagee, plaintiff, was not interested in the payment of the money at the time when he paid it. I am not prepared to say that this contention is sound.

If the case had rested upon the determination of the simple question of fact as to whether the amount had or had not been paid within the stipulated time, the case might have stood on a different footing; but here, if we were to hold that the mortgagee was not interested in the payment of the money, because it was eventually found that the debt had been satisfied before the date of such payment, we must not only hold that the mortgagee knew the facts that led to the adverse decision in the proceedings in execution of the mortgage decree, but we must further hold that he was bound to anticipate the conclusion of the Court upon a mixed question of law and fact that was ultimately arrived at. I do not think that that would be a right view to take of the matter. It

is clear that there was a disputable question awaiting the determination of the Court with reference to the rights of the mortgagee; and, so long as that question remained undetermined, it cannot be said that the mortgagee was not interested in the payment of the money which was necessary to be paid to protect the interest which he was claiming as mortgagee.

The view I take is amply supported by the decision of this Court in the case of *Nobin Krishna Bose* v. *Mon Mohun Bose*, (1881) I. L. R., 7 Cal., 573, and by the decision of the Privy Council in the case of *Dakhina Mohan Roy* v. *Saroda Mohan Roy*, (1893) I. L. R, 21 Cal., 142. Some reliance was placed upon the case of *Ramtuhul Singh* v. *Biseswar Lal Sahoo*, (1875) 15 B. L. R., 208: L. R., 2 I. A., 131: 23 W. R., 305, as shewing that the mere fact of a payment going to benefit the defendant would not be sufficient to entitle the party making the payment to recover it from the defendant. The facts of that case were very peculiar, and very different from those of this case. Here the defendants not only had the benefit of the payment made, but they would, as a matter of fact, have lost their property were it not for that payment.

[311] That being so, I think upon the provisions of section 69 of the Contract Act, as well as on general principles of justice, equity and good conscience, the decree made in favour of the plaintiff is right and ought to be affirmed with costs.

S. C. G. *Appeal dismissed.*

NOTES.

[This was followed in (1899) 25 Cal, 826

See also (1908) 11 O.C., 279; (1904) 7 O C., 146.

In (1906) 5 C.L J., 59 this case was sought to be distinguished on the facts there, according to which the person that made the payments was a purchaser at a compulsory sale and as such the payments were made by him not for the former proprietor but for *himself*.]

[25 Cal. 311]

The 1st June, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Bhola Nath Bhuttacharjee...... .....Judgment-debtor

versus

Kanti Chundra Bhuttacharjee............Decree-holder.

Mortgage—Decree absolute for foreclosure—Transfer of Property Act (IV of 1882), sections 87 and 88—Whether time to redeem would run from the date of the preliminary decree, or from the date of the decree of the Appellate Court, when it simply confirms the decree of the first Court.

Where, in a suit on a mortgage, the decree of the Appellate Court simply dismisses the appeal, leaving the decree of the first Court untouched, the time for redemption would run from the date of the decree of the first Court.

*Appeal from Order No. 368 of 1896, against the order of B. G. Geidt, Esq., Additional District Judge of 24-Pergunnahs, dated the 26th of June 1896, reversing the order of Babu Mati Lal Haldar, Munsif of Alipur, dated the 13th of March 1896.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgments of the High Court.

Babu *Golap Chunder Sircar* for the Appellant.

Babu *Nilmadhub Bose*, and Babu *Shib Chunder Palit*, for the Respondent,

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.)

Maclean, C J.—This is a suit to enforce a mortgage security. On the 8th September 1893, the usual preliminary mortgage decree was made, giving the defendant three months' time within which to redeem, the three months to run from the date of that decree. On the 24th of July 1894 an appeal by the defendant against that decree was heard and dismissed, thus leaving the decree untouched. On the 30th of July 1894, an application was made by the plaintiff for foreclosure absolute, and notice **[312]** of that application was served on the 8th of August of the same year on the mortgagor, the present appellant. On the 15th September in the same year the foreclosure was made absolute. No objection was then made by the defendant. It appears that the Court was satisfied that notice had been served upon him; this appears upon the face of the order of the 15th September 1894. On the 16th November 1894, possession was given to the plaintiff by the Court, and on the 8th of April 1895 satisfaction was entered up by the Court, which practically terminated the suit. Sometime in April 1895, the defendant made an application to the Munsif to set aside his own foreclosure order absolute of the 15th September 1894, and the ground for his application was that the three months given for payment under the decree of the 8th September 1893 run, not from the date of that decree, but from the date of the Appellate Court's decree of the 24th July 1894. The Munsif acceded to that view and set aside his own order. An appeal was taken to the District Judge, who reversed the order of the Munsif. Hence the appeal to us.

To my mind it is not necessary for us to go into the question whether the three months for redemption run from the date of the original decree or from the date of the appellate decree. In my judgment, if the defendant desired to raise that point, the proper time to raise it was when the matter came before the Munsif upon the application by the plaintiff for foreclosure absolute. He ought then to have raised it; he ought then to have invited the Court to hold that the three months for payment ought to run from the 24th July 1894, and not from the 8th September 1893, and that as that period had not expired, the foreclosure ought not to be made absolute. He did nothing of the sort. To my mind it is too late for him to raise the question now. I have been at a loss to appreciate, and I invited the learned Vakil for the appellant to assist me, upon what ground, or perhaps I should say upon the exercise of what jurisdiction, the Munsif had the power to discharge the order of the 15th September 1894, having regard to the circumstances under which that order was made. Upon that point the learned Vakil has not been able to afford me any assistance. In my **[313]** opinion, the Munsif had no such power. In this view of the case it becomes unnecessary, as I said before, to discuss the question as to the period from which three months for payment commenced to run, though it is not to be inferred from my silence that I do not concur with the view upon that point of the Court below.

There is one other fact to which I ought to refer, namely, that there was an application by the present appellant to the Munsif to review the order of the 15th September 1894. That application was unsuccessful.

I think the Court below was quite right, and the appeal must be dismissed with costs.

Banerjee, J.—I am of the same opinion. I only wish to add that if it were necessary to go into the question raised, namely, whether the time for redemption should run from the date of the first Court's decree, or from the date of the decree in appeal, I should not have felt much hesitation in answering it in favour of the respondent, and saying that the time should run, having regard to the terms of the decree in the Appellate Court, from the date of the decree of the first Court. No doubt, as there was an appeal here, the final decree in the case is the decree of the Appellate Court. But the decree of the Appellate Court simply dismisses the appeal, leaving the decree of the first Court untouched, and I find very great difficulty in understanding how it can be said that, although the decree of the first Court, which is thus left untouched, provided that, if payment was not made within three months from the date thereof, the mortgage should be foreclosed, the mortgagor, by simply preferring an unsuccessful appeal, and without obtaining any order from the Appellate Court to that effect, gets, necessarily, and by the mere fact of the appeal, an extension of time, namely, three months from the date of the Appellate Court's decree.

Great reliance was placed upon the decision of this Court in the case of *Noor Ali Chowdhuri* v. *Koni Meah*, (1886) I. L. R., 13 Cal., 13, as showing that the time in such cases should run from the decree of the Appellate Court, notwithstanding that that decree merely confirms [314] the first Court's decree. But the case just referred to depended upon the construction of section 52 of Bengal Act VIII of 1869. That section enacts that "in all cases of such suits for the ejectment of a ryot or the cancelment of a lease, the decree shall specify the amount of the arrear, and if such amount, together with interest and costs of suit, be paid into Court within fifteen days from the date of the decree execution shall be stayed." The provision for stay of execution upon payment of arrears forms no part of the decree; it is a provision contained in the Rent Law; that law enacts that if payment is made within fifteen days from the date of the decree, execution should be stayed; and the Court held that the date of the decree there meant the date of the final decree in the case. That may be so; but there is no reason why a decree for foreclosure should be taken subject to any similar limitation. Here the time has to be fixed by the decree itself. The first Court's decree fixed a certain time, namely, three months from the date thereof. The decree of the Appellate Court left that decree untouched, and merely dismissed the appeal. There is no reason then for saying that the mere fact of the appeal being preferred has the effect of extending the time for redemption.

Another case was relied upon, namely, the case of *Daulat* v. *Bhukandas Manek Chand*, (1886) I. L. R, 11 Bom., 172, but there the learned Judges based their decision upon what they presumed to have been the intention of the decree of the Appellate Court. There being no indication here in the Appellate Court's decree of any intention to alter or extend the time fixed by the first Court, and there being nothing in sections 86 and 87 of the Transfer of Property Act, which governs this case, to show that the time allowed is other than that expressly and definitely fixed by the Court, I do not see any reason for holding that the time in this case runs from any date other than that of the decree of the first Court.

The law makes ample provision for preventing hardship. The Court which makes the decree is authorized by section 87 of the Act to enlarge the time upon good cause being shown. Here, [315] as has been pointed out in the judgment of the learned Chief Justice, far from any good cause being shown,

no cause whatever was shown, nor even was any application made, for extension of time, before the decree absolute was made. I, therefore, think the order appealed against is quite right, and should be confirmed with costs.

S.C.G. *Appeal dismissed.*

NOTES.

[See the remarks of Dr. *Rash Behari Ghosh* in his Mortgages, IV Edn. (1911) Vol. I, p. 600, in support of the view that time is not enlarged merely because there is an appeal. See also (1907) 11 C.W.N., 679; (1907) 31 Mad., 28.]

[25 Cal 315]

The 29th June, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE

Kali Pado Mukerjee............Decree-holder

versus

Dino Nath Mukerjee............Judgment-Debtor.*

Execution of decree—Code of Civil Procedure (Act XIV of 1882), sections 223 and 649—Bengal, North-Western and Assam Civil Courts Act (XII of 1887) section 13—Redistribution of local areas, Effect of—Jurisdiction of Munsif.

A obtained a decree against *B* in the Court of the first Munsif of Howrah After the decree, the local area, within which the cause of action arose, and the judgment-debtor resided, was transferred from the first to the second Munsif On an application by *A* for the execution of his decree in the Court of the second Munsif which allowed execution

Held, that the second Munsif had no jurisdiction to entertain the application and allow execution, and that the application ought to have been made in the Court of the first Munsif which passed the decree.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Mohendra Nath Roy* for the Appellant.

Babu *Purna Chunder Shome* for the Respondent.

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.)

Maclean, C.J.—This suit was instituted before the first Munsif of Howrah, and was a suit for an account in which eventually a money decree was given in favour of the plaintiff.

[316] I will assume for the purposes of this judgment that the local area within which the cause of action arose and the judgment debtor resided was transferred from the first to the second Munsif. The decree-holder applied for execution to the second Munsif, who directed execution to issue. From that order an appeal was taken to the District Judge, who held that the Court of the first Munsif was the one which ought to have made the order, and that the Court of the second Munsif had no jurisdiction to make it. Hence the present appeal.

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* Appeal from Order No. 112 of 1897, against the order of J. F. Bradbury, Esq., District Judge of Hooghly, dated the 8th of December 1896, reversing the order of Babu Probodh Chunder Dutt, Munsif of Howrah, dated the 12th of September 1896.

The appellant relies mainly upon the latter portion of section 649 of the Code of Civil Procedure, which says that, "where the Court which passed the decree to be executed has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed were instituted at the time of making the application for execution of the decree, would have jurisdiction to try such suit," would be the Court which would have jurisdiction to execute the decree. Now, it is clear that in order to enable the appellant to succeed under that portion of section 649 which I have read he must make out one of two alternatives—either that the Court which passed the decree to be executed has ceased to exist, or that it had ceased to have jurisdiction to execute it. It is quite clear that the Court has not ceased to exist, and I have heard no argument from the learned Vakil who appears in support of this appeal to induce me to hold that the Court had no jurisdiction to execute it. On the other hand, I think it clear that that Court had jurisdiction to execute it.

But then it is said that if that be so, although that Court may have had that jurisdiction, it did not follow that the Court of the second Munsif had not also that jurisdiction, and reliance is placed upon sub-section (3) of section 13 of the Bengal, North-Western and Assam Civil Courts Act (XII of 1887). But in my judgment that section does not give the Court of the second Munsif of Howrah the jurisdiction for which the appellant contends.

All that that section says is, if I may paraphrase it, that when there has been a certain distribution of civil business by the District Judge, any decree or order passed by the Subordinate [317] Judge or by the Munsif shall not be invalid only by reason of, practically, that distribution. That section does not appear to me to confer upon the Court of the second Munsif in this case the jurisdiction which the appellant claims. In my opinion the proper Court to execute this decree, even assuming that there has been that fresh distribution of civil business by the District Judge, since the date of the decree, was the Court of the first Munsif. Upon these grounds, I think that the judgment of the Court below is correct, and that this appeal must be dismissed with costs.

Banerjee, J.—I am of the same opinion. Two points have been pressed before us by the learned Vakil of the decree-holder, appellant: *first*, that the Court of Appeal below is wrong in holding that the second Munsif of Howrah had no jurisdiction to entertain this application for execution of a decree passed by the first Munsif of that place, when, by reason of a redistribution of local areas between the first Munsif and second Munsif, the first Munsif had ceased to have jurisdiction in the case and under section 649 of the Code of Civil Procedure the second Munsif had acquired jurisdiction over the same; and, *second*, that even if section 649 of the Code of Civil Procedure does not cover this case, the Court of Appeal below was wrong in holding that the second Munsif of Howrah had no jurisdiction to entertain this application for execution, when it ought to have held that he had such jurisdiction under the provisions of sub-section 3 of section 13 of the Bengal, North-Western and Assam Civil Courts Act (XII of 1887).

The decree was passed by the first Munsif of Howrah. It was a decree for a certain sum of money due on an account, and the cause of action arose within the jurisdiction of the first Munsif of Howrah, and, admittedly, within the local area that was assigned to the first Munsif of Howrah. The decree under the provisions of section 223 of the Code of Civil Procedure could, therefore, be executed by the Court of the first Munsif of Howrah which passed it, or by any other Court if it was sent to such other Court for execution under the provisions of the Code of Civil Procedure.

There was no transfer of the execution case by the Court [318] which passed the decree; so no question arises here as to whether the second Munsif had or had not acquired jurisdiction by reason of the transfer of this particular execution case.

The ground, however, upon which the learned Vakil for the appellant contends that it was the second Munsif's Court at Howrah, and that Court alone, which had jurisdiction to entertain this application for execution, is that, by reason of a redistribution of local areas between the date of the decree and the date of the present application for execution, the local area within which the cause of action arose which led to the suit, has now been assigned to the second Munsif of Howrah, and that consequently the first Munsif of Howrah ceased to have jurisdiction to execute the decree, and the Court of the second Munsif of Howrah has acquired jurisdiction to execute it, as it is the Court in which the suit should have been instituted if it had been instituted at the present day; and in support of this argument, paragraph 2 of section 649 of the Code is relied upon.

There is nothing in either of the judgments of the Courts below to show that there has been this redistribution of business that is referred to in the argument, though there is a remark in certain reasons recorded as additional reasons by the learned District Judge, which goes to show that there has been such a redistribution. Assuming then that there has been such a redistribution, is it clear that section 649 applies to this case, and gives to the second Munsif of Howrah the jurisdiction he is said to have acquired?

In my opinion this question ought to be answered in the negative. For the two contingencies that paragraph 2 of section 649 contemplates are: *first*, that the Court which passed the decree should cease to exist; and, *second*, that it should cease to have jurisdiction to execute the decree. In the present case the Court which passed the decree has clearly not ceased to exist. There is still a Court of the first Munsif of Howrah. Nor has the Court ceased to have jurisdiction to execute the decree that it made, notwithstanding that there has been a redistribution of areas. For on reference to section 13 of Act XII of 1887, under the second sub-section of which this redistribution must have been [319] made, I find that the third sub-section enacts that, "when civil business arising in any local area is assigned by the District Judge under sub-section (2)" (I quote only so much of the section as bears upon the present argument) "to one of two or more Munsifs, a decree or order passed by the Munsif shall not be invalid by reason only of the case in which it was made having arisen wholly or in part in a place beyond the local area, if that place is within the local limits fixed by the local Government under sub-section (1)" and that in the present case the cause of action arose within the local limits fixed by the local Government under sub-section (1) is not disputed. Sub-section (1) enacts that "the local Government may, by notification in the official Gazette, fix and alter the local limits of the jurisdiction of any Civil Court under the Act." It is, then, the local limits fixed by the local Government under sub-section (1) of the section that determine the jurisdiction of the Court, the distribution of business by reference to local areas made by the District Judge under sub-section (2) having relation merely to the convenience of transaction of business. That being so, the re-distribution of local areas referred to in the argument could not affect the jurisdiction of the first Munsif to entertain this application, when he had full jurisdiction under sub-section (1) of section 13.

The first Munsif's Court, therefore, not having ceased to have jurisdiction to execute the decree, within the meaning of section 649 of the Code of Civil Procedure, the first point urged before us must fail.

Then, as to the second point, the contention is, that the second Munsif had jurisdiction, as the third sub-section of section 13 says, "a Munsif having jurisdiction in any case under sub-section (1) can make a valid order in the case, notwithstanding that the case in which it is made had arisen wholly or in part in a place beyond the local area assigned to him." But I do not see how that can help the appellant's contention. Sub-section (3) saves the jurisdiction of each of two Munsifs having jurisdiction within the same local limits, only where their area is, for the convenience of transacting business, divided by an order of the District Judge. It does not, however, give to either of two Munsifs having jurisdiction over [320] the same local area, power to pass an order, when his competency to pass that order is affected, not by virtue of any order or distribution made by the District Judge, but by virtue of some provision of the law; and here there is a clear provision of the law in section 223 of the Code of Civil Procedure, which declares that the Court which has jurisdiction to execute this decree is the Court which passed it, or some other Court to which it may be sent for execution. The second Munsif, therefore, not having any jurisdiction to execute the decree by reason of the provisions of section 223 of the Code, sub-section (3) of section 13 of the Act cannot vest him with any jurisdiction in the matter.

The result then is that both the contentions urged before us fail, and the appeal must consequently be dismissed with costs.

S. C. G. *Appeal dismissed.*

NOTES.

[TRANSFER OF JURISDICTION—

The expression '*Court of First Instance*' has been substituted for '*Court which passed a decree*' in C P.C., 1908, sec. 37, which corresponds to sec. 649, C.P.C., 1882. See also the new sec. 150 of the C.P.C., 1908.

As regards the jurisdiction of the Court that actually passed the decree there was a difference of opinion between the Calcutta and the Madras High Courts, see 25 Cal., 315; 27 Cal., 272, 28 Cal., 238: 5 C.W.N., 150; 35 Cal., 974 and 30 Mad., 537; 17 M.L.J., 417. In (**1914**) **26 M.L.J., 189** the question is fully discussed with reference to the previous case-law and the Legislative changes noted above.**]**

[25 Cal. 320]

The 16th August, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Radha Rani Dassi............Objector

versus

Brindabun Chundra Basack............Petitioner.*

Appeal—Succession Certificate Act (VII of 1889), sections 9 and 19—Order granting Certificate, conditional, upon giving security.

Where, on an application for a certificate of succession under the Succession Certificate Act (VII of 1889), an order was made granting the certificate conditionally upon the applicant's giving security:

Held, that this was an order "granting, refusing or revoking a certificate" within the meaning of section 19 of the Act, and that therefore an appeal would lie therefrom.

* Appeal from order No. 305 of 1896, against the order of S. J. Douglas, Esq., District Judge of Dacca, dated the 11th of August 1896.

Bhagwani v. *Manni Lal*, (1891) I.L.R., 13 All., 214, dissented from.

THE facts of the case for the purposes of this report appear sufficiently from the judgment of the High Court.

Babu *Lal Mohun Das*, and Babu *Sarat Chunder Dutt*, for the Appellant.

Babu *Hari Mohun Chuckerbutty*, and Babu *Harendra Narayan Mitter*, for the Respondent.

[321] The following **judgments** were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.).

Maclean, C.J.—A preliminary objection is taken that no appeal lies, the ground being that, inasmuch as this order of the 11th August 1896 was an order conditional upon the applicant finding security, it was not an order that was appealable within the meaning of section 19 of the Succession Certificate Act. In my opinion, an order is not the less an order because there is a condition attached to it that security is to be given by the person in whose favour it is made. It is still an order. The appellant not unnaturally relies upon the case of *Bhagwani* v. *Manni Lal*, (1891) I. L. R., 13 All., 214. With great respect to the learned Judges who decided that case, I regret I am unable to concur in that decision. It seems to me to be rather a narrow view to take of the term "order" in section 19.

That disposes of the preliminary point.

Upon the merits, the learned Judge in the Court below has granted this certificate without a tittle of evidence to show that the promissory notes referred to in the order were the property of the deceased son-in-law of the applicant. I do not think that is a right course to adopt. I think he is bound to enquire into the matter and require at least some evidence to show that there is a *prima facie* case that the property, in respect of which the certificate is granted, belonged to the deceased person. This order has been made without any evidence whatever. I think the proper course is to remand the case to the Court below with this intimation of our opinion. The appellant is entitled to his costs in this Court.

The principle of this judgment, upon the merits, will, it is admitted, apply to appeal No. 444 of 1896. That case, therefore, will also be remanded to the Court below. The appellant in this case also must have his costs.

Banerjee, J.—I am of the same opinion. I do not think that the preliminary objection based upon section 19 of the Succession Certificate Act and upon the case of *Bhagwani* v. *Manni Lal*, (1891) I. L. R., 13 All., 214, is a valid one. Section 19 says that "subject to the other provisions of this Act an appeal shall lie to this Court from an order [322] of the District Court granting, refusing, or revoking a certificate under the Act." The order appealed against says: "Brindaban Chandar Basack will be granted a certificate with regard to eight Government promissory notes named in the petition, provided that he gives security to the amount of rupees six thousand five hundred." This to my mind is undoubtedly an order granting a certificate within the meaning of section 19, though it is coupled with a condition which the Court, by section 9 of the Act, is authorised to impose, the condition, namely, that the applicant must give security. I must, therefore, respectfully dissent from the view taken by the Allahabad High Court in the case cited for the respondent.

Upon the other point, namely, that it was necessary for the Court below to make some enquiry before granting the certificate, especially when the application was opposed, I do not think it necessary for me to add anything to what has already been said in the judgment of the learned Chief Justice, and

to what I have said in the case of *Hurri Krishna Panda* v. *Balabhadra Panda*, (1896) I. L. R., 23 Cal., 431.

S. C. G. *Appeal allowed, case remanded.*

NOTES.

[I. In (1914) 26 M.L.J., 365 the Madras High Court dissented from this decision and followed (1903) 28 Bom., 119 holding that the question whether the debts belonged to the deceased is not a matter that can be gone into on an application for succession certificate. See also (1901) 5 C.W.N. 494.

II. Upon the question of appeal from a conditional order granting security, this was ollowed in (1908) P.R. 139 but dissented from in (1902) 5 O.C. 213; (1903) 26 All. 173.]

[25 Cal. 322]

The 30th August, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Banku Behary Sanyal and another............Judgment-debtors

versus

Syama Churn Bhuttacharjee............Decree-holder.*

Execution of decree—Stay of Execution—Decree for arrears of rent—Decree for money—Code of Civil Procedure (Act XIV of 1882), section 546.

A decree for arrears of rent is a "decree for money" within the meaning of section 546 of the Code of Civil Procedure.

ONE Syama Churn Bhuttacharjee obtained a decree for arrears of rent against one Banku Behary Sanyal, in the Court of the Munsif of Faridpore, and it was confirmed on appeal. The judgment-debtor preferred a second appeal to the High Court, which was admitted under section 551 of the Code of Civil Procedure. On the decree-holder's taking out execution, and the property of **[323]** the judgment-debtor having been advertised for sale, he applied to the Munsif under section 546 of the Code of Civil Procedure to stay the sale. The Munsif allowed the application and stayed the sale. On appeal, the Subordinate Judge reversed the decision of the Munsif, holding that section 546 of the Code of Civil Procedure did not apply to rent decrees or to sales in pursuance of such decrees.

From this decision the judgment-debtor appealed to the High Court.

Babu *Kishory Lal Sarkar*, for the Appellant.

No one appeared for the Respondent.

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.)

Maclean, C. J.—I feel no difficulty about this case. In my opinion the expression "decree for money" used in the last paragraph of section 546 of the Code of Civil Procedure applies to a case where a decree has been made for payment of arrears of rent. Arrears of rent are "money." It would be a very

* Appeal from order No. 220 of 1897, against the order of B. C. Mitter, Esq., Offg. District Judge of Faridpore reversing the order of Babu Chundra Bhusan Banerjee, Munsif of that District, dated the 20th of January 1897.

narrow construction to hold otherwise, especially as regards the operation of this particular section, which deals with the case of staying execution of a decree pending an appeal on certain terms as to giving security. Why that should not apply to a case where the decree is for arrears of rent, as well as to any other case of a money decree, I fail to see. I think the appeal must succeed and the order of the Munsif be restored with costs.

Banerjee, J.—I am of the same opinion. There is no reason why a decree for rent should not be held to be included within the meaning of the expression "decree for money" in the last paragraph of section 546 of the Code of Civil Procedure, nor is there anything in the Bengal Tenancy Act to show that the provisions of section 546 should not apply to a case like the present. Section 143 of the Bengal Tenancy Act makes the Civil Procedure Code generally applicable to rent suits, subject only to certain exceptions; and none of the exceptive provisions of the Bengal Tenancy Act, such as those in sections 148, 163 and 170, goes to show that section 546 was intended not to have any application to the execution of a rent decree.

S. C. G. *Appeal allowed.*

NOTES.

[In the C.P.C. 1908, O. 41, r. 6, sub-clause 2, which corresponds to sec. 546 of the C.P.C., 1882, the words 'for money' which occurred in the third para. of sec. 546 after the word 'decree' have been omitted, and the words 'to the Court which made the order' have been added.]

[324] *The 30th June, 1897.*
PRESENT :
SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Azim Sirdar and others............Defendants
versus
Ramlall Shaha and others............Plaintiffs.*

Landlord and tenant—Suit for rent—Tenant settled on the land by a trespasser, Position of —Joint landlords—Payment of rent by a tenant to some of the landlords, whether sufficient discharge from liability to other landlords—Bengal Tenancy Act (VII of 1885), sections 157 and 188.

A suit was brought by the plaintiffs against a tenant for the entire rent, making the co-sharer landlords also defendants to the suit. The defence of the tenant, defendant No. 1, was denial of relationship of landlord and tenant, and payment to the co-sharer landlords. The co-sharer landlords *inter alia* pleaded that, as the tenant-defendant was settled on the land by them at a time when they were claiming to be entitled exclusively to the possession thereof, under a title derived from their auction purchase, they must be taken to have been trespassers on the land, so far as the plaintiffs' share was concerned, and that consequently defendant No. 1, who was settled on the land by them, must also be treated as a trespasser as against the plaintiffs.

Held, that the defendant No. 1 could not be treated as a trespasser as against the plaintiffs, and that the plaintiffs were entitled to claim rent for use and occupation from the defendant No. 1.

Nityanund Ghose v. *Kissen Kishore*, W. R. (1864), Act X, Rul., 82, *Lalun Monee* v. *Sona Monee Dabee*, (1874) 22 W. R., 334 ; *Lukhee Kanto Doss Chowdhry* v. *Sumeeruddi Lusker*, (1874) 13 B.L.R., 243 ; 21 W. R., 208 ; *Surnomoyee* v. *Deno Nath Gir*, (1883) I. L. R., 9 Cal., 908 ; *Binad Lal Pakrashi* v. *Kalu Pramanik*, (1893) L. R., 20 Cal., 708, referred to.

Held, also, that the payment to the co-sharer landlords, defendants Nos. 2 and 3, was not sufficient to discharge the defendant No. 1 from liability to the plaintiffs.

Ahamudeen v. *Grish Chunder Shamunt*, (1878) I. L. R., 4 Cal., 350, distinguished.

[325] THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

The *Advocate-General* (Sir *Charles Paul*), Babu *Saroda Churn Mitter*, and Babu *Hurkumar Mitter*, for the Appellants.

Mr. *C. P. Hill*, Dr. *Rash Behary Ghosh*, and Babu *Jasoda Nundon Pramanick*, for the Respondents.

The following **judgments** were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.) :—

Banerjee, J.—This is an appeal arising out of a suit brought by the plaintiffs-respondents asking the Court to pass a decree against the defendant No. 1 for the entire sixteen annas of the rent due from him in respect of certain lands held by him under the plaintiffs and the defendants Nos. 2 and 3, and to award to the plaintiffs a 7 annas, or 7-16th share of the amount decreed, that

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* Appeal from Appellate Decree No. 574 of 1895, against the decree of A. Ahmad, Esq., Officiating District Judge of Nuddia, dated the 20th of June 1895, modifying the decree of Babu Ananda Charan Sen, Munsif of Kushtia, dated 27th of September 1894.

being their share, and to award to their co-sharers, the defendants Nos. 2 and 3, the remaining 9-16ths of the amount. There was also a prayer, in the alternative, for a decree against the defendants Nos. 2 and 3 for so much of the amount appertaining to the plaintiffs' share as might be found to have been realised by those defendants.

The allegations upon which the claim is based are shortly these: That the plaintiffs are the *putnidars* of village Amlah, jointly with the defendants Nos. 2 and 3, the share of the plaintiffs being seven annas; that, in the village Amlah, there was a non-transferable *rayati* holding in the name of one Ram Dhone Ghose, which the defendants Nos. 2 and 3 are alleged to have purchased; that the plaintiffs brought a suit in the Civil Court against the defendants Nos. 2 and 3 to have it declared that the alleged purchase by the said defendants of the *jote* of Ram Dhone Ghose was invalid, and that the plaintiffs were entitled to *khas* possession of the land covered by the said *jote*, jointly with the defendants Nos. 2 and 3, and the suit was decreed in favour of the plaintiffs; that the defendant No. 1 holds a portion of the land which formed the *jote* of Ram Dhone Ghose in respect of which rent is claimed in this suit; that notwithstanding that he was served with notice from the plaintiffs, **[326]** requiring him to pay rent to them, the defendant No. 1, in collusion with defendants Nos. 2 and 3, withheld payment of rent to the plaintiffs; and that as the defendants Nos. 2 and 3 refused to join with the plaintiffs in bringing this suit, the plaintiffs have been compelled to institute this suit making the tenant and their co-sharers defendants in it.

The defence of the tenant-defendant was that there was no relation of landlord and tenant subsisting between him and the plaintiffs; that the rate at which the plaintiffs claimed rent was in excess of that at which rent was payable by him; and that the rent that was payable by him had been paid by him in full to the defendants Nos. 2 and 3.

The co-sharer-defendants, that is the defendants Nos. 2 and 3, in their defence, supported the tenant-defendant, and urged that there was no relation of landlord and tenant between the plaintiffs and the defendant No. 1; that they were not liable for the plaintiffs' claim; and that the plaintiffs' suit was liable to dismissal under the provisions of the Road Cess Act, Bengal Act IX of 1881.

The first Court held that the relation of landlord and tenant between the plaintiffs and the defendant No. 1 had been made out: that the provisions of the Road Cess Act were no bar to this suit; that the amount of rent payable by the tenant-defendant was proved, inasmuch as the quantity of land held by the defendant No. 1 and the rate of rent per bigha of such land were established by the evidence; but the first Court dismissed the plaintiffs' suit on the ground that the tenant-defendant had paid all that was payable by him to the defendants Nos. 2 and 3; and that the plaintiffs were not entitled to recover anything from the tenant-defendant, nor anything from the defendants Nos. 2 and 3 in a suit for arrears of rent.

Against this decision, the plaintiffs preferred an appeal, but no objection appears to have been raised at the hearing against the decision of the first Court upon any of the points which had been decided in favour of the plaintiffs by that Court. The Lower Appellate Court was of opinion that the first Court was wrong in holding that payment to the defendants Nos. 2 and 3 was sufficient to discharge the tenant-defendant from liability to the **[327]** plaintiffs, and it accordingly gave the plaintiffs a decree for the rent due to them on account of their share.

Against that decree of the Lower Appellate Court, this second appeal has been preferred jointly by the tenant-defendant and the co-sharer defendants, and it is contended on their behalf, *first*, that upon the facts found the Courts below ought to have held that the relation of landlord and tenant between the plaintiffs and the defendant No. 1 was not established; *secondly*, that the Court of Appeal below ought to have held that payment to the defendants Nos. 2 and 3 was sufficient to discharge the defendant No. 1 from liability to the plaintiffs; *thirdly*, that the Court of Appeal below ought to have held that the provisions of section 20 of Bengal Act IX of 1881 were a bar to the present claim; *fourthly*, that the Court of Appeal below ought not to have made any decree in favour of the plaintiffs without determining the amount of rent payable by the defendant No. 1, when a question had been raised as to the amount of rent payable; and, *fifthly*, that the suit, in so far as it relates to the rent due for one instalment of the year 1300, ought to have been dismissed as premature.

Upon the first point there is no question that the plaintiffs are entitled to a seven annas share in the *patni* mehal, Amlah, the village in which the land in suit is situated, nor is there any question that the plaintiffs have been declared entitled to that share of the land in dispute jointly with the defendants Nos. 2 and 3; but it is contended that as the tenant-defendant was settled on the land by the defendants Nos. 2 and 3 at a time when they were claiming to be entitled exclusively, to the possession thereof, under a title derived from their auction purchase of the *jote* of Ram Dhone Ghose, the defendants Nos 2 and 3 must be taken to have been trespassers on the land, so far as the plaintiffs' seven annas share was concerned, and that consequently the defendant No 1, who was settled on the land by them, must also be treated as a trespasser as against the plaintiffs, and not as their tenant.

I do not think that there is any force in this contention. Tenancy in this country is created not only by contract, but also by occupation of land, so far as agricultural lands are concerned. **[328]** As was observed by this Court in the case of *Nityanand Ghose* v. *Kissen Kishore*, (1864) W. R. Act X. Rul., 82: "Here it is a very usual thing for a man to squat on a piece of land, or to take into cultivation an unoccupied or waste piece of land. Tenancy in a great many districts in Bengal commences in this way, and where it so commences it is presumed that the cultivator cultivates by the permission of the landlord, and is under obligation to his landlord to pay him a fair rent, when the latter may choose to demand it. Thus the established usage of the country regards these parties as landlord and tenant, and unless the landlord chooses thus to treat him, the cultivator is not regarded, as he would be by the law as administered in England, as a trespasser, but as a tenant, and he would be so although he may never have expressly acknowledged the landlord's rights, or entered into express contract with him for the payment of rent. If he chooses to cultivate the zemindar's lands, and the zemindar lets him, there is an implied contract between them creating a relationship of landlord and tenant."

So in the case of *Lalun Monee* v. *Sona Monee Dabee*, (1874) 22 W. R., 334, Mr. Justice JACKSON observes: "If these parties are in possession they make themselves tenants by use and occupation of the land." In the Full Bench case of *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddi Lusker*, (1874) 13 B. L. R., 243: 21 W. R., 208, where the landlord sued a *raiyat* for rent alleged to be due under a *kabulyat* and the plaintiff was unable to prove the *kabulyat*, the question arose whether, as the defendant had occupied the land under the zemindar, the latter was entitled to recover some rent or

compensation for the use of the land, and the learned Judges held that he was so entitled. And following the two last mentioned cases GARTH, C.J., in the case of *Surnomoyeee* v. *Deno Nath Gir*, (1883) I. L. R., 9 Cal., 908, observes: "As the plaintiff is willing in this case to waive the dispossession and to consider the defendant as her tenant, we think that upon the authority of those cases we may give the plaintiff a decree for use and occupation."

The principle of law enunciated in those decisions has now been **[329]** embodied in section 157 of the Bengal Tenancy Act, upon which reliance was placed by the learned Counsel for the respondent in answer to the appellants' contention. If the success of the plaintiffs, so far as this point is concerned, depended solely upon the provisions of section 157 of the Bengal Tenancy Act, there would have been a difficulty in the plaintiffs' way, created by section 188 of that Act, which enacts that " where two or more persons are joint landlords, anything which the landlord is under this Act authorised to do must be done by both or all of those persons acting together, or by an agent authorised to act on behalf of both or all of them," and the present suit is brought, not by the entire body of landlords nor by an agent authorised to act on behalf of them all, but by only some of them. But quite independently of the provisions of section 157 of the Bengal Tenancy Act, according to the law as it has always been understood in this country, as will appear from the cases to which I have referred, the relationship of landlord and tenant has been held to exist, at any rate as regards agricultural lands, between the person who is the proprietor of such lands and the actual cultivator when there is no intermediate tenure existing between the two. And in the case of *Binad Lal Pakrashi* v. *Kalu Pramanik*, (1893) I.L.R., 20 Cal., 708, which was decided by a Full Bench of this Court after the passing of the Bengal Tenancy Act, it was held that a person being settled on certain land as a *raiyat* by a trespasser, and being sued in ejectment by the true owner, was entitled to resist the action on the ground of his being a non-occupancy *raiyat*. Sir COMER PETHERAM, whose judgment was concurred in by the other members of the Full Bench, observes: "The possession of the land in question for the purpose of cultivating it was acquired a good many years ago by the defendant from the persons who at that time were in actual possession of the zemindari within which it was situated, and who were the only persons who could give possession of the lands of the zemindari to cultivators. It is not suggested that the defendants did not then obtain possession as tenants under the *bonâ fide* belief of the title of their landlords, but since then it has been ascertained by a judgment of a Court of law that the zemindari did not belong to these persons, but to **[330]** the plaintiffs, and the question is whether, now that the plaintiffs have established their right to the zemindari, they can treat all cultivators who have been settled on the lands by the persons whom they have ousted from its possession as trespassers, and obtain *khas* possession of all the *raiyati* lands from them at any moment without any notice and without any compensation even for the crops on the land. I am of opinion that they cannot." It follows then that the plaintiffs are incompetent to treat the defendant No. 1 as a trespasser and to eject him. That being so they must be held entitled to claim as against him rent for use and occupation. The first contention raised before us must therefore fail.

As regards the second contention, the only authority cited in its support is the case of *Ahamudeen* v. *Grish Chunder Shamunt* (1878) I. L. R., 4 Cal., 350. But that case is clearly distinguishable from the present. There the ground upon which the payment of rent to some of the co-sharers was held to be payment to them all was, as appears from the judgment, this,—that the

tenant had paid his rent, as he had been accustomed to do, to the joint owners that is, to some of the joint owners. The ground then of the decision in that case was that the fact of all the co-sharers having let some members of their body realise the whole rent for a long period of time raised the presumption that the co-sharers who had been realising the rent were doing so with the consent of the other co-sharers. In the present case that fact is wholly wanting; on the contrary, we have it upon the finding of the Lower Appellate Court that notice was given to the defendant No. 1 by the plaintiffs after they had recovered their decree against the defendants Nos. 2 and 3, declaring their rights, that they had acquired a right to a 7 annas share of the land; and if in spite of such notice the tenant continued to pay rent to defendants Nos. 2 and 3 who had previously been in receipt of rent, not as some of the co-sharers, but as persons claiming to be the exclusive landlords, such payment by the tenant must be taken to have been made at his risk, and cannot exonerate him from liability to the plaintiffs' claim.

With reference to the third contention this is how the facts stand: The tenant-defendant, against whom, and against whom alone, the decree of the Lower Appellate Court has been made, [331] did not raise any objection to the suit on the ground of its being opposed to the provisions of the Road Cess Act. The objection was raised on behalf of the co-sharer defendants; and though it is quite true that an issue was raised on the point, the first Court decided that issue in favour of the plaintiff, holding that the return filed was a sufficient compliance with the provisions of section 20 of Bengal Act IX of 1880, when the land, in respect of which rent is now claimed, had been entered in such return. Against this decision of the first Court no objection appears to have been raised before the Lower Appellate Court either on behalf of the tenant-defendant or on behalf of the co-sharer defendants. That being so, we do not think that the appellants ought now to be allowed to raise this objection before us, and we take this view, not only because this objection is of a purely technical character, but also because the peculiar circumstances of this case go to show that it would not be right and proper that the appellants should be allowed to raise the objection now. The circumstances, to which I refer, are those stated in the following passage of the judgment of the first Court upon the second issue. "Both parties were called upon to file the return, and the party defendants Nos. 2 and 3 having filed it first, the return from the plaintiffs seems to have been not accepted as only superfluous; the return by the party defendants Nos. 2 and 3 appears to have been filed some time after the date of the High Court's decree, passed on appeal in Suit No. 45 of 1887. In that return the names of these tenant-defendants have not been given, but the lands comprised in the *jote* in the name of Ram Dhone Ghose have been inserted as if still standing in the name of Ram Dhone, though said to be held in possession by two of the party defendants Nos. 2 and 3. Thus it comes to this, that the return in respect of the *patni taluk* has been filed in respect of the *patni taluk*, and the lands in suit have also been mentioned therein, though not the names of the tenants sued." So that, although the present plaintiffs had put in a road cess return, that return was not accepted, because another return had already been filed by their co-sharers, the defendants Nos. 2 and 3; and there has been no inquiry as to what the nature of the return was which the plaintiffs wanted to file. The defendants Nos. 2 and 3, evidently for their own [332] benefit, inserted in the return filed by them the name of Ram Dhone Ghose, as the person in whose name the holding stood covering the land in dispute, and they ignored the names of the tenants who are now sued.

In this state of things, it would be obviously unjust to visit the plaintiffs with any penalty by reason of the Road Cess return, put in by their co-sharers,

not containing the name of the tenant-defendant. As the tenant-defendant is evidently making common cause with the defendants Nos. 2 and 3, to give effect to this objection would virtually be to enable the defendants Nos. 2 and 3 and defendant No. 1, who is acting in collusion with them, to take advantage of their own wrong. For these reasons we think it right not to allow the objection to be raised in this Court. And I may add that even if it had been open to the appellants to raise this objection, it is not at all clear that they would have been entitled to succeed.

As to the fourth contention, no doubt, the Lower Appellate Court has not come to any determination as to the rate of rent; but then the first Court determined that question, inasmuch as it found the quantity of land, which was in the possession of the tenant-defendant and also the rate at which rent was payable in respect of such land; and that finding was not questioned before the Lower Appellate Court. That being so, and the plaintiffs respondents being quite willing to have the decree of the Lower Appellate Court modified so as to reduce the amount of the decree to what it ought to be, having regard to the area and the rate found, we think the decree of the Lower Appellate Court ought to be modified accordingly.

The fifth point raised before us need not detain us long, as the learned Counsel for the plaintiffs respondents admits that the claim for the last quarter of the year 1300 is premature.

That being so, the decree of the Court below will be modified in the two respects mentioned above, but as the objections raised in this case on behalf of the appellants have for the most part been of a purely technical character, and as the claim of the plaintiffs has been resisted on grounds which are by no means fair, we think it right to direct that the appellants should pay the costs of the respondents.

[333] It is admitted that this judgment will govern the remaining six appeals, that is, second appeals Nos. 1575 and 1622 to 1626, both inclusive. In the view we have taken above of these cases it becomes unnecessary to consider the question whether the petitions of compromise filed by the tenants in some of those cases, and subsequently withdrawn by them, are binding upon them.

Maclean, C.J.—I concur in the judgment which has just been delivered.

S. C. G. *Decree varied.*

NOTES.

[I. Tenancy in this country is created not only by contract but also by occupation in the case of agricultural land; consent of both parties is not essential to establish the relation of landlord and tenant:—(1883) 9 Cal., 908; (1874) 21 W.R., 208; (1874) 22 W.R., 334; (1898) 20 Cal., 708; (1897) 25 Cal., 324; **(1912) 17 C.W.N., 348.**

II. "In the cases of 9 Cal., 908 and 25 Cal., 324, the learned Judges treated the Full Bench case of *Lakhi Kant*, 13 B.L.R., 243 as laying down that the landlord is entitled to rent or compensation for the use of the land, where he is unable to prove the kabuliyat under which rent is claimed, but the Full Bench distinctly held that the question whether the landlord is entitled to rent for use and occupation depends upon the claim which is stated in the plaint and that where a claim for rent on account of such occupation is not made in the plaint the landlord is not so entitled. This view has been accepted and followed in (1895) 22 Cal., 752; (1899) 27 Cal., 239; (1909) 10 C.L.J., 538"—(1912) 17 C.W.N., 311 where it was held that in a suit for rent where no alternative claim was made for compensation for use and occupation, no rent could be decreed on that footing.]

[25 Cal. 333]

CRIMINAL REVISION.

The 28th October, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

Deputy Legal Remembrancer............Petitioner

versus

Ahmad Ali............Opposite-Party.*

Reformatory Schools Acts (V of 1876), sections 2 and 7 and (VIII of 1897), section I, clauses 2—3 and 8—Criminal Procedure Code (Act X of 1882), section 3 and section 399—Criminal Procedure Code (Act X of 1872), section 318—General Clauses Consolidation Act (X of 1897)—Effect of the repeal of a repealing statute—Construction of statute.

The accused was convicted of the offence under section 457 of the Penal Code by the Deputy Magistrate of Barisal, who found that the accused was a boy of fourteen or fifteen years, decidedly under sixteen, and passed the following order:—

"I find Ahmad Ali, boy, guilty of house-breaking by night for the purpose of committing theft, and instead of being imprisoned in the jail under section 457 of the Penal Code, I direct under section 399 of the Criminal Procedure Code and section 7 of Act V of 1876, that Ahmad Ali be confined in the Calcutta Reformatory for two years for training in some branch of useful industry."

Held, that the order could not be sustained under section 7 of Act V of 1876 as that Act had been repealed before the date of the order and the commission of the offence, nor under section 8 of Act VIII of 1897, as the order did not comply with the provisions of the latter Act.

Held, further, that section 318 of the Criminal Procedure Code (Act X of 1872) having been repealed by section 2 of Act V of 1876, the corresponding **[334]** section 399 of the present Criminal Procedure Code (Act X of 1882) must also be held by virtue of section 3 of the Code to have been repealed in the provinces, including Bengal, to which Act V of 1876 was extended.

The repeal of a statute repealing another statute does not revive the repealed statute. The law in India as embodied in section 7 of the General Clauses Act (X of 1897) is the same as the law in England.

Queen-Empress v. *Madasami*, (1888) I. L. R., 12 Mad., 94, and *Queen-Empress* v. *Manaji*, (1889) I. L. R., 14 Bom., 381, referred to and approved of.

THE facts of the case appear fully from the judgments of the High Court.

The *Officiating Deputy Legal Remembrancer* (Mr. *Abdur Rahim*) for the Crown.

No one appeared for the Accused.

The following **judgments** were delivered by the High Court (BANERJEE WILKINS, JJ.):—

Banerjee, J.—This is a rule calling upon the accused person and the Magistrate of the district to shew cause why the sentence passed in this case should not be set aside as being contrary to law, and a proper sentence passed.

* Criminal Revision No. 682 of 1897, made against the order passed by Babu Chandra Kumar Dutta, Deputy Magistrate of Barisal, dated the 3rd of May 1897.

The sentence passed by the learned Deputy Magistrate on the 3rd of May 1897 runs in these words: "I find Ahmed Ali, boy, guilty of house-breaking by night for the purpose of committing theft, and instead of being imprisoned in the jail under section 457 of the Penal Code, I direct under section 399 of the Criminal Procedure Code and section 7 of Act V of 1876 that Ahmed Ali be confined in the Calcutta Reformatory for two years for training in some branch of useful industry."

No cause is shewn either by the accused or by the District Magistrate.

The order of the Deputy Magistrate, so far as it refers to section 7 of Act V of 1876, is clearly wrong, as before the date of the order (3rd May 1897) and that of the commission of the offence (27th April 1897) that Act had been repealed by section 2 of Act VIII of 1897, which came into operation on the 11th March 1897. The question then is whether section 399 of the [335] Code of Criminal Procedure or any provision of the present Reformatory Schools Act (VIII of 1897) will sustain the order.

Act VIII of 1897 does not warrant the sentence as it stands, as the least period for which detention in a Reformatory School can be ordered under that Act is by section 8 of the Act fixed at three years, whereas the term for which detention is here directed is two years only.

Section 399 of the Code of Criminal Procedure, if it stood alone, would no doubt warrant the order made in this case, the accused having been found to be "a boy of fourteen or fifteen years, decidedly under sixteen." But then the question arises, what is the effect of section 399 read with section 3 of the Code of Criminal Procedure, and with section 2 of Act V of 1876? And how far is that effect modified by sections 2 and 3 of Act VIII of 1897?

Section 2 of Act V of 1876 enacted that on and from the day on which that Act was extended to any Province by the Local Government, section 318 of the Code of Criminal Procedure (that is, Act X of 1872, the Code then in force) should be repealed therein. Section 399 of the present Code of Criminal Procedure corresponds to, and is in fact a reproduction almost word for word of, section 318 of the former Code; and section 3 of the present Code enacts that in every enactment passed before that Code comes into force in which reference is made to any section of the Code of Criminal Procedure (Act X of 1872), such reference shall so far as practicable be taken to be made to the corresponding section of the present Code. Therefore section 399 of the present Code must be taken to stand repealed to the extent to which section 318 of the former Code had been repealed by section 2 of Act V of 1876, that is in the Provinces to which the last mentioned Act had been extended; and it remains operative only as regards the rest of British India.

It might appear somewhat anomalous that after having provided in section 2 of Act V of 1876 for the gradual repeal of section 318 of the Criminal Procedure Code of 1872, the Legislature should re-enact this last mentioned section in an unmodified form in the Code of 1882 But the anomaly is explained when it [336] is remembered that section 399 of the Code of Criminal Procedure is a general provision applicable to all cases except those otherwise specially provided for, while the provisions of Act V of 1876 and Act VIII of 1897 are of a special character applicable only to certain defined classes of cases. This view is in accordance with the decision of the Madras High Court in *Queen-Empress* v. *Madasami*, (1888) I. L R., 12 Mad., 94.

The repeal of Act V of 1876 does not revive section 399 of the Criminal Procedure Code in places in which it had been repealed by the first mentioned Act, regard being had to the provisions of section 7 of the General Clauses Act

(X of 1897), which, in fact, embodies the rule of English law applicable to the subject (see Maxwell on the Interpretation of Statutes, 3rd Edition, p. 585).

Nor does section 3 of Act VIII of 1897 really raise, as it might at first sight seem to do, any inference that section 399 of the Code of Criminal Procedure is in force throughout British India, and is repealed in any Province only from the date of the notification mentioned in the section, such notification having reference, as section 1, sub-section 3 shews, only to the Punjab and Coorg, and not to any other part of British India.

Section 399 of the Code of Criminal Procedure must therefore be held to have no force in the Provinces to which Act V of 1876 was extended, and to be in force only in the rest of British India. Now Act V of 1876 was extended to Bengal on the 1st of March 1878 by a notification, dated the 14th of February 1878 (See the *Calcutta Gazette* for 1878, Part I, p. 138). Therefore section 399 has no force in Bengal, and the order of the Court below directing the accused to be confined in the Calcutta Reformatory for two years is not warranted by law, and must be set aside.

The question then remains what sentence should be passed on the accused. There being no clear finding that the accused was at the date of conviction "under the age of fifteen years," the limit of age prescribed by the present Reformatory Schools Act VIII of 1897, the provisions of that Act do not apply to him, and there is no other provision of law under which he can be detained in a reformatory. We therefore set aside the sentence passed **[337]** on the accused as being contrary to law; and having regard to all the circumstances of the case we sentence the accused under section 457 of the Penal Code to rigorous imprisonment for six months, the sentence taking effect from the date of this order.

Wilkins, J.—This is a rule calling upon the District Magistrate of Backergunge and the accused Ahmed Ali to show cause why the order of the Deputy Magistrate of Barisal, dated the 3rd May last, directing that the accused (whom he had convicted under section 457 of the Penal Code) be detained in the "Calcutta Reformatory" for a term of two years, should not be set aside as being contrary to law, and a proper sentence passed.

The order purports to have been made "under section 399 of the Criminal Procedure Code and section 7 of Act V of 1876."

The rule was granted to the Deputy Legal Remembrancer at the instance of the Local Government. It has been duly served upon the parties concerned, of whom the District Magistrate admits that the order is illegal, but the accused does not appear to show cause.

As to the illegality of the order, so far as it depends upon the Reformatory Schools Act V of 1876, there can be no question; *firstly*, because that Act has been repealed by section 2 of the Reformatory Schools Act VIII of 1897; and, *secondly*, because, even if the Act of 1876 were still in force, the order is in contravention of Rule I of the Rules* made by the Governor-General in Council under the provisions of section 22 of that Act; this being a first conviction of the accused, and the latter being over ten years of age, the minimum period for which he could be sentenced to detention in a Reformatory School would be three years; and, as he appears to be close upon sixteen years of age, it would follow that he could not legally be sent to a Reformatory School at all.

It remains to be seen whether the order is a good order under section 399 of the Criminal Procedure Code.

* Notification No. 340, Home Department, dated 18th March 1878.

[338] The question as to the effect of the Act of 1876 upon the provisions of section 399 of the Criminal Procedure Code in any Province to which the former Act had been extended, was discussed by a Full Bench of the Madras High Court in the case of *Queen-Empress* v. *Madasami*, (1888) I.L.R., 12 Mad., 94. So far as the question now before us is concerned the position is much the same as when that case was decided in 1888. But it will be advisable to refer briefly to certain provisions of the Act of 1897 when discussing the question.

The entire Act of 1897 extends to the whole of British India "except the territories for the time being administered by the Lieutenant-Governor of the Punjab and the Chief Commissioner of Coorg, but either of the said local Governments may at any time by notification in the local official Gazette, extend" the whole Act to their territories from any date fixed in such notification. This is provided by sub-section (3) of section 1.

Again, section 3 declares that from the date so fixed, section 399 of the Criminal Procedure Code "shall be repealed in the Province to which the notification relates."

It will be observed, therefore, that the Act is silent as to whether section 399 of the Criminal Procedure Code is still in force in the Provinces to which the Act applies by virtue of section 1, sub-section (3); for example in this Province of Bengal.

The reason for this silence is not very clear. It may be that the Legislature, when enacting Act VIII of 1897, assumed that section 399 of the Code of Criminal Procedure had been already repealed by Act V of 1876 in all territories to which that Act had been extended; or, it may be, as pointed out by MUTTUSAMI AYYAR, J., in *Queen-Empress* v. *Madasami*, that it allowed section 399 of the Criminal Procedure Code to remain in force side by side with the Reformatory Schools Act, so as to reserve to itself the power to provide in the future "reformatories" for the benefit of female juvenile offenders, the special Act dealing only with male juvenile offenders.

[339] The inconsistency, however, of leaving section 399 of the Criminal Procedure Code in force in some Provinces, and of altogether repealing it in others, would seem to furnish an argument against the adoption of the second of these conjectures.

And, indeed, it appears to me that section 399 of the Criminal Procedure Code has already been practically repealed in Bengal by Act V of 1876; and, of course, the repeal of the latter Act would not have the effect of reviving the section which it repealed.

I base this opinion upon the following reasons: When Act V of 1876 was passed, the Procedure Code in force was that of 1872. Section 318 of that Code, which is practically word for word the same as section 399 of the present Code, was repealed in Bengal on and from the day upon which Act V of 1876 came into force in this Presidency by notification (See sections 1 and 2, Act V of 1876). That section 318 of the Code of 1872 was reproduced as section 399 of the present Code was perhaps due (partially at least) to the fact that Act V of 1876 had not in 1882 been extended to every Province in British India, and that it was necessary to leave some such provisions in force in the Provinces to which this special Act had not been extended. But the result would not be to revive the provisions of section 318 of Act X of 1872, or, in other words, to make section 399 of the present Code to be in force, in Provinces (such as Bengal), in which the Reformatory Schools Act of 1876 was in force. This would be prevented by the provisions of the first paragraph

of section 3 of the Criminal Procedure Code, which runs as follows: " In every enactment passed before this Code comes into force, in which reference is made to, or to any chapter or section of, the Code of Criminal Procedure Act XXV of 1861, or Act X of 1872, or to any other enactments hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding chapter or section." So that, where section 2 of Act V of 1876 refers to section 318 of Act X of 1872, as being repealed, that reference must, " so far as may be practicable, " be taken to be made to the corresponding section, viz., section 399 of the Code of 1882 now in force. In other words, Act [340] V of 1876 repealed, not only section 318 of Act X of 1872, but also section 399 of the present Code, in all territories to which the Act of 1876 has been extended.

It consequently follows that the order of the Deputy Magistrate of Barisal purporting to be under section 399 of the Criminal Procedure Code and section 7 of Act V of 1876 is an illegal order under both these sections.

There is yet another matter in which that order is at least irregular. The age of the accused is not clearly ascertained. In his statement to the Court, he is declared to be fifteen years old; in the judgment the Deputy Magistrate says "that he is a boy of fourteen or fifteen years, decidedly under sixteen." Now, even if the Act of 1876 had been in force, the Magistrate should have clearly determined the age of the boy before directing his detention in the reformatory school. This has been laid down in the case of *Queen-Empress* v. *Manaji*, (1889) I. L. R., 14 Bom., 381, and the present Act of 1897, section 11, prescribes that there should be a preliminary enquiry and a finding in this respect.

For the above reasons, I also think that the order of the Deputy Magistrate should be set aside, and in lieu thereof that Ahmed Ali should be sentenced under section 457 of the Penal Code to rigorous imprisonment for six months.

S. C. B.

NOTES.

[This subject is discussed fully in (1899) 21 All., 391 F.B.]

[25 Cal. 340]

APPELLATE CIVIL.

The 4th January, 1898.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

Kunjo Behari Gossami and another............Defendants

versus

Hem Chunder Lahiri............Plaintiff.*

Probate—Jurisdiction in Probate cases—Transfer of a probate case by the District Judge in whose Court it was instituted, to that of a Subordinate Judge - The Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), section 23, sub-section 2, clause (d)—Probate and Administration Act (V of 1881), section 52.

An application was made for probate of the will of a deceased testator [341] in the Court of the District Judge, who transferred the case to that of the Subordinate Judge. The opposite party *inter alia* objected that the Subordinate Judge had no jurisdiction to try the case.

Held, that the case came within the scope of section 23, sub-section 2, clause (*d*), of the Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), and therefore the Subordinate Judge had jurisdiction to try it.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Saroda Churn Mitter*, and Babu *Indu Bhusan Masumdar*, for the Appellants.

Sir *Griffith Evans*, and Babu *Shib Chunder Palit* for the Respondent.

The **judgment** of the High Court (**Banerjee** and **Wilkins, JJ.**) was as follows: –

This appeal arises out of an application by the respondent, Hem Chunder Lahiri, for probate of the will of the late Jibun Kristo Gossami, uncle of the petitioner's wife's father, by which the petitioner and his wife have been appointed executors.

The will propounded by the petitioner is dated the 20th September 1895, that is, about six months before the death of the testator. The application for probate was opposed by the appellants, Kunjo Behari and Debendernath Gossami, two of the nephews of the testator, mainly on the grounds that the testator was not of sound disposing mind at the time the will propounded is alleged to have been executed, and that he was completely under the influence of the petitioner and his wife; and that the execution of the will should be held to have been brought about by coercion and undue influence.

The case was transferred by the District Judge, in whose Court it had been instituted, to the Court of the Subordinate Judge under the provisions of section 23, sub-section 2, clause (*d*) of Act XII of 1887. Upon the case being so transferred, an objection was taken on behalf of the defendants to the jurisdiction of the Subordinate Judge to try the case. The learned

* Appeal from Original Decree No. 35 of 1897 against the decree of Babu Abinash Chundra Mitter, Subordinate Judge of Hooghly, dated the 22nd of December 1896.

Subordinate Judge has overruled that objection, and upon the evidence he has held [342] that the will propounded had been duly executed by the testator, and that it was not invalid by reason of any want of mental capacity on his part or by reason of the execution of it having been brought about by coercion and undue influence; and he has accordingly ordered probate to be granted upon security being given by the petitioner under section 78 of the Probate and Administration Act.

In appeal it is contended on behalf of the objectors, *first*, that the Court below was wrong in holding that it had jurisdiction to try the case; and, *secondly*, that upon the merits it ought to have held that the will was invalid by reason of want of mental capacity on the part of the testator, and also by reason of the execution of it having been brought about by coercion and undue influence on the part of the petitioner and his wife.

It is further contended that the Court below was wrong in making the objectors bear their own costs, and that, having regard to all the circumstances of the case, it ought to have directed that their costs should come out of the estate of the testator.

In support of the first contention, it was argued that the provision of Act XII of 1887 that has been relied upon, applies only to incidental proceedings, such as those relating to the testing of security and the like, and that it does not authorize the trial of a probate case by a Subordinate Judge, jurisdiction to hear such cases being vested exclusively in the District Judge, and in the District Delegate where the proceeding is not a contentious one.

We are of opinion that this contention is not correct. Section 23, sub-section 2, clause (*d*), enacts that the High Court may, by "general or special order"—we quote only so much of the section as bears upon the present case—"authorize any Subordinate Judge to take cognizance of or any District Judge to transfer to a Subordinate Judge under his administrative control, proceedings under the Probate Act, 1881, which cannot be disposed of by District Delegates."

The proceeding in the present case is one under the Probate and Administration Act (V of 1881), and is one which the District Delegate cannot dispose of having regard to the provisions of [343] section 52 of that Act. The case, therefore, comes clearly within the scope of section 23, sub-section 2, clause (*d*). A slight contention was raised as to whether a probate case, where there is contention, can come within the meaning of the term "proceeding" in section 23, the argument being that such a case is really a "suit" and not a "proceeding"; but the very section of the Probate and Administration Act (section 83) which says that a contentious probate case shall take as nearly as may be the form of a suit, itself describes the case as a "proceeding." There is nothing then in the language of clause (*d*) of section 23 of Act XII of 1887 to take the present case out of its operation and scope. And if one looks to the reason of the enactment, it becomes clear that it was intended to cover cases of this description.

The object of section 23, as we understand it, is to enable a District Judge, in whose Court, and in whose Court alone, certain proceedings are ordinarily to be instituted, to transfer these proceedings, under a general or special order of the High Court to a Subordinate Judge. In regard to probate proceedings, the District Judge may transfer them in certain cases to the District Delegate, but then such transfer is limited to non-contentious proceedings only. As regards contentious proceedings, the only way in which a District Judge may be relieved is by acting under clause (*d*) of sub-section 2 of section 23.

We are, therefore, of opinion that the Court below had jurisdiction to entertain this case, and that the first contention urged on behalf of the appellants must fail.

We now come to the second contention raised before us. The learned Vakil for the appellants has very properly not thought it fit to raise any question as to whether the will propounded by the petitioner was signed by the testator. There is ample evidence to show that the will was signed by the testator and presented for registration by the testator on the very day it was signed. The contention of the appellants was mainly directed to showing that the mental condition of the testator was such that it ought not to be held that the execution of the will by him was an intelligent execution; or, in other words, that he was not of sufficient mental capacity to execute a will. And it was further contended that, as **[344]** regards the execution of this will, he was entirely under the influence and guidance of the petitioner and his wife Promoda Sundari, the person to whom the whole of the testator's property has been bequeathed.

In support of this contention, the evidence of the witness Gopal Chunder Gossami, a medical practitioner, examined on behalf of the petitioner, has been relied upon as showing that the testator was not of sufficient mental capacity to execute a will; and other witnesses examined for the petitioner and for the objectors have also been referred to as supporting the statements of the witness just named.

Upon a careful consideration of the evidence, the conclusion that we arrive at is this, that, though by reason of old age and disease aggravated by an accident that injured his leg, and the taking of opium to which the testator was very much addicted, his mental capacity was somewhat enfeebled about the time of the execution of the will, it cannot be said that he had not sufficient capacity to execute a will such as the one that has been propounded in this case. Their Lordships of the Privy Council observe in the case of *Sajid Ali* v. *Ibad Ali*, (1895) I.L.R., 23 Cal., 1; L. R., 22 I. A., 171: "Even in cases where the mental faculties of the person affected have been greatly enfeebled by physical weakness, he may still be capable of devising and intelligently executing a will of a simple character, although unfit to originate or to comprehend all the details of a complicated settlement." And then their Lordships say: "Nothing can be more simple than the changes which were made by the will impeached upon the terms of the second will which it was intended to supersede."

These remarks, we think, apply with full force to the present case. For we find that the will propounded is not the only will that the testator executed. Before that, he had already executed two wills. By one of them, dated the 27th September 1875, executed in favour of his wife, he left all his property absolutely to her, with power to her to adopt a son if she felt inclined to do so. Then upon the death of his wife, he executed a second will on the 11th December 1891, by which he bequeathed almost the whole of his property to **[345]** Promoda Sundari, the legatee under the present will, and made certain provisions for the maintenance of the worship of the family idol, and for a few other matters of minor importance. And the only points of difference between this last-mentioned will and the one now under consideration, are the omission of a certain provision for the maintenance of Omesh Chunder Gossami, one of the nephews of the testator; a slight variation in the direction for the expenditure of a sum of Rs. 1,000 for the performance of the first *sradh* of the testator; and the omission to make any binding provision for the worship of the family idols. These differences are, in our opinion, of such a slight character that

they cannot go to show, as the learned Vakil for the appellants contends they do, that the present will was not intelligently executed by the testator, if the will immediately preceding had been really executed by him.

[Their Lordships then considered the evidence and concluded.]

Upon the whole then we are of opinion that neither the allegation as to want of sufficient mental capacity, nor that of coercion and undue influence, has been established; and that, on the contrary, the evidence clearly goes to show that the testator, though enfeebled in body and also to some extent in mind through old age and disease, still had sufficient mental capacity to execute this will.

Upon the question of costs, we are of opinion, having regard to a portion of the evidence at any rate brought forward by the objectors, which we must say is not true, that the learned Subordinate Judge in the Court below was right in making the objectors bear their own costs. He has shown sufficient consideration to the fact of their being the heirs-at-law of the testator, and, as such, persons interested in seeing that the will is duly proved, when he has exonerated them from liability to pay the petitioner's costs. The cross-appeal on this point has very properly been abandoned.

It remains now to dispose of the question relating to the costs of this appeal. Considering the fact that the judgment of the Court below, which is a very clear and a very strong judgment, was against them, we cannot say that the appellants are entitled **[346]** to be exonerated from paying the costs of the respondent altogether. At the same time, having regard to the fact that this appeal was argued by the learned Vakil for the appellants very temperately, and no point was unduly pressed before us, we think the assessment of costs ought to be moderate. We accordingly order that the appeal be dismissed with costs, the hearing fee being assessed at ten gold mohurs. The cross-appeal not being pressed is dismissed without costs.

S. C. G. *Appeal dismissed.*

[25 Cal. 346]

The 27th August, 1897.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE WILKINS.

Collector of Dinagepore............1st party

versus

Girja Nath Roy and others............2nd party.*

Land Acquisition Act (I of 1894), sections 6, 18, 23, clauses 4, 24, 48—Compensation—Acquisition of land "injuriously affecting other property"—Right to compensation for loss of a ferry by reason of acquisition of adjacent land—Land Clauses Consoliation Act (8 Vict., c. 18), section 63.

The word "acquisition," as used in section 23 of the Land Acquisition Act, includes the "purpose" for which the land is taken as well as the actual taking. And the words "at the time" in clause 4 of the same section must be taken to mean the time when the damage takes place and the right to compensation arises.

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* Appeal from Original Decree No. 70 of 1896, against the decree of R. R. Pope, Esq., District Judge of Dinagepore, dated the 23rd of November 1895.

London and Brighton Railway Company, v. *Truman*, (1885) L. R., 11 App. Cas., 45, *Hopkins* v. *Great Northern Railway Company*, (1877) L.R., 2 Q. B. D., 224 ; 46 L. J., (Q.B.) 265 ; *Ricket* v. *Metropolitan Railway Company*, (1867) L. R., 2 E. and I. A., 175 ; *Cowper Essex* v. *Acton Local Board*, (1889) L. R., 14 App. Cas., 153 ; referred to.

The District Board of Dinagepore erected a bridge over the river Tulai, in consequence of the erection of which a ferry, which was within 100 cubits of the bridge and owned by the Maharajah of Dinagepore who was also the owner of the land taken for the construction of the bridge, ceased to exist: *Held*, that the owner of the ferry was entitled under the Land Acquisition Act to compensation for the loss of the ferry.

THE facts of the case are fully stated in the judgment of the High Court.

[347] The *Senior Government Pleader* (Babu *Hem Chunder Banerjee*), and the *Junior Government Pleader* (Babu *Ram Charan Mitter*), for the Appellant.

Mr. *Hill*, Babu *Jasoda Nandan Pramanik*, Dr. *Rash Behary Ghose*, and Babu *Nalini Ranjan Chatterjee*, for the Respondents.

Babu *Ram Charan Mitter* for the Appellant contended that the Maharajah was not entitled to any compensation for the loss of the ferry, regard being had to the provisions of sections 23 and 24 of the Land Acquisition Act. The ferry ghat was not on the land actually acquired by Government The Maharajah might have an equitable claim for damages in the Civil Court. Supposing the Maharajah had suffered loss by the erection of the bridge, could he under the Land Acquisition Act claim damages for the loss of his income from the ferry? His remedy, if any, would lie in a Civil Court by a regular suit. If another person had plied a ferry in competition with the Maharajah's ferry, that would not have entitled him to claim damages from the owners of the rival ferry —*London and Brighton Railway Co.* v. *Truman*, (1885) L.R , 11 App. Cas., 45, *Hopkins* v. *Great Northern Railway Co*, (1877) 46 L.J., (Q.B.) 265, *Ricket* v. *Metropolitan Railway Co.* (1867) L R., 2 E. and I.A , 175. Unless the injury or loss was by reason of the acquisition of the land itself, and unless the Maharajah had a statutory right, no action for damages would lie : see Cripps on Compensation, 3rd edition, p. 147.

Mr. *Hill* for the Respondent.—The case has been rightly decided by the lower Court and the Maharajah is entitled to full compensation. We are dealing with the question of "injuriously affecting *other* property by reason of the acquisition" as contemplated by section 23, cl 4 of the Land Acquisition Act. The ferry ceased to exist by reason of the construction of the bridge, and it cannot be said that the acquisition of this land for the bridge did not injuriously affect the ferry - *Hammersmith and City Railway Co.* v. *Brand*, (1868-69) L R., 4 H. L., 171, *Duke of Buccleuch* v. *Metropolitan Board of Works*, (1872) L.R., 5 H. L., 418 (458), *Glasgow Union* [348] *Railway Co.* v. *Hunter*, (1870) L. R., 2 H L. Sc. App , 78 (82), *Cowper Essex* v. *Local Board for Acton*, (1889) L.R., 14 App. Cas., 153 (161, 164, 176). *The Queen* v *Cambrian Railway Co.*, (1871) L R., 6 Q. B , 422, *Great Western Railway Co.* v. *Swinton and Cheltenham Railway Co*, (1884) L R., 9 App Cas., 787 (802), *Secretary of State for India* v. *Shanmugaraya Mudaliar*, (1893) I. L. R., 16 Mad., 369 ; L. R., 20 I. A., 80.

It is essential to know the purpose for which the land is to be acquired, because the purpose is very much to affect the question of compensation for the land. The moment it was declared that the land was required for the bridge the injury ensued, the value of the ferry having been diminished—Land Acquisition Act, section 6, referred to.

Babu *Ram Charan Mitter* in reply.—Section 23, clause 4 of the Land Acquisition Act supports the view that the injury must be by reason of the

acquisition of the land. The injury in this case was due, not to the acquisition of the land, but to the *use* to which the land when acquired was put; and under the law—the Land Acquisition Act—the Court cannot take into consideration the mode of using the land. Considerable time elapsed between the declaration by the Collector and taking possession of the land; the damage must be assessed at the time when the Collector took possession and not at any subsequent time. No doubt a declaration was made that the land was required for a bridge, but the respondent suffered no loss simply by reason of the acquisition. Moreover, the Government after the acquisition of the land might use it for a different purpose. The English cases cited were under a differently worded Statute and had no application to the present case. The sole question was whether the loss to the claimant was by reason of the acquisition of the land.

The **judgment** of the High Court (**Macpherson** and **Wilkins, JJ**) was as follows:—

This is an appeal from an award made by the District Judge of Dinagepore under the Land Acquisition Act (I of 1894) upon a reference made to him under section 18 of that Act.

[349] It appears that the District Board of Dinagepore erected a bridge over the Tulai river on the road from Dinagepore to Krishnagunge. Near the place where that road strikes the river, and where the bridge now stands, there used to be a ferry owned by the Maharajah of Dinagepore through whose estate the river Tulai flowed. That ferry ceased to exist when the bridge was erected and in consequence of its erection. Under these circumstances, the District Board proposed to offer to the Maharajah, upon whose land the bridge had been erected, the sum of Rs. 3,458-15-9 as compensation for the loss of his ferry, but the proposal was vetoed by the Commissioner of the Division, with the result that the land upon which the bridge stood was acquired under the Act, and that the Maharajah made a free gift of it to the public. He, however, claimed Rs. 6,000 as compensation for the injury sustained by him in the loss of his ferry. As this claim was opposed at the instance of Government and rejected by the Collector, the case was referred to the District Judge under section 18 of the Act for the determination of the amount of the compensation, and the District Judge has, for reasons recorded in his judgment, awarded to the Maharajah the exact sum which the District Board originally proposed to offer to him as compensation for the loss of his ferry.

In this appeal the Collector under the Act is the appellant; and his contention is that the respondents, *i.e.*, the Maharaja and the zemindars, are not entitled in law to any compensation by reason of the ferry having been injuriously affected.

Although the bridge was constructed before the land was acquired or any proceedings taken for its acquisition, we must take it that the Act was put in force for the purpose of testing the Maharajah's claim for compensation for the loss of his ferry, and we must regard the acquisition as relating back to the time when possession of the land was taken. The circumstance has not been referred to on either side as one which should in any way affect the decision of the case.

In this appeal the question at issue is one purely of law, the determination of which depends upon the proper construction of **[350]** the Act, section 23 sets out the matters which the Court is bound to take into consideration in determining the amount of compensation to be awarded for land acquired under the Act. The claim in this case is based upon clause 4 of sub-section (1) of that section, which is to the following effect: "The damage (if any) sustained

by the person interested at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, moveable or immoveable, in any other manner, or his earnings."

It is contended for the appellant that the claim is unsustainable, because no action could have been maintained by the Maharaja in respect of the bridge if it had been opened without the authority of the Act, and because the damage, if any, sustained is attributable, not to the acquisition of the land, but to the user of it when the bridge had been constructed and opened. In support of these contentions certain English cases have been cited, viz., *London and Brighton Railway Co.* v. *Truman*, (1885) L. R., 11 App. Cas., 45; *Hopkins* v. *Great Northern Railway Co.*, (1877) 46 L. J., (Q.B.) 265: L. R., 2 Q.B., 224 and *Ricket* v. *Metropolitan Ry. Co.*, (1867) L. R., 2 E. and I. A., 175.

It seems to us that no question of an actionable right here arises, and that it is unnecessary to consider the English cases in which there has been much discussion and some difference of opinion as to the rights of persons whose land had not been acquired but who claimed compensation under certain provisions of the Land Clauses Consolidation Act and the Railway Clauses Consolidation Act in consequence of their lands or interests having been injuriously affected by the exercise of the powers conferred by those Acts. Many of them turned on the construction of the Acts, the language of which is different from that of the Act now under consideration. There is a difference between the claim of a person whose land had not been acquired for compensation for injury caused to his property or interests by the acquisition, and the claim of a person part of whose land had been acquired for compensation for injury caused by the acquisition to the remainder of his [351] land, and this was pointed out by Lord HALSBURY in *Cowper Essex* v. *Acton Local Board*, (1889) L. R., 14 App. Cas. 153.

We are dealing now with the latter class of cases only. A piece of th Maharajah's land was acquired for the construction of a bridge; a bridge has been constructed upon it and opened for traffic, and he claims compensation for the loss of the income derived from his ferry which was worked within a very short distance of the spot on which the bridge has been constructed and within the limits of his estate. The ferry which is his property has undoubtedly been injuriously affected, he has suffered loss in consequence, and the only question is whether his claim comes within the 4th clause of the 23rd section of the Act.

Mr. *Hill* for the respondent has also referred us to other English cases bearing upon the construction of a somewhat similar provision in the Land Clauses Consolidation Act. Section 63 of that Act provides that in estimating the purchase money or compensation to be paid regard shall be had, not only to the value of the land to be purchased or taken, "but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner *or otherwise* injuriously *affecting such other lands* by the exercise of the powers" of the Act. The only case to which we need refer is that of *Cowper Essex* v. *Acton Local Board*, (1889) L. R., 14 App. Cas., 153 mentioned above. There a piece of the claimant's land had been acquired for sewage purposes, and the question was whether he was entitled to compensation for damage sustained by reason of the injuriously affecting his other lands by the exercise of the statutory powers. It was argued that the damage, if any, would result only from the future use or abuse of the land, and that if the land had been acquired without statutory powers no action would have lain for the construction of the works.

Their Lordships held that the claimant was entitled to compensation, and the ground of their decision was that the contemplated or intended use of the

land for the purpose for which it was taken caused a depreciation in the value of the claimant's other land, [352] although the sewage works might be so conducted as to cause no nuisance. Lord WATSON says: "A proprietor is entitled to compensation for depreciation of the value of his other lands in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers."

We have, however, to construe a section of the Indian Act, and in doing so cases bearing upon the construction of a somewhat similar provision of an English Act different in its language can be of little or no assistance. We have alluded to the *Cowper Essex* case as showing that the contemplated legal use of the land for the purpose for which it was taken might be within the meaning of the English Act an "injurious affecting" (these words being the same in the Indian Act) of the other land of the person, part of whose land had been compulsorily taken. It does not of course follow that it is so under the Indian Act. The damage which must be taken into consideration under the 4th clause of section 23 is the damage sustained at the time of the Collector taking possession of the land by reason of the acquisition injuriously affecting the other property in any other manner, or the earnings of the person interested. There is no limit as to the nature of the "injurious affecting" except in so far as this is provided for by the other clauses of the section; the difficulty is as to the time when the damage is sustained.

The words "at the time when the Collector takes possession of the land" cannot mean that compensation can only be given for the damage which had actually at that time been sustained without reference to a continuing damage caused by the acquisition. The damage must be by reason of the acquisition; but this is only complete when possession is taken, for till then the Government could withdraw from it under section 48. The Collector could moreover take possession if he chose on the very day the award was made. The whole proceedings from the declaration under section 6 to the taking of possession might be completed within a month, and on any such construction a person deprived of earnings or an annual income would get nothing or next to nothing.

[353] The words must be taken to mean the time when the damage takes place, and the right to compensation arises, and it is, we think, sufficient to bring a case within this provision if, when possession is taken, there is other property or earnings injuriously affected so as to cause some damage to the person interested. Here the ferry was in existence. In the corresponding provision of the repealed Act (X of 1870) the words were "at the time of awarding compensation." That was open to abuse, as the award might have been, and very frequently was, made long after possession had been taken. Under the present Act the Collector makes his award whether the persons interested do or do not agree to take the compensation awarded, and the Collector can take possession immediately on making his award. The alteration in the law does not affect the construction of the section for the purpose of this case.

Then, was the damage sustained by reason of the acquisition, injuriously affecting the ferry? It is said that the word "acquisition" means the mere taking of the land without any regard to the purpose for which it was taken, and that the ferry was not in any way injuriously affected by the acquisition of the land, however much it may have been injured by the construction of the bridge when the bridge was constructed and opened to traffic. We think it is clear that the word "acquisition" as used in section 23 includes the purpose for which the land is taken as well as the actual taking.

Under section 6 the declaration of the intended acquisition must state the purpose for which the land is needed; after it has been published the Collector is to take order for the acquisition. He is to measure, mark out and make a plan of the land, to give notice that the Government intends to take possession of it, that he will receive claims to compensation for all interests in it, and that all persons interested must attend at a specified time and state the nature of their respective interests and the amount and particulars of their claims to compensation. He is then to inquire into the respective interests and claims and to make his award, and in determining the amount of compensation he is to be guided by the provisions of sections 23 and 24.

If he is not to take into consideration the purpose for which **[354]** the land is taken, it is difficult to see how he is to determine the amount of the compensation with reference to many of the matters which he is bound to consider under section 23.

It may be true that if the bridge had never been constructed, or if constructed never opened for traffic, the actual injury to the ferry might have been comparatively speaking small. But it is impossible to say that it was not injuriously affected by the acquisition in such a way as to cause some damage to the owner of it. The declaration of the Government that the land was wanted for a purpose which would entirely destroy that ferry, the proceedings taken, and the actual acquisition of the land for that purpose, must have considerably affected the letting or selling value at the time of the acquisition.

The intention of the Legislature to be gathered from the Act seems to have been that persons, a part of whose land has been compulsorily taken from them, should, apart from its actual value, be compensated for injury done to their other property by the taking.

We must hold, therefore, that the Maharajah was entitled under the Act to compensation for the loss of the ferry, and that the decision of the District Judge is right. No question as to the amount of the compensation is raised in this appeal, and the appeal is dismissed with costs.

B.D.B. *Appeal dismissed.*

NOTES.

[This subject is fully discussed by MOOKERJEE, J., in (1907) 34 Cal., 470 : 11 C.W.N., 356 : 5 C.L.J., 669.]

[26 Cal 354]

The 22nd July, 1897.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Jagannath Prasad Gupta............Defendant

versus

Runjit Singh .... Plaintiff

Limitation Act (XV of 1877), Sch. II, Arts. 119 and 124—Suit for possession of immoveable property by a Hindu, on the allegation that he was the reversionary heir by adoption of the last owner—Suit for the office of a shebait by the reversionary heir—Hindu Law—Mitakshara—Marriage in approved form—Stridhana property, Inheritance of—Order granting letters of administration—Suit for possession by establishment of title.

In a suit brought by the plaintiff to recover possession of certain immoveable properties, on the allegation that he was the great grandson [355] by adoption of one *R*, who was the brother of one *V*, to whose adopted son the said properties originally belonged, the defence was that the suit was barred by limitation under article 119,† Sch II of the Limitation Act.

Held, that article 119 of Sch II applies only to a suit for a declaratory decree as to the validity of an adoption, and that the present suit, which was one for possession of immoveable property, was not barred under that article, notwithstanding that the plaintiff had to establish the validity of an adoption as the basis of his title

Parvathi v *Saminatha*, (1897) I L R, 20 Mad, 40 dissented from *Lala Parbhu Lal* v. *Mylne*, (1887) I L R, 14 Cal, 401, *Basdeo* v *Gopal*, (1886) I L R, 8 All, 644, *Ganga Sahai* v *Lakhraj Singh*, (1886) I L R, 9 All, 253 *Natthu Singh* v *Gulab Singh*, (1895) I. L R., 17 All, 167, *Padajirav* v. *Ramrav*, (1888) I L R, 13 Bom, 160 *Fannyama* v. *Manjaya Hebbar* (1895) I L R 21 Bom, 159, and *Hari Lal Pranlal* v *Bai Rewa*, (1895) I. L R, 21 Bom 376, referred to

Where a *shebait* does not appoint his or her successor as provided in the will of the founder, and where there is no other provision for the appointment of *shebait*, the management of the endowment must revert to the heirs of the founder, and the limitation applicable to a suit for possession of such an office is twelve years under article 124, and not six years under article 120 of the Limitation Act

Jai Bansi Kunwar v *Chattar Dhari Singh* (1870) 5 B L R, 181 13 W R, 396, and *Gossamee Sree Greedhareejee* v *Rumanlolljee* (1889) L R 16 I. A, 137, I L R, 17 Cal, 3 referred to

Under the Hindu law of the Benares School, in the absence of any evidence to the contrary, a marriage must be presumed to have taken place in one of the approved forms; therefore the heir of a woman to her *stridhana* property is the nearest kinsman of her husband and not of her father *Thakoor Deyhee* v *Rai Baluk Ram*, (1867) 11 Moo I A. 139,

* Appeal from Original Decree No 232 of 1895 against the decree of Babu Kally Charan Ghosal, Subordinate Judge of Moorshedabad, dated the 16th of May 1895.

[Art 119 -

Description of Suit	Period of limitation	Time from which period begins to run.
To obtain a declaration that adoption is valid	Six years	When the rights of the adopted son as such are interfered with.]

Gojabai v. *Shahajirao Malhji Raje Bhosle*, (1892) I. L. R., 17 Bom., 114, and *Gridhari Lal* v. *Government of Bengal*, (1868) 1 B. L. R., P. C., 44 : 10 W. R., P. C., 31, referred to.

Where letters of administration were granted to the defendant, in preference to the plaintiffs, the order granting the letters of administration is not a bar to the plaintiff bringing a suit for the purpose of determining any question of inheritance or of the right to be appointed as *shebait*, the decree in which will supersede the grant.

Arunmoyi Dasi v. *Mohendra Nath Wadadar* [(1893) I. L. R., 20 Cal., 888], referred to.

The Virmitrodaya cannot be referred to where the Mitakshara is clear.

[356] THE facts of the case, so far as they are necessary for the purposes of the report and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Golap Chunder Sarkar*, and Babu *Saroda Charan Mitter*, for the Appellant.

Mr. *W. C. Bonnerjee*, Dr. *Rash Behary Ghose*, Babu *Lal Mohun Das*, Babu *Girija Sunker Mazumdar* and Babu *Sridhar Das Gupta* for the Respondent.

The following **judgments** were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.)

Banerjee, J.—The suit, out of which this appeal arises, was brought by the plaintiff-respondent to recover possession and mesne profits of certain properties, seven in number, namely, two revenue-paying estates (in one of which only an 8 annas share is claimed), two dwelling houses, a temple and a garden, and a tank. The material allegations on which the plaintiff bases his suit are shortly these: That the properties in dispute originally belonged to Kumar Ram Chunder, the adopted son of Rajah Udmanta Singh, who was the brother of Rajah Hanumant Singh; that the plaintiff was the great grandson by adoption of the said Rajah Hanumant Singh, having been duly adopted on the 24th of August 1866 by the widow of Rajah Kirti Chand, grandson of Rajah Hanumant Singh; that Kumar Ram Chunder, having dedicated properties Nos. 1 and 2 of the schedule to the plaint (that is the two revenue-paying estates) to the worship of a certain idol, and having appointed Rani Annapurna, widow of Rajah Udmanta Singh, to be the *shebait*, died, leaving him surviving his widow Rani Ananda Moye and the said Rani Annapurna; that Rani Annapurna purported to make a gift of a 2 annas share of property No. 2 in favour of the defendant, who claims to be her sister's adopted son; that by her last will and testament, dated the 6th July 1877, Rani Annapurna purported to dedicate property No. 1, and the remaining six annas of property No. 2, to certain idols, and to appoint Rani Ananda Moye as *shebait*; that on the death of Rani Annapurna, Rani Ananda Moye obtained probate of the said will and remained in possession of the properties in dispute; that on the death of Rani Ananda [357] Moye in September 1883, the defendant and the Court of Wards, on behalf of the plaintiff who was then a minor, made separate applications for letters of administration to the estate, and the application of the defendant was granted, while, owing to the neglect of the manager under the Court of Wards to adduce evidence, the application on behalf of the plaintiff was disallowed; that the defendant has since then gradually taken possession of the properties in dispute, and has been misappropriating the profits of the endowed properties; and that according to the Hindu law of the Benares School, which governs the family, the plaintiff, as the reversionary heir to Kumar Ram Chunder after the death of his widow Rani Ananda Moye, is entitled to the properties in dispute. And the plaintiff seeks to recover possession of the said properties as the heir to Kumar Ram Chunder. And he makes an alternative prayer that if it be held that the properties Nos. 1 and 2 were the absolute

property of Rani Annapurna, he may be awarded possession of property No. 1 and of a six annas of property No 2 as heir of the said Rani and as *shebait* of the idols to whom she dedicated those properties.

The defendant pleaded limitation and *res judicata* in bar of the suit, denied the adoption of the plaintiff and his title as heir to Kumar Ram Chunder and to Rani Annapurna, and alleged that the properties in dispute were the *stridhana* or absolute property of Rani Annapurna, and that the defendant as her sister's adopted son was entitled as her heir to all of them except No. 7, which had been dedicated by her to public use. He also denied the charge of misappropriation of the profits of the endowed properties. There were certain other points raised in the defence which are not necessary to be considered for the purposes of this appeal.

Upon these pleadings several issues were framed in the Court below; and that Court has held that the suit is not barred by limitation or by the principle of *res judicata*; that the plaintiff is the validly adopted son of Rajah Kirti Chand, and the defendant the validly adopted son of Annapurna's sister; that the plaintiff is the heir of Kumar Ram Chunder and of Rani Annapurna in preference to the defendant; that the defendant has committed **[358]** waste of the income of the endowed property; that the properties Nos. 1, 2 and 3 belonged absolutely to Annapurna, who made a gift of 2 annas of No. 2 to the defendant and dedicated No. 1 and the remaining 6 annas of No. 2 to the idols Lakshminarayan and Radhamohun; that the remaining properties belonged to Kumar Ram Chunder; and that the plaintiff had no cause of action against the defendant as regards property No. 7. And in accordance with these findings, the lower Court has given the plaintiff a decree for possession of properties Nos. 1 and 3 and a 6 annas share of property No. 2 as *shebait* of Thakurs Lakshminarayan and Radhamohun, and for possession of the remaining properties in suit except a 2 annas share of property No. 2 in his own right, the claim for an account having been abandoned.

Against this decree the defendant has preferred this appeal, and the plaintiff has filed a cross appeal.

At the hearing, the cross-appeal was not pressed. In the appeal of the defendant, the only grounds pressed are, *first*, that the Court below should have held that the whole suit was barred by limitation under article 119 of Schedule II of the Limitation Act; *second*, that the Court below should have held that the suit, so far as the plaintiff sought to oust the defendant from the office of, *shebait* and to recover possession of the endowed properties as *shebait*, was barred by limitation under article 120 of Schedule II of the Limitation Act; *third* that the Court below should have held that the suit, so far as the plaintiff seeks to recover possession of properties other than those of Rani Annapurna, was barred by limitation under article 144 of the said Schedule; *fourth*, that the Court below should have held that the defendant was the heir to the *stridhana* of Rani Annapurna in preference to the plaintiff; *fifth*, that the Court below should have held that the charge of waste and misappropriation of the income of the endowed property was not established against the defendant, and that the plaintiff was not entitled to oust the defendant from the office of *shebait*; and, *sixth*, that the Court below should have held that the defendant had acquired a valid title to property No. 6 under his purchase at a sale in execution of decree.

We shall consider these grounds in the order in which they have been stated above.

[359] In support of the first ground, the learned Vakil for the appellant argued that, as the plaintiff could not, in any view of the case, succeed

without establishing the validity of his adoption, and as a suit to obtain a declaration that his adoption was valid was barred under article 119 of schedule II of the Limitation Act by reason of the time allowed by that article having expired, the whole suit must be held to be barred by limitation, and he relied upon the cases of *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri*, (1886) I. L. R., 13 Cal., 308, *Mohesh Narain Munshi* v. *Taruck Nath Moitra*, (1892) I.L.R., 20 Cal., 487, and *Parvathi* v. *Saminatha*, (1896) I.L.R., 20 Mad., 40. On the other hand, it was contended for the respondent that article 119 applied only to a suit to obtain a declaration that an adoption was valid, and that it had no application to a suit like the present for possession of immoveable property, and in support of this contention the case of *Fannyama* v. *Manjaya*, (1895) I.L.R., 2 Bom., 159, and the cases therein cited were referred to.

After giving our best consideration to the point, we come to the conclusion that the contention of the appellant is not correct.

If article 119 applied to this suit it would be barred, assuming that the rights of the plaintiff, as the adopted son of Rajah Kirti Chand, were interfered with by the order of the High Court dated the 11th September 1885, granting the defendant's application for letters of administration to the estate of Rani Annapurna, and refusing that of the plaintiff, as the present suit was brought more than six years after that date, and more than three years after the plaintiff attained majority. But we do not think that article 119 applies to a suit like the present, which is brought for recovery of possession of immoveable property, though the plaintiff has to establish the validity of his adoption as the basis of his title. That article, as its language shows, applies only to a suit to obtain a declaration that an adoption is valid. The view contended for by the learned Vakil for the appellant is not only opposed to the plain language of the article in question, but would [360] lead to obvious anomaly and hardship. Thus, while a son claiming the immoveable property of his father from a person who denies his legitimacy has twelve years within which to bring his suit, an adopted son making a similar claim against a person who denies the validity of the adoption would in that view have only six years allowed to him. Again, an adopted son claiming by inheritance the immoveable property of a collateral kinsman by adoption years after his adoption took place, would in that view have only six years from the time the succession opens within which to bring his suit, whereas if he had been a blood relation of his deceased kinsman, he would have had the ordinary period of twelve years. We do not think it reasonable to suppose that the Legislature could have intended this.

It was argued by the learned Vakil for the appellant that his view was supported by the cases he cited. Two of these being decisions of the Privy Council, if they are in point, we are bound to follow them. But they were both cases in which the contention was that the suit was barred by limitation because it was too late for the plaintiff "to set aside" the adoption of the defendant, or, in other words, to displace the title by adoption under which the defendant claimed to hold the immoveable property in dispute; whereas the contention in the present case is, that the suit is barred by limitation, because it is too late for the plaintiff to "establish" his adoption, or, in other words, to have it declared that his title by adoption under which he seeks to recover the immoveable property in dispute, is valid. The provision of law relied upon in the two cases cited was that portion of article 129 of Act IX of 1871, which corresponds to article 118 of Act XV of 1877, and not the portion corresponding to atricle 119, upon which the present appellant's contention rests. Though these two articles of the pr nt Act into which article 129 of the

former Act has been broken up, relate to cognate matters, and though the two contentions mentioned above are in some respects analogous, it is by no means clear that precisely the same considerations apply to both. The reasons which led their Lordships of the Privy Council in *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy*, (1886) I. L. R, 13 Cal., 308 [361] to conclude that the expression ' suit to set aside an adoption " includes a suit for possession of land after displacing a title by adoption, as well as a suit for a declaration that an adoption was invalid, do not warrant the conclusion that the expression "suit to establish an adoption " includes also a suit for possession of immoveable property upon a title by adoption, when the property claimed is, as it is in this case, that of a collateral relation by adoption.

Moreover, both the cases referred to were cases governed by the old law (Act IX of 1871), the language of the corresponding provision of which (article 129) was very different. In the earlier of the two cases, *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy*, (1886) I. L. R, 13 Cal, 308, which was a suit by a reversioner after the death of the widows of the last full owner, to recover possession of immoveable property from the defendant who was holding it as his adopted son, their Lordships observe: " It thus appears that the expression 'set aside an adoption' is, and has been, for many years applied in the ordinary language of Indian lawyers to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature. It is worth observing that in the Limitation Act of 1877, which superseded the Act now under discussion, the language is changed. Article 128" (evidently a misprint for 118) " of Act XV of 1877, which corresponds to article 129 of 1871, so far as regards setting aside adoptions, speaks of suits 'to obtain a declaration that an alleged adoption is invalid or never in fact took place,' and assigns a different starting point to the time that is to run against it. Whether the alteration of language denotes a change of policy, or how much change of law it affects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression 'suit to set aside an adoption' to be one of a loose kind, and that more precision was desirable.

" If then the expression is not such as to denote solely, or even to denote accurately, a suit confined to a declaration that an alleged [362] adoption is invalid in law or never took place in fact, is there anything in the scope or structure of the Act to prevent us from giving to it the ordinary sense in which it is used, though it may be loosely, by professional men ? " And this question is answered in the negative. This shows that, though their Lordships did not decide what the effect of the change in the law was, they decided that a suit for possession which could succeed only if a title by an alleged adoption was displaced, was governed by article 129 of the earlier Act, because the loose expression "suit to set aside an adoption " used in that article, applied indiscriminately to suits for possession of land and to suits of a declaratory nature, and did not denote solely or even accurately a suit of the latter description. Can the same thing be said of articles 118 and 119 of the present Act, which taken together correspond to article 129 of the Act of 1871 ? Evidently not. The language is altered and made more precise so as to apply only to suits of a declaratory nature, and the time is reduced from twelve years (which is the period generally allowed in the enactments for suits for possession of immoveable property) to six years, a much shorter period. To our minds their Lordships' observations quoted above go to support the view taken of article 119

of the present Limitation Act in the argument for the respondent rather than that taken on the other side.

The learned Vakil for the appellant argued that the next case cited, *Mohesh Narain Munshi* v. *Taruck Nath Moitra*, (1892) I. L. R., 20 Cal., 487 went clearly to support the view taken by him of the meaning and effect of article 119 of the Act of 1877; and the passage in the judgment most strongly relied upon is the one in which their Lordships say: "It was suggested that the Act of 1871, having been superseded by the Act of 1877, the question of limitation should be determined with reference to the provisions of the later statute, in which the language used is somewhat different, the suit there referred to as necessary to save the limitation being described as one 'to obtain a declaration that an alleged adoption is invalid or never in fact took place.' It seems to be more than doubtful whether **[363]** if these were the words of the statute applicable to the case, the plaintiff would thereby take any advantage." We do not think that the concluding sentence in the above passage, which is only a *dictum* in guarded language and not a decided opinion of their Lordships, bears out the appellant's contention that the change in language adopted in articles 118 and 119 of Act XV of 1877 has not effected any change in the law. "What their Lordships considered to be more than doubtful even if the language of the old law (article 129 of Act IX of 1871) were the same as that of the present law (article 118 of Act XV of 1877) was not whether that would make any change in the law, but whether the plaintiff would take any advantage, that is, whether the plaintiff in the case before their Lordships would succeed under the circumstances of the case (quoted. in 27 Cal., 255)." That this is the meaning of the above passage appears to us to be clear, not only from the language used, but also from the fact that the High Court held that the suit was barred by adverse possession, and their Lordships in an earlier part of the judgment say that they decide the question upon the construction of article 129 of Act IX of 1871 without expressing any dissent from the view of the High Court that the suit was barred by adverse possession.

The case of *Parvathi* v. *Saminatha*, (1896) I. L. R., 20 Mad., 40 no doubt is in favour of the appellant. But as against that case there has been a strong current of decisions the other way. See *Lala Parbhu Lal* v. *Mylne*, (1887) I. L. R., 14 Cal., 401 *Basdeo* v. *Gopal*, (1886) I. L. R., 8 All., 644, *Ganga Sahai* v. *Lakhraj Singh*, (1886) I. L. R., 9 All., 253, *Natthu Singh* v. *Gulab Singh*, (1895) I. L. R., 17 All., 167, *Padajirav* v. *Ramrav*, (1888) I. L. R., 13 Bom., 160, *Fanniyama* v. *Manjaya*, (1895) I. L. R., 21 Bom., 159 and *Hari Lal* v. *Bai Rewa*, (1895) I. L. R., 21 Bom., 376.

For the reasons given above, and upon the authority of the cases we have referred to, we must respectfully dissent from the **[364]** case of *Parvathi* v. *Saminatha*, (1896) I. L. R., 20 Mad., 40 and hold that article 119 of Schedule II of Act XV of 1877 applies only to a suit for a declaratory decree, and that the present suit, which is one for possession of immoveable property, is not barred under that article.

The second ground of appeal, namely, that the suit, so far as the plaintiff seeks to oust the defendant from the office of *shebait* and to recover possession of the endowed properties, should have been held as barred under article 120 of Schedule II of the Limitation Act, is based upon the case of *Jagannath Dass* v. *Bir Bhadra Das*, (1892) I. L. R., 19 Cal., 776. But that case is quite distinguishable from the present. What was held there was that a suit to oust a *shebait* from his office which is not hereditary, and the appointment to which is made by nomination, is governed by the six years' rule of limitation under article 120. In the present case the late *shebait* Rani Ananda Moye, not having

appointed her successor as provided in the will of the founder, Rani Annapurna (Ex. B), and there being no other provisions for the appointment of *shebait*, the management of the endowment must revert to the heirs of the founder, See *Jai Bansi Kunwar* v. *Chattardhari Singh*, (1870) 5 B. L. R., 181; 13 W. R., 396, *Gossamee Sree Greedharreeje* v. *Rumanlolljee Gossamee*, (1889) L. R., 16 I. A., 139; I. L. R., 17 Cal., 3, and the office of *shebait* henceforth must be hereditary in the founder's family. The limitation applicable to a suit for possession of such an office is twelve years under article 124, and not six years under article 120, and the suit being brought within twelve years from the date when the defendant took up the management of the endowed properties, is well within time.

In support of the third ground, namely, that the suit, so far as it is one for possession of properties other than those of Rani Annapurna, should have been held as barred under article 144 of Schedule II of Act XV of 1877, the learned Vakil for the appellant argued that as Kumar Ram Chunder died in 1859, it was possible for his widow Rani Ananda Moye to have been barred by limitation under Act XIV of 1859, before Act IX [365] of 1871, which superseded that Act and allowed the reversioners to reckon limitation from the date of the widow's death, came into operation, that is, before April 1873; and if the widow was so barred, the reversioner was also barred under the old law (see *Nobin Chunder Chuckerbutty* v. *Gurupersad Doss*, (1868) B. L. R., Sup. Vol., 1008; 9 W. R., 505), and his right being once barred could not be revived by Act IX of 1871 or Act XV of 1877 as is expressly provided by section 2 of the latter Act. The view of the law upon which this argument proceeds is correct, see *Drobomoyi Gupta* v. *Davis*, (1887) I. L. R., 14 Cal., 323, *Shamlall Mitra* v. *Amarendro Nath Bose*, (1896) I. L. R., 23 Cal., 460, but the argument assumes that Rani Ananda Moye's possession within twelve years before April 1873 is not proved—an assumption which is disproved by the admission of the defendant in paragraph 10 of his written statement. No doubt the admission is qualified; but except as heir to her husband we fail to see how Rani Ananda Moye could have been in possession of these properties which belonged to her husband, and had not been dedicated to the idols. That being so, the third ground before us must fail.

Upon the fourth ground, namely, that the defendant ought to have been held to be the heir of Rani Annapurna's *stridhana* in preference to the plaintiff, the argument on behalf of the appellant is two-fold. In the first place, it is argued that if Annapurna had been married in one of the disapproved forms, the defendant as her sister's son was unquestionably her heir in preference to the plaintiff, her husband's kinsman; and as the burden of proof lay on the plaintiff, and he had adduced no evidence on the point, his claim should be dismissed; and in the second place it is contended that even if the marriage of Annapurna be assumed to have been in an approved form, still the defendant, as her sister's adopted son, was her heir in preference to the plaintiff. We shall consider these two branches of the argument separately.

Upon the first branch of the argument, it is suggested that the marriage of Rani Annapurna took place in the disapproved [366] form called *Asura*, allowable for the *Vaisya* or mercantile caste to which the parties belong. But though the parties may belong to the *Vaisya* caste, as stated by one of the plaintiff's witnesses, Mohant Krishnanand Ram Goswami, and though some consider the *Asura* form of marriage allowed for that caste, Manu is strong in his condemnation of it, and he prohibits it altogether: see Manu III, 25 51, IX, 98. As Rajah Udmanta Singh, the husband of Rani Annapurna, belonged to a highly respectable Hindu family, as is shown by the fact of his having the

title of Rajah, it is improbable that he should have contracted a marriage in the *Asura* form. It would be unreasonable, therefore, to assume, in the absence of evidence (and it was admitted in the argument that there was no evidence on the point) that the marriage of Rani Annapurna took place in the *Asura* or in any other disapproved form. In *Thakoor Deyhee* v. *Rai Baluk Ram*, (1866) 11 Moo. I. A., 139, in which a similar question arose, their Lordships of the Privy Council, in the absence of evidence to the contrary, held that the marriage in dispute was according to one of the four approved forms. And the same view was taken by the Bombay High Court in the recent case of *Gojabai* v. *Shahajirao Maloji Raye Bhosle*, (1892) I. L. R., 17 Bom., 114, in which TELANG, J., observed : "It must be assumed, as in the absence of all evidence it was rightly assumed by the Subordinate Judge, that Anundbai's marriage was in one of the approved forms."

The first branch failing, it becomes necessary to consider the second branch of the argument upon the fourth ground, namely, that if Annapurna was married in one of the four approved forms, even then the defendant was the heir to her *stridhana* in preference to the plaintiff. The parties are admittedly governed by the Hindu law of the Benares School; and there can be no question that the Mitakshara is the highest authority in that school; and the Mitakshara in chapter II, section XI, paragraph 11, says: "Of a woman dying without issue as before stated and who had become a wife by any of the four modes of marriage denominated *brahma*, *daiva*, *arsha* and *prajapatya*, the (whole) property as before described belongs in the first place to her husband. On [367] failure of him it goes to his nearest kinsman (*sapinda*). But in the other forms of marriage called *asura*, *gandharva*, *rakshasa* and *paisacha*, the property of a childless woman goes to her parents, that is to her father and mother. The succession devolves first (and the reason has been before explained) on the mother who is virtually exhibited (first) in the elliptical phrase *pitrigami*, implying that it goes (*gachhati*) to both parents (*pitarau*) that is to the mother and to the father. On failure of them, their nearest kinsman takes the succession." This clearly shows that if the marriage of Annapurna was, as in the absence of evidence we must assume it was, in one of the four approved forms, the plaintiff, who is the nearest kinsman of her husband now living, and not the defendant who is her father's kinsman, is her heir.

But it is argued by Babu *Golap Chunder Sarkar* for the appellant that, though the Mitakshara is clear on the point, a doubt arises as to the correctness of the rule laid down in the passage quoted above, by reason of that rule being in conflict with a text of Brihaspati quoted in the Viramitrodaya (G. C. Sarkar's Translation, page 243), a text of a sage which is recognised as an authority; and there being a doubt thus raised, the Viramitrodaya, which is a work of authority in the Benares School, should, as observed by the Privy Council in *Gridhari Lal Roy* v. *The Government of Bengal*, (1868) 1 B. L. R., P. C., 44 : 10 W. R., P. C, 31, be followed, and following the Viramitrodaya, the defendant should be held to be the heir of Annapurna's *stridhana* in preference to the plaintiff. In support of this argument the case of *Thakoor Deyhee* v. *Rai Baluk Ram*, (1866) 11 Moo. I. A., 139, is cited as furnishing an instance in which a text of the sage, Katyayana, not referred to in the Mitakshara, was followed upon a point on which the Mitakshara lays down a different rule.

We are unable to accept this argument as sound. What their Lordships of the Privy Council said in the case of *Gridhari Lall Roy* v. *The Government of Bengal*, (1868) 1 B. L. R., P. C., 44 : 10 W. R., P. C.. 31, was that, when the text of the Mitakshara was doubtful upon any point, the Viramitrodaya as a

work of authority in the Benares School might be referred to for the [368] purpose of removing the doubt. But their Lordships do not say, and there is neither reason nor authority for saying, that where the Mitakshara is as it is here, clear on the point, the text of any sage, which is in conflict with the rule therein laid down, can be referred to for the purpose of creating a doubt, as the learned Vakil for the appellant contends. To allow such a course would be to upset altogether the Hindu Law of the Benares School, and indeed of every other school. The Mitakshara is the guiding authority of the Benares School, and we cannot, in administering the law of that school, question the correctness of that authority because of its conflict with the text of some ancient sage. Nor is the case of *Thakoor Deyhee* v. *Rai Baluk Ram*, (1866) 11 Moo. I. A., 139, cited for the appellant at all a case in point. There Katyayana's well known text was referred to upon the question as to the widow's right to alienate the property inherited by her from her husband, because upon that question the Mitakshara is silent, or at best doubtful. We should add that upon the question of succession to the *stridhana* of a childless woman, the Viramitrodaya, following the text of Brihaspati referred to above, places in the line of heirs certain kinsmen on the father's side (the sister's son being one of them) before several near relations of the husband, and thus gives an order altogether inconsistent with that given in the Mitakshara. The view we take is in accordance with the opinion of the Bombay High Court in *Gojabai* v. *Shahajirav Malaji Raje Bhosle*, (1892) I. L. R., 17 Bom., 114.

We must in this case follow the Mitakshara, and hold that the plaintiff is the heir to the property of Rani Annapurna in preference to the defendant.

Coming now to the fifth ground, namely, that the charges of waste and misappropriation of the endowed property have not been established, and that the plaintiff is not entitled to oust the defendant from the office of *shebait*, we are of opinion that the first part of it is immaterial, even if it be well founded, and the second part is altogether untenable.

Granting that the charges of waste and misappropriation of endowed property are not established against the defendant, [369] that does not materially affect the result. The late *shebait*, who was authorized to appoint her successor, having omitted to do so, and there being no other provision on the point in the deed of dedication, the management, as has been said above, reverts to the heirs of the founder, see *Jai Bansi Kunwar* v. *Chattardhari Singh*, (1870) 5 B. L R., 181 · 13 W. R., 396, and *Gossamee Sree Greedhareejee* v. *Rumanlolljee Gossamee*, (1889) L. R., 16 I. A., 137: I. L. R., 17 Cal., 3. The plaintiff as the next heir to Rani Annapurna is therefore entitled to be appointed *shebait*.

It was contended for the appellant that the grant of letters of administration to the defendant by the order of the High Court, dated the 11th of September 1885, is a bar to the appointment of the plaintiff as *shebait*, so long as the grant of administration is not revoked. We do not consider this contention to be of much force The order granting letters of administration to the defendant is, under section 41 of the Evidence Act and section 59 of the Probate and Administration Act, conclusive proof of the representative title of the defendant against all debtors of the deceased, Rani Annapurna, and all persons holding property which belonged to the deceased. But the object of the proceedings under the Probate and Administration Act is to determine only the question of representation of the deceased for the purpose of administering the estate, and not for the purpose of determining any question of inheritance or of the right to be appointed as *shebait*. A reference to sections 2, 3, 4, 6 and 37 of the Probate and Administration Act, which authorize the grant of letters of

administration to persons who may not be the heirs of the deceased, well bears out the view we take, which also receives support from the observations in the judgment of this Court in *Arunmoyi Dasi* v. *Mohendra Nath Wadadar*, (1893) I. L. R., 20 Cal., 888. The order granting letters of administration to the defendant is therefore no bar to this suit, the decree in which will surpersede the grant.

The sixth ground, namely, that the defendant has acquired a valid title to property No. 6 by his purchase at a sale in execution of a decree, need not detain us long. The Court below on **[370]** this point says: "Now it has been decided before, and defendant has himself admitted that Sri Narain Singh was not validly adopted by Rani Anandmoyi, so the purchase by defendant of his son's right cannot avail him." This view is, we think, quite correct, and no reason has been shown to induce us to dissent from it.

The grounds urged before us, therefore, all fail, and the appeal must consequently be dismissed with costs. The cross-appeal not being pressed, must also be dismissed with costs.

Maclean, C. J.—The above is the joint judgment of Mr. Justice BANERJEE and myself. I only wish to add one word on the second point. I entertain some doubt whether the defendant can, upon this particular point, successfully set up the Statute of Limitation as against the present plaintiff. The defendant was never appointed, and never was, *shebait*. He held the property and managed it as administrator, and as administrator alone, and in fact stood in a fiduciary position towards the person who was legally entitled to be *shebait*. The plaintiff is that person, and when the plaintiff comes forward and as *shebait* claims the property, I feel a difficulty in saying that the defendant, holding it as he did, in a fiduciary capacity, can successfully set up the Statute of Limitation as against him. The point was urged before us by Mr *Bonnerjee* for the respondent, and though it is unnecessary to decide it, I refer to it, to show that it has not escaped me. In making these observations, I am not unmindful of the decision in the case of *Balwant Rao* v. *Puran Mal*, (1883) I. L. R., 6 All., 1.

S. C. G. *Appeal dismissed.*

NOTES.

[I. The limitation in Arts. 118, 119 is limited to *purely* declaratory suits and is not extended to suits for possession even though the title should rest on adoption :—(1898) 25 Cal., 351 ; (1900) 27 Cal., 242 ; (1903) 30 Cal., 990; (1904) 9 C.W.N., 222, (1909) 5 M.L.T., 262; (1912) 18 I.C., 493 (Mad.); (1914) P.R., 81 F.B. ; (1902) 24 All., 195 ; (1904) 26 All., 10.

The Bombay view is different ; see, (1900) 24 Bom., 260 ; (1902) 26 Bom., 720 ; (1903) 27 Bom., 614.

II. As regards suits for hereditary office, see also (1898) 21 Mad., 278 ; **(1900) 23 Mad., 271 P.C.** ; (1905) 28 Mad., 197 , (1910) 35 Mad., 92 ; (1910) 20 M L J., 781 ; (1912) 39 Cal., 887.

III. As regards succession to religious endowments, see also (1909) 11 C.L.J., 2.

IV. As regards the effect of probate on adverse claims, see also (1905) 33 Cal., 116 at 131.

V. The general presumption is in favour of the marriage being in the approved form :—(1907) 31 Bom., 583 : 9 Bom. L.R., 560 ; 33 Bom., 433 at 437 ; 32 Mad., 512 ; (1913) 20 I.C., 557 (Nagpur).]

[371] APPEAL FROM ORIGINAL CIVIL.

The 17th January, 1898.

PRESENT :

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, MR. JUSTICE MACPHERSON, AND MR. JUSTICE TREVELYAN.

Saral Chand Mitter............Defendant

versus

Mohun Bibi... ....Plaintiff.*

Minor—Fraudulent Representation by minor that he was of age—Mortgage—Civil Procedure Code (Act XIV of 1882), sections 42, 45, 53—Plaint, Amendment of.

A sum of money was advanced to a minor by a mortgagee, secured by a mortgage of house property, on the representation by the minor that he was of age, and the mortgagee was deceived by such false representation:

Held that the mortgagee was entitled to a mortgage decree against the property of the infant.

Dhanmull v. *Ram Chunder Ghose*, (1890) I. L. R., 24 Cal., 265, distinguished and doubted, (1859) 4 De G. & J., 458.

Held, also, that on the question of amending a plaint, section 53 of the Civil Procedure Code should be read with sections 42 and 45 : that it is the intention of the Legislature that all matters in dispute should be disposed of in the same suit. The proviso to section 53 is not intended to interfere with this.

Nelson v. *Stocker*, (1859) 4 DeG. & J., 458, *per* TURNER, L.J., applied.

APPEAL from a decision of JENKINS, J., dated 27th July 1897.

The defendant by an instrument of mortgage, dated 14th November 1893, mortgaged his right, title and interest, in a house and premises, No. 5, Syed Salleh's Lane, Machua Bazar, in the Town of Calcutta, and in a house and premises No. 9, Canal West Road, Sealdah, in the District of the Twenty-four Pergunnahs, in favour of the plaintiff to secure the re-payment of a sum of Rs. 5,000, with interest at 24 per cent. per annum with quarterly rests, lent to him by the plaintiff. At the time the mortgage was given the defendant admittedly was a minor, but he would have come of age six or seven months later, if it had not been for an order of 1st February 1894, which appointed a guardian of the person and property of the infant and thereby extended the period of minority to the age of 21. The defendant was a young man of [372] dissolute habits, and being in want of money went to the plaintiff and asked for the loan. The plaintiff, being suspicious as to the defendant's age, asked for proofs, and the plaintiff thereupon produced an affidavit of a relative stating that he was of age and also a document purporting to be a certificate of the death of his father, and this certificate was produced before the Registrar of Assurances at Sealdah, who, on seeing it, was satisfied and registered the mortgage. The money was then handed over to the defendant. On the institution of this suit to obtain a mortgage decree, in answer to the plaint a written statement was put in, on 17th April 1895, by the guardian of the infant, disclosing the fact that, at the time of the advance, the defendant was a minor. At the hearing, on 6th July 1897, a question was raised as to the amendment of

* Appeal from Original Civil, No. 30 of 1897, in Suit No. 110 of 1895.

the pleadings, it being suggested that if, at the date of the mortgage, the defendant was an infant, the plaintiff should be allowed to raise an alternative case to the effect that he had been induced to part with his money upon the fraudulent representation of the infant defendant, and an order giving leave to make the amendment was granted to the plaintiff.

The Judgment appealed from was as follows:—

Jenkins, J.—On the 14th November 1893 the defendant executed, in favour of Luckhinarain Singh, the original plaintiff in the suit, a mortgage of certain immoveable properties, which had devolved on the defendant under the will of his grandfather, and on the 20th February 1895 this suit was instituted, whereby it is prayed—

"(*a*) That the defendant may be decreed by this Honourable Court to pay to the plaintiff the sum of Rs. 5,000, together with the interest due thereon, and the costs of this suit on some day to be fixed by this Honourable Court, and that in default thereof the right to redeem the said mortgaged premises may be foreclosed.

"(*b*) That the said premises may be sold, and the sale proceeds applied in and towards the repayment of the said sum of Rs. 5,000, and the interest thereon, and the costs of this suit.

[373] "(*c*) That if the sale proceeds be not sufficient for the payment in full of the said amounts, the said defendant be decreed and ordered to pay to the plaintiff the amount of such deficiency.

"(*d*) That for such purpose such directions may be given and such accounts may be taken as to this Honourable Court may seem necessary.

"(*e*) For such further and other relief as the nature of the case may require."

Luckhinarain having died, the plaintiff Sreemutty Mohun Bibee, as his administratrix, was substituted in his place.

On the 1st February 1894 Kaliprosonno Ghose was appointed guardian on the allegation that the defendant was an infant, and on the 17th of April 1895 he put in a written statement, pleading infancy and submitting the matter to the Court.

This was the state of the record when the case came on for trial. On that occasion, however, it was stated that the defendant had reached the age of 21, and it was arranged that the guardian should be discharged.

Thereupon it was asked by the plaintiff whether the defendant intended to affirm his mortgage, and to this there was a reply in the negative.

On this the plaintiff contended that it was not open to the defendant to rely on his infancy, on the ground that the mortgagee had been induced by his fraud, and that, at any rate, the decision gave rise to such rights as are indicated by sections 64 and 65 of the Indian Contract Act. It was further pointed out that until then there had been no avoidance of the mortgage, and leave was asked to file a supplemental written statement. The defendant objected, but I acceded to the application. In coming to this conclusion I was influenced by the fact that to refuse it would simply necessitate the institution of a fresh action without any advantage to the defendant, as I have given him all the time he required to meet the allegations of fraud; and next because this supplemental written statement was, so far as the plaintiff sought to rest on his mortgage, really in the nature of a replication seeing that there had been no prior avoidance of the mortgage.

[374] In this state of things the following issues were raised :—

1. Was the mortgage deed executed by the defendant?

2. Was the defendant an infant at the date thereof?

3. Was the plaintiff induced to lend the money under the circumstances alleged in the written statement?

4. Apart from the question of fraud are the plaintiffs entitled to recover under the sections of the Contract Act (64 and 65)?

There really can be no question that the defendant executed the mortgage, nor have I any doubt that at its date the defendant was under the age of 18 and consequently a minor. I accordingly decide the 1st and 2nd issues in the affirmative. In deciding the 3rd issue, I have to deal with a conflict of evidence of a most direct character going to the very heart of the matter in dispute.

There are, however, certain matters which are practically beyond question, and it will be best to state them, so as to see which of the conflicting cases best accords with the established facts. Those facts I take shortly to be as follows:—

Some days prior to the mortgage, arrangements were made for an advance by Luckhinarain Singh to the defendant on the security of the property which has been actually charged. In the course of the negotiations there were produced to Luckhinarain the death certificate and affidavit which are alleged to have contained the false representation. The death certificate and affidavit were afterwards placed before Aushootosh Bose, a pleader of the Alipore Court, by Luckhinarain, who requested him to advise whether, having regard to them, money could be advanced. Subsequently, Aushootosh Bose, in accordance with instructions, prepared a draft and engrossed mortgage mentioned in the plaint On the 11th of November 1893 Luckhinarain accompanied by Aushootosh and Gunput met the defendant and Hari Churn Mitter at the Sealdah Registry; the defendant signed the mortgage and the defendant, Luckhi, Aushootosh, and Gunput went upstairs and presented the deed for registration.

The Registrar, who was a friend of the defendant's family, doubted whether the defendant was a major, nor were his doubts removed by the production of the affidavit of Achintanath Biswas, [375] so the parties went downstairs and Hari, Luckhi, and Gunput went away in a garry, and after the space of an hour brought back the death certificate. The parties once more went before the Registrar, the certificate was handed to him, and he, apparently being satisfied as to the defendant's majority, registered the deed. On this 5,000 rupees in notes was paid into the defendant's hands and the parties again went downstairs, leaving the death certificate and the affidavit with the Registrar. Notes to the amount of Rs. 200 were handed to Aushoo and then Luckhinarain and Aushootosh left in a garry, leaving the others there. A few days after Saral went to the Registry and obtained the affidavit that had been left there.

The facts which I have so far stated are beyond dispute, and it will now be convenient to examine shortly the several versions of the plaintiff and the defendant as to what occurred over and above this.

According to Gunput's evidence Saral himself took part in the negotiations for a loan, and himself produced to the plaintiff the certificate and affidavit. After stating that Saral came with Suren Das to Luckhinarain 15 or 20 days prior to the mortgage, Gunput proceeds as follows:—

"Suren said to Luckhinarain Singh in defendant's presence: 'Here is Saral Babu; will you advance him the Rs. 2,000 on a promissory note, which

you have promised to advance'; upon that Luckhinarain Singh said: 'The other day you told me something about his age; where are the affidavit and certificate of death of his father.' Saral thereupon produced two pieces of paper from his pocket and handed them over to Luckhinarain Singh, who read them and handed them over to me." The witness then identified these two documents as being the death certificate and the affidavit. Gunput further describes how the two came again the next day, and that it was ultimately arranged that Rs. 5,000 should be advanced on mortgage. After this, according to Gunput, the defendant obtained a return of the death certificate and affidavit on his furnishing the copies which have been produced here. Gunput beyond this connects Saral with the transaction before its completion by stating that he handed to him a draft of the mortgage.

[376] I now pass to the plaintiff's version of what happened at the Sealdah Office.

According to it the defendant was present in the Registry, and on the Registrar, Hem Chunder, expressing doubts as to his majority, produced the affidavit to the Registrar. Babu Hem Chunder being still in doubt, Hari Mitter was sent by the defendant to get the death certificate, and for that purpose went away with Luckhinarain Singh and Gunput, dropped them at their house, went on, and brought back the certificate, picking up Luckhinarain and Gunput on the way. Then it is said that it was on production of the certificate by the defendant to Hem Chunder that the deed was registered and the 5,000 rupees paid. It is admitted that after leaving the Registrar's room notes to the amount of Rs. 200 were handed to Aushoo, but it is sworn that this was to discharge the expenses in connection with the transaction, and Ashootosh's remuneration, amounting in all to Rs. 140, and that Rs. 60 was then and there repaid to the defendant. Beyond this it is absolutely denied that any payment was made by Saral.

The version put forward on the part of the defence is widely different. Saral swears that he knew nothing about the mortgage till the day before it was executed, that he took no part in the negotiations for the loan, and did not produce the certificate and affidavit, and he further disclaims prior possession of them or even knowledge of their existence. He further swears that he did not know, though he was present, why Hem Chunder declined at first to register the document, that he did not produce either the affidavit or certificate to Hem Chunder, that he did not know the nature of those documents when they were produced, or what the affidavit was when he went to the office afterwards and took it away, and he denies that he sent Hari Mitter for the certificate. On the other hand he states that, after leaving the Registry, he paid Rs. 2,000 to Luckhinarain, Rs. 1,100 to Gunput, and did not receive Rs. 60 or any other sum back in respect of the Rs. 200 paid to Aushoo. Then the question comes, which version am I to adopt. Now I absolutely decline to believe Saral's disavowal of all connection with the certificate and affidavit. In the first place it is proved to my satisfaction that documents undistinguishable from [377] these had been previously shown to Preonath Shastri on the occasion of Saral's obtaining a loan from him. Then I find it impossible to believe that the defendant did not know for what purpose those documents were produced to Hem Chunder. There can be no question that Hem Chunder did express his doubts as to Saral's age, and when it is borne in mind that he was a friend of Saral's family and was well acquainted with Saral himself, it is beyond my capacity to believe that Hem Chunder should not have said a word to Saral on the point, and that Saral remained in absolute ignorance of that which admittedly was going on in his presence. I find it equally difficult to accept

his account of what happened when the affidavit was taken away from the Registry. He states that in consequence of Gunput's persuasion he accompanied him to get the affidavit; still he declares that, though it was he who went to the Registrar and asked for the document, he did not know what it was; that he only described it to the Registrar as "the first document which was produced to you in connection with the loan"; that the Registrar told the clerk to get it; that it was handed to him folded, and that he did not open it. The purpose of this evidence is to support the defendant's theory of his ignorance and freedom from guile, but when I consider the improbability of the tale, and the fact that during the cross-examination of Gunput no suggestion was made of his having accompanied Saral on the occasion when the affidavit was taken away, I do not hesitate to say that the defendant's evidence on the point is undeserving of credit.

The conclusion to which I come is that the defendant was perfectly well aware of the purport of these two documents, and the purpose to which they were put in connection with the transaction. It is the defendant's case that he had nothing to do with the case, and that Hari Mitter acted for him. Yet he does not call Hari as a witness, though he is a friend of the defendant's and was in Court during the trial. The evidence appears to me to demand the conclusion that Saral took part in the negotiations for the loan, and that he used the death certificate and affidavit fraudulently, being well aware of their falsity, for the purpose of inducing Luckhinarain to believe that he, Saral, had attained his majority, and so of procuring from him the advance which was made.

[378] After the best consideration I have been able to give I further come to the conclusion that Luckhinarain was deceived into making the loan by the defendant's fraudulent misrepresentation. In arriving at this conclusion I have not overlooked the arguments based on the rate of interest and on the assertion that Luckhinarain is a money-lender. But I cannot find in those circumstances anything to justify me in coming to the conclusion that the defendant's fraud had not its intended and natural result on Luckhinarain's mind. It has also been a prominent point in the defendant's argument in this connection that the advance was made on a first class security, but I am bound to disregard it as there is not a tittle of evidence in its support. As bearing to a certain extent on this part of the case I will here deal with the defendant's statement that he only got Rs. 1,700. The balance of Rs. 3,300 the defendant accounts for as follows:—

He says Rs. 2,000 was paid to Luckhinarain: but as to the remaining Rs. 1,300 there has been a departure from the original suggestion. At first it was suggested that Rs. 300 was paid to Aushoo which would have left a balance of Rs. 1,000 for Gunput; later, however, the Rs. 300 dropped to Rs. 200, with a corresponding rise in the amount paid to Gunput, though Sital, who was called by the defendant, adhered to the original figure of Rs. 1,000, his evidence in this respect being consistent with the earlier rather than with the later account suggested by the defendant. Now, as to the Rs. 2,000, it is sworn by Saral that he paid that amount to Luckhinarain, and Sital's testimony is to the same effect. On the other hand Gunput and Aushoo, who were both there and must have seen the payment, if made, deny that it ever was made. As to Rs. 1,100 Gunput swears it was not paid; the defendant declares that it was; while according to Sital it was Rs. 1,000 that was paid to Gunput. Both the defendant and Sital agree in stating that Gunput went in a garry with them from the Registry to Lal Bazar, where change was obtained. This account naturally suggested the question why was it necessary to take Gunput to Lal Bazar for the purpose of changing the notes, seeing that even after the alleged payments

to Luckhinarain and Ausboo there were notes to pay the sum Gunput is said to have received whether it was Rs. 1,100 or Rs. 1,000.

[379] Saral's explanation is that Gunput was paid Rs. 1,000 when he got into the garry, but as he was to pay to Sital Rs. 25 and the coachman Rs. 10, Sital suggested that the Rs. 100 should be kept till the change was got. Sital, on the other hand, says that before the garry was driven away no money was given to Gunput, and that the notes were given to Gunput at Lal Bazar. While Gunput was in the box, for some reason or other, doubtless a very good one, no suggestion was made to him in cross-examination that he had gone to Lal Bazar, and it is a curious fact that, though Saral says that he informed his father-in-law of all this before he put in his written statement as guardian *ad litem*, still there is not a suggestion in the written statement of this alleged iniquitous conduct on the part of Gunput and Luckhinarain.

Mr. Hyde says that it was unnecessary to do more than plead infancy, and that is the explanation he gives.

I do not for a moment suggest that the silence of the written statement is in any sense conclusive, still I think it is a factor to which one may have regard in determining which version should be accepted in this conflict of testimony.

Apart, however, from this, I certainly would place credence in the testimony of Gunput and Aushoo, rather than of Saral and Sital. The last-named struck me as a most unsatisfactory witness, and when I bear in mind the accounts he gave of how Gunput had promised him the Rs. 25, and his mode of giving evidence, I am able to place little (if any) reliance on his statements. While as to Saral, not only did he, in my opinion, practise a deliberate fraud on Luckhinarain in the mode I have already indicated, but he has come here and given an absolutely false account of the part he took in the whole transaction. In a conflict of testimony he is not a witness on whom I would rely, and I decline to accept his account of what occurred. I accordingly hold that the Rs. 2,000 and Rs. 1,100 were not paid as Saral has suggested, and further that the Rs. 60 was paid back. So much for the facts of the case: I next have to consider what result should follow from those facts.

On the part of the defendant it is contended that, notwithstanding the defendant's fraud, infancy is a complete answer both **[380]** to the claim for personal payment and also to the relief by foreclosure or sale on the mortgage. In support of this contention reliance is placed on *Dhanmull* v. *Ram Chunder Ghose*, (1890) I. L.R., 24 Cal., 265, a decision of the Appellate Court by which, of course, I am bound.

It has not been suggested that in relation to this point the Indian differs from English law, and it is perfectly obvious that in England infancy affords a complete answer to that which before the Judicature Acts would have been called an action at law on the contract; and it is equally clear that a decree for personal payment on the contract expressed or implied in a mortgage could not be made against an infant however fraudulent he might be. The liability of a fraudulent infant to a decree for sale or foreclosure is however a perfectly different thing, and it is necessary to examine the case of *Dhanmull* v. *Ram Chunder Ghose* to see whether the learned Judges in that case were dealing with anything more than the right to a decree for personal payment against a fraudulent infant. From the report of the case it appears that it was a suit brought to recover the sum of Rs. 13,000 and interest due on a mortgage executed by the defendant on the 26th March 1886. The plaintiff alleged that the defendant at the time of execution represented himself to be of full age, and thereby induced the plaintiff to advance the mortgage money, and

he contended that, in the event of the defendant establishing that he was a minor at the date of the mortgage, then his representations amounted to a fraud, and were wilfully made with a view to deceive the plaintiff, and that the plaintiff should in any event be held entitled to recover the money. The prayer of the plaint was for the usual mortgage decree and for a money decree. The defendant pleaded minority, and denied the alleged fraudulent representation.

The case was heard before Mr. Justice NORRIS, who found that the plea of minority was proved, but that the defendant falsely pretended, and allowed other persons in his presence and on his behalf to state to the plaintiff that he was of full age; that such statements were false to the knowledge of the defendant, and operated upon the plaintiff's mind, so as to induce him to [381] advance the money. It was admitted at the Bar that if the plea of minority was established the plaintiff could not be entitled to a mortgage-decree, but it was argued that, if the case of false representations was made out, he was entitled to a money decree.

The learned Judge dismissed the suit, and from that dismissal there was an appeal which was heard and decided by the Chief Justice Sir COMER PETHERAM, Mr. Justice PRINSEP, and Mr. Justice PIGOT, who affirmed the decision of Mr. Justice NORRIS.

Now there can be no doubt that the facts of that case must be taken for all purposes to be the same as those of the present, but that does not necessarily make it conclusive: for it is clear that a case is not a precedent for any proposition that was neither consciously nor unconsciously in the mind of the Court. Now, according to the report of the case, it was admitted at the hearing before Mr. Justice NORRIS that, if the plea of minority was established, the plaintiff could not be entitled to a mortgage-decree. If that be so, it would be reasonable to suppose that both in the Court of First Instance and the Appellate Court the only point that was discussed and made matter of actual decision was whether the plaintiff could get a money decree in spite of the plea of infancy, seeing that the advance had been procured by the infant's fraud. A glance at the cases quoted, and a moment's consideration of the cases left unquoted, distinctly bear out the view that the argument of Counsel and the deliberation and decision of the Courts were limited in the manner I have indicated.

This too is apparent from the judgments that were delivered. For instance the learned Chief Justice says: "No case has been cited before us, nor are we aware of the existence of any, in which a person has been held personally liable to pay a debt contracted by him during his infancy on the ground that he obtained the credit by fraudulent misrepresentations as to his age." Mr. Justice PRINSEP adopts the reasons and conclusions of the Chief Justice. Then, if one turns to the judgment of Mr. Justice PIGOT, the same thing appears. He says: "I think it is clearly established that the defendant was under age when he entered into the contract." Then later, after stating that the suit must fail, he proceeds: "Assuming it to be framed in tort an infant," as Sir F. POLLOCK [382] accurately says, "could not be made liable for what was in truth a breach of contract by framing the action *ex delicto*. You cannot convert a contract into a tort to enable you to sue an infant." If any doubts were left after reading this passage, it is removed by what appears in the concluding part of the judgment where the learned Judge says:—

"If we as a Court of equity as well as a Court of law were to allow the plaintiff to recover in this suit it would amount to restraining a defendant from setting up the plea of infancy in an action on contract by reason of his having made a fraudulent misrepresentation *dans locum contractui*; and in no

case has this ever been done." It appears to me clear that the learned Judges were simply considering the defendant's personal liability to a money decree, that being the sole question with which they were invited to deal. The high respect I entertain for the learned Judges who decided the case of *Dhanmull* v. *Ram Chunder Ghose* wholly precludes me from supposing that they ever intended to deal with the plaintiff's right to foreclosure or sale by virtue of his mortgage—a point on which there has been an undeviating course of decision from the time of Lord COWPER down to the present day, and a point which has been familiarized by the inclusion of *Savage* v. *Foster* in the 2nd volume of White and Tudor's leading cases in Equity. I refer to those decisions as being authoritative on this point, as it is apparent from the very case of *Dhanmull* v. *Ram Chunder Ghose* that the point is one which falls to be determined by this Court administering principles of equity in accordance with the decisions of English Courts.

No doubt the report of *Dhanmull* v. *Ram Chunder Ghose* records Counsel's admission that if the plea of minority were established the plaintiff could not be entitled to a mortgage-decree.

It may be that there was some special circumstances in the case that demanded such an admission, but it is obvious that, however that may be, it has no binding force, and in my opinion the plaintiff's right to a mortgage-decree is *res integra* so far as that case is concerned.

[383] I have, therefore, to determine whether the defendant can rely on his infancy to the plaintiff's prayer for a mortgage-decree.

I was in the first place referred by the plaintiff to the second case of *Ganesh Lala* v. *Bapu*, (1895) I. L. R., 21 Bom., 198, on the authority of which it was contended that the defendant would be bound apart from fraud by virtue of section 115 of the Evidence Act. As, however, I find that there has been fraud, it is unnecessary for me to consider whether the principle there enunciated would govern this case.

There are, however, as I have already mentioned, a number of English cases which clearly establish that, in a Court of Equity, the disability of a party, whether arising from infancy or coverture, cannot be successfully used in defence of fraud, so that, if the Rule of English Equity applies, the defendant cannot avail himself of the plea of infancy. It is unnecessary to do more than refer to a few of the better known of these cases, such as *Watts* v. *Cresswell* (9 Vin. Abr. 415: 2 Eq., Cas. Abr. 515) decided by Lord COWPER, who held the Great Seal from 1714 to 1718; *Savage* v. *Foster* (2 Wh. & Tud. Eq., Cas. 678); *Teynham* v. *Webb*, (1750) 2 Ves. Sen. 198, decided by Lord HARDWICKE in 1750; *Evans* v. *Bicknell*, (1801) 6 Ves. 174 (181), decided by Lord Eldon in 1801; *Cory* v. *Gertchen*, (1816) 2 Madd., 40; *Vaughan* v. *Vandersteqen*, (1854) 2 Drew., 363, *Davies* v. *Hodgson*, (1858) 25 Beav , 177 ; *In re Lush's Trust*, (1869) L. R., 4 Ch , 591 ; and *Cahill* v. *Cahill*, (1883) L. R., 8 App., Cas., 420 (434), *per* Lord BLACKBURN, from which it is apparent that the prinple is one which has prevailed for 180 years, and has met with the approval of the most eminent English Judges. It further has the support of so eminent a text writer as Lord ST. LEONARDS (3 Sugden's Vend. and Purch. 428). Nor is the rule one peculiar to the English Courts, for a reference to Story and Kent will show that it is one recognized and acted on by the Courts of the United **[384]** States. It is therefore fair to take the rule as an expression of that which is required by the principles of equity, justice and good conscience, and so a rule which should govern decisions of this Court. It may be said, however, that the special circumstances of this case forbid the innovation of the rule, and doubtless it is to that end that it has been more than once repeated

in the course of the argument that Luckhinarain was a money-lender and the defendant an unfortunate young man entrapped into the transaction. I am at all times inclined to regard with suspicion this class of argument.

Even a money-lender, if such Luckhinarain was, is not beyond the pale of the law, and even in regard to him the justice of his claim must be judged by the evidence given in the case in which that claim is put forward, and not by any general appeal to the iniquities, real or imaginary, of those who follow his calling.

The Evidence Act prescribes that the judgment of the Court must be based upon facts declared by the Act to be relevant and duly proved, and it would be intolerable that Courts should decide rights upon suspicions unsupported by testimony.

Then, if the conduct and behaviour of the defendant is a matter for consideration, I fear it would be impossible for me to view him in the favourable light in which he has been painted. He might perhaps find apologists for his youthful extravagances and vices, possibly even for the fraud by which he secured the loan; but I think it would be difficult anywhere to find an excuse for his attempt to escape from the consequences of the fraud by the version which he has given this Court of his conduct--a version which I have been wholly unable to accept. Therefore, I confess that the defendant does not appear to me to be a fitting object of that sympathy which I have been invited to extend to him. On the contrary, I see no reason for withholding the application of the rule of equity by reason of those personal matters to which my attention has been called There remains, however, another point taken on the part of the defendant which requires notice.

It is said that the result of the written statement is to convert the action from one on contract into one on tort based on deceit, and that the statute of limitation would afford a complete answer to **[386]** an action based on deceit. To the argument so stated there would be the obvious answer that it is a misconception to treat the action as one in tort, for it is not and does not purport to be such. The plaintiff's right to succeed, notwithstanding the defendant's infancy, arises from the applicability of a principle of equity, which treats fraud as a bar to the plea of disability. The precise position was this.

The effect of the infancy was that the mortgage was voidable, not void, for that is the result of the decision of this Court by which I clearly am bound whatever my own views may be.

Accepting this as the law, the infant's right to elect whether he should affirm or repudiate the mortgage remained open until he attained his majority, and in this particular case it was not until after the infant attained his majority, which happened in the month of June, that the plaintiff could have known whether the defendant would by his repudiation render reliance on his fraud obligatory on the plaintiff. I may also further point out that even in the written-statement there is merely a plea of infancy, and a submission to the protection of the Court, and no allegation even of such a provisional repudiation as is open to an infant in relation to a voidable transaction.

But apart from this, the position is very clearly expressed by Lord Justice TURNER in *Nelson* v. *Stocker*, (1859) 4 De Gex. & J., 458, where he indicates the true question is whether the false representation is such a fraud as will take away the privilege of infancy.

It seems to me, therefore, that the answer to the plea of infancy could properly be introduced under the circumstances of this case by way of replication, to use the phraseology of English pleading, as the plaintiff was not bound

to assume in his plaint that it would be necessary for him to rely on the fraud of the infant. In any case, I do not think that art. 95 of the Limitation Act is, on the facts of this case, any answer to the plaintiff's claim.

Under the circumstances, therefore, I hold the plaintiff is entitled to succeed, but while I give her the benefit of the principles of equity, she must take her remedy subject to the qualifications those principles impose.

In the first place I will not allow any interest. Then, as I [386] indicated in the course of the argument, I am not inclined to charge the infant with remuneration paid to Aushootosh Bose, but as it is not clear what part of the Rs. 140 was applied in payment of the expenses, and as the cost of an inquiry on the point would be disproportionate to the result, the simpler plan will be to disallow the whole of the Rs. 140. I understand the plaintiff is willing to accede to this course. The mortgaged property therefore will be a security for the principal advanced after deducting the Rs. 140 and costs, and there will be an account on that footing. There will, therefore, be the usual mortgage decree with interest at 6 per cent. on decree, with the qualification that the plaintiff will not be entitled to recover the principal sum or interest otherwise than out of the mortgaged property. Costs on scale No. 2 including reserved costs.

From this decision, and also from the order giving the plaintiff leave to amend his plaint, the defendant appealed.

Mr. *Garth* (Mr. *Chakravarti* with him) for the appellant. Although the power of making amendments under section 53 of the Code of Civil Procedure is discretionary, the power in this case was exercised contrary to the proviso to that section. The conversion of this suit from a suit to enforce a mortgage into a suit for the recovery of money paid upon the footing of a false representation is the conversion of a suit of one character into a suit of another and inconsistent character. As regards the facts of this case my submission is that a mortgage by an infant, like a contract, is void, if the plea of infancy is raised. Luckhinarain deliberately blinded himself to the fact that the defendant was a minor. He must shew that he took all prudent precautions which a man should take. If he cannot, a Court of Equity will not help him. The only question was whether the Registrar would be satisfied or not as to the minority. The plaintiff has failed to prove that Luckhinarain himself was deceived, or took any steps to prevent himself from being deceived. As long as he did not do so he cannot raise the plea of fraud. In this decree we are ordered to pay the money and there is no time fixed for payment. On the facts as given in *Dhanmull* v. *Ram Chunder Ghose*, (1890) I. L. R., 24 Cal., 265, there was no misrepresentation.

[387] Sir *G. Evans* (with him Mr. *Dunne* and Mr. *Sinha)* for the Respondent.—This is a case of deliberate fraud by a forged certificate and a false affidavit and would deceive any one. The affidavit was made by a friend and relative of the minor, Hari Babu, who was in the same office with him. The Registrar even was deceived by the certificate, and was satisfied that the boy was over age. He was as a matter of fact within 7 months of attaining his majority. As regards the case of *Dhanmull* v. *Ram Chunder Ghose*, (1890) I. L. R., 24 Cal., 265, it is not necessary for this Court now to overrule that case. In that case in the lower Court Counsel gave up all claim under the mortgage, as they thought they would be entitled to a money decree only. The mind of the Chief Justice turned in that case upon whether a money decree could be given against the infant. PIGOT, J., dealt with the case on the same lines. That case has been confined to a narrow point on account of the line taken by Counsel. They cited *Ex-parte Unity Joint Stock Mutual Banking Association*, (1858) 3 De G. & J., 63, to show it was a debt, but did not cite

analogous cases to shew how relief can be given, which is laid down in cases cited by the Judge in the Court below. If the infant is old and cunning enough to carry on a fraud he should be made liable—*Watts* v. *Creswell* (9 Vin. Abr. 414). Where fraud is practised by a married woman or an infant the protection thrown around them is taken away; but the Courts of Equity have not carried it so far as to make a money decree against them. A married woman's property is liable to be visited with the consequence of the fraud—*Vaughan* v. *Vanderstegen*, (1854) 2 Drew, 363; *Sharpe* v. *Foy*, (1868) L. R., 4 Ch. App., 35; *Hobday* v *Peters*, (1860) 28 Beav., 351; *In re Lush's Trust* (1869) L.R., 4 Ch. App, 591 (596,600),. The only objection to a money decree is the question whether it is available against the person. The minor cannot now turn round and say, Luckhinarain ought to have thought the document was a forgery, but if a man has got no money you cannot make [388] an order in a Court of Equity that he shall pay. The case of a married woman is stronger—*Cahill* v. *Cahill*, (1883) L R., 8 App. Cal., 420; *Raj Coomary Dassee* v. *Preo Madhub Nundy*, (1897) 1 Cal., W. N, 153. It does not matter whether in this case the contract is void or voidable. The minor cannot take advantage of his own fraud.

The following **judgments** were delivered by the Appellate Court (MACLEAN, C.J., and MACPHERSON and TREVELYAN, JJ.) :—

Maclean, C.J.—On the 14th November 1893 the defendant mortgaged certain property to one Luckhinarain, who has since died, his representative being the plaintiff in the suit, to secure a sum of Rs. 5,000 advanced by him with interest at the rate of 24 per cent. per annum. At the time the mortgage was given the defendant admittedly was a minor, but he would have come of age six or seven months later, if it had not been for an order of the 1st February 1894, which appointed a guardian of the person and property of the infant, the effect of which was to extend the period of minority to the age of 21. On the 20th February 1895 Luckhinarain, the mortgagee, instituted this suit to enforce his mortgage, and on the 17th April 1895 a written statement was put in by the guardian of the infant, and that written statement disclosed the fact that the defendant was an infant at the date of the mortgage in question. The case came on for trial, and on the 6th July 1897, as I understand, on the suggestion of the learned Judge himself, a question arose as to the amendment of the pleadings, it being suggested that if it turned out that at the date of the mortgage the defendant was an infant the plaintiff should be allowed to raise an alternative case to the effect that Luckhinarain had been induced to part with his money upon the fraudulent representation of the infant defendant. Mr. Justice JENKINS allowed the application for the amendment, and one of the points we have to decide is whether that leave was or was not properly granted. The case proceeded and the learned Judge found as a fact that the defendant was a minor at the date of this mortgage, that he represented and represented falsely to Luckhinarain, the intending mortgagee, that he was of age, and that the [389] advance was made on the faith of that representation, and although the Judge in the Court below did not make a personal decree against the defendant for the repayment of the money advanced, he gave the plaintiff an ordinary mortgage decree. The defendant appeals from that decision.

The first point we have to consider is as to whether the learned Judge in the Court below was right in allowing the amendment which enabled the plaintiff to set up his alternative case. This point depends upon the construction of certain sections of the Code of Civil Procedure. It is urged by Mr. *Garth* for the appellant that, although the power of making amendments

is discretionary under section 53 of the Code, the power in this case was exercised contrary to the proviso to that section. That proviso says this: "Provided that a plaint cannot be altered so as to convert a suit of one character into a suit of another and inconsistent character."

It is urged by the appellant that the conversion of this suit from a suit to enforce a mortgage into a suit for the recovery of money paid upon the footing of a false representation, is the conversion of a suit of one character into a suit of another and inconsistent character. No doubt, in one sense, the original character of the suit was to enforce the mortgage, but the object of the suit was, after all, to recover the money. We must read the proviso with other sections of the Code, and particularly with sections 42 and 45. Section 42 says: "Every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so as to prevent further litigation concerning them," while section 45 says: "Subject to the rules contained in chapter II and in section 44, the plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly." It seems to me that if the argument of the appellant were to prevail, it would virtually prevent an alternative case, which arises out of, and is immediately connected with, the same transaction, from ever being raised in the same suit I do not think, looking at the sections of the Code I have referred to, that that was the intention of the **[390]** Legislature, nor do I think that the alternative claim, which is set up, is inconsistent with the character of the claim originally made within the meaning of the proviso in question. Reading sections 42 and 45 of the Code, the intention of the Legislature was that, as far as possible, all matters in dispute between the parties relating to the same transaction should be disposed of in the same suit, and I do not think that the proviso to section 53 was intended to interfere with this. I therefore think that Mr. Justice JENKINS was perfectly right in allowing, in the manner he did, the amendment of the plaint.

Now I pass to the facts of the case, and in my opinion the plaintiff has succeeded in substantiating his story. The evidence shows that the defendant was desirous of raising money. He was a young man, apparently of dissolute habits, and being in want of money he approached Luckhinarain, whom for this purpose I will regard as a professional money-lender. I think the evidence shows that he went to him, and asked for the loan in question. Luckhinarain was suspicious as to the defendant's age, whereupon the defendant then and there produced an affidavit of a relative, which deposed to the date of his birth, and which, if true, would show that he was of age. He also produced what purported to be a certificate of the death of his father. The evidence shows to my mind that copies of these documents were made, and that the defendant took away the originals. The copies were then sent to the pleader who has given evidence in the case. The mortgage was settled by him, the mortgage was prepared, and ultimately, the parties concerned, the intending mortgagee, the pleader, the defendant and one or two others, went to the Registrar at Sealdah to have the transaction completed. There, according to my view of the evidence, the Registrar objected, entertaining a doubt as to whether the defendant was of age, and was not satisfied with the affidavit which had been produced. The evidence shows that Hari Mitter who was, to use the defendant's own language, his "boon companion," was sent to fetch the certificate, that he fetched the certificate, that upon that the Registrar was satisfied, the mortgage was executed, and the money handed over to the defendant. I think these facts have been made out by the plaintiff

[391] It has been urged that the appearance of the defendant was such as would induce any prudent man about to advance him money to hesitate doing so, his appearance being, it is suggested, such as to indicate clearly that he was a minor. In these cases, the appearance of the minor is a matter of considerable importance; but in the present case there is no evidence, or practically no evidence, upon this point one way or the other, so I dismiss that as an element in this particular case.

That being the history of the case, what we have to consider is did the defendant fraudulently represent to Luckhinarain, the intending mortgagee, that he was of age, and did Luckhinarain rely and act upon that representation? I may here remark that Mr. Justice JENKINS regarded the evidence of the defendant as very unsatisfactory evidence, upon which he could place no reliance. It is clear to my mind upon the evidence that the defendant produced his affidavit and produced his certificate, the affidavit being false and the certificate a forgery, with the express object of inducing Luckhinarain to advance the money, that Luckhinarain did advance the money upon the faith of the representation, which was certainly made, and which was certainly false, that the defendant was of full age.

It has been urged by Mr. *Garth* that a prudent man would have made further inquiries before advancing the money, and would not have been satisfied either with the affidavit or with the certificate. It occurs to one at once to inquire what further inquiries could he have made.

The mother of the defendant, even if she had been accessible, would have been the last person to whom either the defendant or Luckhinarain would have been likely to apply for any information; but the mother was a *purdanashin* lady, and was not accessible to Luckhinarain for the purpose of his making inquiries from her. It is also suggested that he might have gone to the mother's house and made inquiries of the servants there: but I am quite unable to accede to this suggestion. It is said that a minute examination of the certificate would have shown that it was a clumsy forgery: but it scarcely lies in the mouth of the defendant to say that. It must be borne [392] in mind that the certificate deceived the Registrar, who had no interest whatever in the transaction.

I am not prepared to accede to the contention urged by Mr. *Garth* that if Luckhinarain had made further inquiries he would have ascertained that the representation made was untrue, for, in my judgment, if a person makes a positive assertion, knowing it to be false, he cannot relieve himself of the liability arising from that false assertion by saying that the person to whom it was made need not have relied, or ought not to have relied, upon it. If he made the representation, and he afterwards alleges that the person to whom it was made did not rely upon it, he ought to show that the representation was not, in point of fact, relied upon.

I see no reason then, upon the question of fact involved in this case, to differ from the conclusion at which Mr. Justice JENKINS has arrived.

But then it is urged that even if, in point of fact, the defendant did make this fraudulent representation, upon the faith of which Luckhinarain parted with his money, seeing that at the time he was an infant, he is not liable to Luckhinarain in the present suit. There is not, so far as I can discover, any distinction betweeen the law in India and the law in England upon this subject. In my judgment, there is a current of cases decided in the Courts of Equity in England, dating back for 150 years or more, which show that, in Equity, an infant cannot take advantage of his own fraud. I think it is

established that in cases of fraud by an infant the protection which the law throws around him is taken away: in other words, that the defence of infancy cannot be successfully pleaded in defence of a fraud perpetrated by the infant. I do not propose to go in detail through the various cases which have been cited; they are all referred to in the judgment of Mr. Justice JENKINS, and in my opinion they establish the proposition for which the respondent contends.

There is, however, one case, the case of *Nelson* v. *Stocker*, (1859) 4 De Gex & J., 458, which is a decision of the Court of Appeal in England, to which I will **[393]** refer. The judgment is that of Lord Justice KNIGHT BRUCE and Lord Justice TURNER. The headnote is this: "A young man of the age of seventeen, previous to his marriage with a woman possessed of personal property, executed a marriage settlement, by which he covenanted to pay £1,000 to the trustee. Before executing it, being asked by the solicitor of the intended wife whether he was of age, he said he believed he was. The intended wife, however, knew that he was not. After the marriage he received the wife's personal estate, and after her death refused to pay the £1,000. *Held*, reversing the decision of the Court below, that, as the wife was not misled by the misappropriation, the settlement was not binding upon the husband when he came of age."

But it is clear from passages in the judgment of Lord Justice TURNER—and Lord Justice KNIGHT BRUCE did not differ from him—that, if a false representation had been made and acted on, the person to whom it was made, not knowing that it was false, the liability of the defendant, although at the time he entered into the covenant he was a minor, to pay the £1,000 would have been undoubted. The Vice-Chancellor had made a decree for the payment of the money, holding that the representation was a false representation. Although the Court of appeal differed from the Court below upon the question of fact, it is, I think, apparent from Lord Justice TURNER'S observations (4 De Gex. & J. at pp. 464, 465) that he did not differ from the Vice-Chancellor upon his view of the law. He says: "If the case had depended simply upon the point of the defendant having represented himself to be of age, when he was not of age, I should have felt no doubt about it." He can only mean by that that, if the representation had been made out, he would have had no doubt as to the liability of the defendant, although he was an infant at the time he entered into the covenant. Lord Justice TURNER then goes on: "It is too much to call upon the Court to believe that this defendant could really have thought himself to be of age at the date of the settlement when he was under eighteen years of age, and, if he did not so think, the representation he made to the solicitor was false and fraudulent. Infants are no more entitled than adults **[394]** are to gain benefits to themselves by fraud, and had the case therefore depended upon this point alone I should have agreed most fully with the decision of the Vice-Chancellor." Now the decision of the Vice-Chancellor was a personal order against the defendant for payment of £1,000. Then the Lord Justice TURNER goes on to say, and, if I may respectfully say so, I entirely agree with him: "The law has for the wisest reasons thrown around infants a protection against acts done by them during their infancy, and the policy of the law cannot be maintained if this privilege of infancy be allowed to be broken in upon on slight and insufficient grounds. If the contracts of infants with persons, who know them to be under age, are held to be binding upon the ground that the infants represented themselves to be of age, there will hardly be a case in which the plea of infancy will be of any effect, and the door will be open to all the frauds against infants, which the law was intended to protect them from." But he goes on to say: "The privilege of infancy is a legal privilege. On the one hand, it cannot be used by infants for the purposes

of fraud. On the other hand, it cannot, I think, be allowed to be infringed upon by persons who, knowing of the infancy, must be taken also to know of the legal consequences which attach to it." In my opinion the observations of Lord Justice TURNER in the case of *Nelson* v. *Stocker* are very pertinent to the present case.

If in the present case, upon the facts, I had been satisfied that Luckhinarain, when he advanced this money, knew that, notwithstanding the affidavit and notwithstanding the certificate, the defendant was not of age, then I agree that he could not come into a Court administering Equity and seek successfully to make the defendant liable. But in this case, upon the facts, I conclude that Luckhinarain was deceived, and deceived by the course of conduct which the defendant adopted. I think the cases establish that, in a case like the present, the defendant, though at the time when he entered into the contract he was an infant, is not entitled to take any advantage resulting from his own fraud.

It has been strongly urged before us that the case decided by this Court some years ago, *Dhanmull* v. *Ram Chunder* **[395]** *Ghose*, (1890) I. L. R., 24 Cal., 265, but only recently reported * is opposed to the view we take. As regards that case, I need only remark that what the Court decided there was that where an infant obtained a loan upon the representation (which he knew to be false) that he was of age, no suit to recover the money could be maintained against him, there being no obligation binding upon the infant which could be enforced by action upon the contract, either in law or in equity, but that the defendant should not be allowed costs in either Court.

That case only dealt with the personal liability of the fraudulent infant. In the case before us, the learned Judge in the Court below has not made a personal decree against the defendant for payment of the money, but has made an ordinary mortgage decree, and there is no cross-objection by the respondent as to his not having been granted a personal money decree against the defendant. Speaking for myself, I am by no means satisfied that that case, (1890) I. L. R, 24 Cal., 265, was rightly decided.

But the decree here, as I pointed out, is a decree against the property which was pledged by the infant, and which has got into the hands of the mortgagee; the decree only goes to that, and therefore, in that respect, it is distinguishable from the case of *Dhanmull* v. *Ram Chunder Ghose*, (1890) I. L. R., 24 Cal., 265.

I have now, I think, dealt with the various points which have been urged before us. I have dealt with the facts of the case and the law which to my mind is applicable to them. If, in this case, a money decree for personal payment had been granted, and we had differed from the view expressed in the case above mentioned, (1890) I. L. R., 24 Cal., 265, it would have been necessary to refer the case to a Full Bench; but inasmuch as there is the distinction I have pointed out in the decree in this case, and the point, which was decided in the other, no necessity arises for the adoption of that course. I think that Mr. Justice JENKINS was right and the appeal fails and must be dismissed with costs.

[396] Macpherson, J.—I agree on all the points which have been disposed of by the Chief Justice.

Trevelyan, J.—I also agree, and I think that if the respondent had objected to there not having been a personal decree, we should, having regard

* A report was made of this case when it was decided, but its publication was prohibited by two of the Judges who decided it, and it could not therefore then appear in the reports. —ED.

to the arguments which have been placed before us, have had to refer the question to a Full Bench.

Attorney for the Appellant: Mr. *Rutter*.

Attorney for the Respondent: Messrs. *G. C. Chunder & Co.*

C. E. G.

NOTES.

[See the Notes to 24 Cal., 265 *supra*. See also (1910) 8 I.C., 888 (Allahabad).]

[25 Cal. 396]

APPELLATE CIVIL.

The 6th June, 1887.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE NORRIS.

Modhusudun Nath Tewari............Defendant

versus

Hiru Ram Pandey and others............Plaintiffs.

Chota Nagpore Landlord and Tenant Procedure Act (Bengal Act I of 1879), section 124—Sale in execution of a decree for rent—Jagir tenure, Incidents of—Right, title and interest of registered "ilakadar"—Joint-holder. *

Where a suit was brought for the recovery of arrears of rent due in respect of a *jagir* tenure, the joint property of four brothers, governed by the Mitakshara law, the arrears having accrued during the lifetime of their father, and a decree was obtained against the eldest brother, who was the sole registered *ilakadar*, or person held responsible in the zemindar's book, it was *held*, that the decree related to the arrears due in respect of the whole tenure and not merely of the judgment-debtor's individual interest, and that a sale of his right, title and interest under section 124 of Bengal Act I of 1879 would, under the circumstances of the case and by the incidents attaching to such tenure, include the right, title and interest of any person claiming jointly with him, and whose interest was inseparably united with his.

THE plaintiffs alleged that they, together with their brother Dukhi Ram and their father, held the village of Kulherpat jointly till 1932 Sumbut, when it was divided among them in **[397]** equal shares. The family was governed by the Mitakshara law. On the 10th January 1882 the village was sold under section 124 of Bengal Act I of 1879, in execution of a decree for arrears of rent and cesses, and purchased by one Rachia Sahu, who re-sold it to the defendant. After the defendant obtained possession the plaintiff's brother Dukhi Ram died without leaving heirs other than the plaintiffs. The present plaintiffs sued to recover possession of 12 annas of the village on the plea that the sale held under

* Appeal from Appellate Decree No. 2007 of 1886, against the decree of F. Cowley, Esq., Officiating Judicial Commissioner of Chota Nagpur, dated the 27th of August 1886, reversing the decree of A. W. Mackie, Esq., Assistant Commissioner and Subordinate Judge of Lohardugga, dated the 20th of January 1886.

section 124 of Bengal Act I of 1879 only passed the four annas share of the plaintiff Hiru Ram, who was the eldest brother, against whom the decree had been obtained. The Subordinate Judge held that there had been no partition, and that as the decree was for the rent due from the father of Hiru Ram, whom he succeeded as manager, being the eldest son, the whole interest in the tenure had passed by the sale. The defendant having appealed against this decision it was set aside by the Judicial Commissioner. Against the decree of the Judicial Commissioner the plaintiff appealed to the High Court.

Mr. *Woodroffe*, Mr. *C. Gregory*, and Babu *Surendra Nath Roy*, appeared for the Appellant.

Dr. *Rash Behary Ghose*, Babu *Jogesh Chunder Dey*, and Babu *Golap Chunder Sarkar*, were for the Respondents.

The **judgment** of the High Court (**Tottenham** and **Norris, JJ.**) was as follows:--

We are of opinion that this appeal must be allowed, and that the Court of First Instance was right in dismissing the suit.

It was brought to recover 12 annas of a *jagir* named Kulherpat, possession of the whole of which has come into the hands of the defendant by transfer from an auction-purchaser under a decree for arrears of rent. It is alleged that the *jagir* when the sale took place was the joint property of four brothers, and that nothing passed by that sale beyond the right, title and interest of one of the brothers, Hiru Ram Pandey, against whom only the rent decree had been obtained. The plaintiffs sue to get back the other three equal shares.

It appears that the *jagir* is one governed by the provisions of **[398]** Bengal Act I of 1879—the Chota Nagpur Landlord and Tenant Act; that no sale of the tenure itself could take place under a decree for arrears; but that with the consent of the Commissioner the right, title and interest of the judgment-debtor could be and was sold.

The Lower Appellate Court thought it must be held that the consent of the Commissioner was limited to the sale of the individual right, title and interest of Hiru Ram, and that the sale conveyed nothing more. We think that the Commissioner's sanction under section 124 must be held to apply to all the right, title and interest represented by the judgment-debtor Hiru Ram in the decree passed against him. There is no question as to his having been sued as representing the full ownership of the *jagir*. The arrears claimed had accrued in the lifetime of the father of the four brothers, and the suit was brought against the eldest of the brothers who held possession as manager, and who was the sole registered *ilakadar* or person held responsible in the zemindary books. The decree, undoubtedly, related to the arrears due in respect of the whole tenure, and the judgment-debtor was undoubtedly sued as being in possession of the whole tenure. His right, title and interest sold would, under the circumstances of the case, and by the incidents attaching to such tenures in Chota Nagpur, include the right, title and interest of any person claiming such jointly with him, and inseparably united with his own.

Many authorities have been cited before us on either side in support of the opposite views taken by the parties of what really passed by the sale. But it is enough to say that the circumstances of the particular case must determine this question, and that we are satisfied that in this case the sale as sanctioned by the Commissioner disposed of the whole right, title and interest represented by Hiru Ram.

The decree of the Lower Appellate Court is, therefore, set aside, and that of the first Court must be restored with costs.

Appeal allowed.

APPEAL FROM ORIGINAL DECREE.

[399] *The 20th April, 1892.*

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Pertab Udai Nath Sahi Dev............Plaintiff

versus

Pardhan Mokand Sing and others............Defendants.

Chota Nagpore Landlord and Tenant Procedure Act (Bengal Act I of 1879), section 124—Jagir and under-tenures—Decree for arrears of rent.

No decree for arrears of rent can be made against any person other than the actual tenant, or some one who may be security for him, and consequently there can be no decree for rent against persons holding subordinate interests in a *jagir* tenure which have been created by the *jagirdar*.

THIS was a suit brought under the provisions of Bengal Act I of 1879 for the recovery of arrears of rent and cesses due in respect of a *jagir* tenure comprising the entire pergunnah of Sisia in the district of Lohardugga. The tenure was alleged to have been granted by the father of the plaintiff, the Maharaja of Chota Nagpur, to an ancestor of the first defendant, on condition of his performing the duties of keeping watch in the *gurh*. The grant was by its terms *putra putradik*, that is limited to the grantee and the heirs male of his body, on failure of which the *jagir* would revert to the grantor free of all incumbrances. It was therefore unalienable, and could under the terms of section 124 of Bengal Act I of 1879 be sold in execution of a decree. But it was alleged that the first defendant had nevertheless divested himself of the whole of his estate by the creation of numerous sub-tenures, which the plaintiff declined to recognize. The name of the first defendant, therefore, was alone registered in the Maharaja's *sherista*, and it was alleged that the numerous *shikmidars*, *mokurraridars*, and *zuripeshgidars* were only made parties to the suit in conformity with certain rules framed by the Commissioner of Chota Nagpur for the execution of decrees under section 124 of Bengal Act I of 1879. The first Court had given the plaintiff a decree against the first defendant only, and it was now sought in appeal to obtain decrees against the remaining defendants.

[400] Mr. *W. R. Donogh* and Babu *B. M. Dass* for the Appellant.

Babu *Jogendra Chundra Ghose* for the Respondents.

* Appeal from Original Decree No. 296 of 1890, against the decree of P. H. O'Brien, Esq., Assistant Commissioner of Ranchi, dated the 11th of June 1890.

The **judgment** of the Court (**Prinsep** and **Hill, JJ.**) was as follows:—

This is a suit for arrears of rent brought against the proprietor of a *jagir*, and together with him are included as defendants various persons said to have subordinate interests in that property created by the *jagirdar*.

An *ex parte* decree was passed against the *jagirdar*; some of the other defendants appeared and objected to any claim as against them, but no questions relating to these defendants have been considered, nor have these defendants been made liable under the decree.

The plaintiff, not being satisfied with the *ex parte* decree against the actual tenant, has appealed to this Court, asking that the tenants of the *jagirdar* who have been made parties to this case should also be made liable under the decree, in order that their interests might be sold at the same time as the *jagir* of the actual tenant. It has been stated that this is in accordance with the practice in Chota Nagpur, and, as authority, a circular issued by the Commissioner of Chota Nagpur has been read before us. The tenure in question, it is stated by the learned Counsel for the appellant, is one of the nature described in section 124 of Bengal Act I of 1879—the Chota Nagpur Landlord and Tenant Procedure Act. We cannot conceive on what principle any person other than the tenant himself or one who may be security for him can be made liable under a decree for arrears of rent. The rules cited before us have not the force of law, and we may observe that it does not appear that they were so intended as they are headed, "Rules issued for the guidance of officers subordinate to the Commissioner," whose signature they bear. It is unnecessary for us to express any opinion regarding the mtaters stated in those rules. It is sufficient to say for the purposes of this appeal that no decree in this suit can be passed except against the actual tenant, defendant No. 1; and we may add that section 121 does not contemplate a general **[401]** sanction for sale of the right and title of any person in the particular under-tenure, but seems to require special orders for the sale of the right and title in any such tenure in each particular case. That is a matter which has not arisen in the present stage of the case, because it may be that, in execution of the decree, the judgment-debtor will pay the amount due and so avoid any sale in execution. The appeal is dismissed with costs.

Appeal dismissed.

[25 Cal. 401]

ORIGINAL CIVIL.

The 19th March, 1897.

PRESENT:

MR. JUSTICE SALE.

Ramjibun Serowgy............Plaintiff

versus

Oghore Nath Chatterjee............Defendant.*

Evidence Act (I of 1872), section 92, prov. 3—Parol evidence qualifying an engagement in a written document—Admissibility of such evidence—Reservation of question as to the admissibility of evidence.

The proper meaning of proviso 3 to section 92 of the Evidence Act (I of 1872) is that a contemporaneous oral agreement, to the effect that a written contract was to be of no force or effect, and that it was to impose no obligation at all until the happening of a certain event, may be proved. An oral agreement purporting to provide that the promise to pay on demand in a promissory note, though absolute in its terms, was not to be enforceable by suit until the happening of a particular event, *i.e.*, that the legal obligation to perform the promise was to be postponed, is not such an agreement as falls within the proviso 3 to section 92 of the Evidence Act.

Jugatanund Misser v. *Nerghan Singh*, (1880) I.L.R., 6 Cal., 433, and *Cohen* v. *Bank of Bengal*, (1880) I.L.R., 2 All., 598, followed.

Questions as to the admissibility of evidence should be decided as they arise, and should not be reserved until judgment in the case is given.

Jadu Rai v. *Bhobotaran Nundy*, (1889) I.L.R., 17 Cal., 173, followed.

THE facts of the case appear sufficiently from the **judgment**.

[402] Mr. *R. Mitter* for the Plaintiff.

Mr. *A. M. Dunne* for the Defendant.

Sale, J.—The point which is raised in this case has been elaborately argued, but I think it would be of no advantage if I took further time to consider the arguments, because it seems to me that the authorities, both English and Indian, are pretty clear. The claim in this suit is based on a promissory note executed by the defendant, under the terms of which there is an absolute engagement on the part of the defendant to pay on demand the sum of Rs. 7,000.

The defendant admits the execution of the note, and admits consideration for it, and the only defence is that which is set up in the 4th paragraph of his written statement. That paragraph runs as follows:—

"That in the year 1895 a settlement of accounts was come to between the plaintiff and the defendant, and it was thereupon agreed between them that the said hundis should be cancelled, and that the defendant should pay the plaintiff the sum of Rs. 4,000 in cash and give him a promissory note for the sum of Rs. 7,000 in full discharge of all his claims against the defendant in respect of the said hundis and of all other claims against the defendant up to that; and it was further agreed between the plaintiff and the defendant that the plaintiff should not bring any suit to enforce payment of the said promissory note until the defendant's share in the compensation money awarded in

* Original Civil Suit No. 307 of 1896.

the Land Acquisition case No. 181 of 1892 in the Court of the District Judge of 24-Pergunnahs should be received by him."

The question is whether evidence in proof of the alleged contemporaneous oral agreement set up in that paragraph of the written statement is admissible, having regard to the terms of section 92 of the Evidence Act.

It was suggested on the part of the defendant that the more convenient if not the right course would be to admit the evidence in the first instance, reserving the question of law as to its admissibility until the final judgment in the case. No doubt that course has advantages and is a proper enough course to follow [403] in certain cases, but having regard to the observations of the Appeal Court in the case of *Jadu Rai* v. *Bholotaran Nundy*, (1889) I.L R., 17 Cal., 173, I do not think that course is open to me in the present instance.

Their Lordships expressed the view that questions as to admissibility of evidence should be determined as they arise, and the particular question as to which that opinion was expressed was a question under section 92 of the Evidence Act. It seems to me therefore I ought to proceed to determine the question of law which has now been raised.

The oral agreement which is set up in the 4th para. of the written statement, and which is sought to be proved for the purpose of limiting the defendant's liability under the promissory note, must, it seems to me, be read in one of two ways. Either it must be read in the literal sense of the words, as constituting an undertaking on the part of the plaintiff not to enforce the note by suit until the happening of a certain event, or else it must be read as meaning that the legal obligation of payment was to be postponed to, or made conditional upon, the happening of a certain event. In whichever sense the words are read, the agreement appears to me to have the effect of varying the terms of the contract as contained in the promissory note, and I think the result is the same whether the section be read in the light of the English cases which have been cited, or whether it be construed apart from those authorities.

Under the promissory note the engagement is an absolute engagement to pay on demand. The defendant seeks to set up a contemporaneous oral agreement, the effect of which is to qualify or restrict that engagement.

The case of *Mosley* v *Hanford*, (1830) 10 B. & C., 729, is clear authority to the effect that in England the evidence of such an oral agreement would be inadmissible. In that case, which was a suit on a promissory note payable on demand, the defendant set up a stipulation that it was to be paid on the sellers giving up [404] possession of certain premises sold to him. TENTERDEN, C.J., regarded the stipulation as having the effect of providing that the promissory note was not to be put in suit till a given event happened, and he held that the evidence of such an agreement was inadmissible.

There are numerous other English authorities to the same effect to which I need not refer, inasmuch as the argument for the defendant is not so much that under the English law the evidence is admissible, but that proviso 3 to section 92 of the Evidence Act has the effect of altering the English law.

Proviso 3 is as follows :—

"The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved."

What Mr. *Dunne* contends is that the general law laid down by section 92, viz., that no contemporaneous oral agreement can be proved to vary the terms of a written contract, is qualified by proviso 3 to this extent, that the terms of a written contract may be varied by proof of a contemporaneous agreement if

the effect of such agreement is to postpone a certain obligation under the contract, or to make it conditional upon the happening of a certain event. I am of opinion that this is not the meaning of the proviso. I do not think it can be read as saying that something may be done under certain circumstances, which section 92 says cannot be done. I do not think that it was intended by proviso 3 to permit the terms of a written contract to be varied by a contemporaneous oral agreement; but having regard to the illustrations (*b*) and (*j*), I think the proper meaning of proviso 3 is that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect at all, and that it was to impose no obligation at all until the happening of a certain event, may be proved.

Placing that construction on proviso 3 brings it into general harmony with the terms of the section, and I think this view of the proviso finds support in the opinion expressed by GARTH, C.J., in **[405]** the case of *Jugatanund Misser* v. *Nerghan Singh*, (1880) I. L. R., 6 Cal, 433, and also in the opinion expressed by Mr. Justice STRAIGHT in the case of *Cohen* v. *Bank of Bengal*, (1880) I. L. R., 2 All., 598. It is to be observed, moreover, that Mr. Justice SPANKIE, who considered that the evidence of the oral agreement sought to be proved in that case was admissible under the proviso, proceeded upon the view that such agreement did not vary the terms of the written contract on which the suit was based.

Now, in the present instance, the oral agreement sought to be proved does not provide that the promissory note was to have no force or effect until the happening of the particular event mentioned, but it purports to provide that the promise to pay on demand, though absolute in its terms, was not to be enforceable by suit until the happening of that event, or, in other words, that the legal obligation to perform the promise was to be postponed. I think it clear that such an agreement does not fall within proviso 3 of section 92, and that being so, the defence fails, and there must be a decree in favour of the plaintiff for Rs. 7,000, with interest at 6 per cent. from date of the note to the date of decree with costs on scale 2 and interest on decree.

Attorney for the Plaintiff: Mr. *N. C. Bose*.

Attorneys for the Defendant: Messrs. *Watkins & Co.*

NOTES

[As regards admissibility of evidence, see (1904) 9 C.W N , 178.]

[25 Cal. 406]

APPELLATE CIVIL.

The 27th August, 1897.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE WILKINS.

Upendra Lal Boral............Plaintiff

versus

Hem Chundra Boral............Defendant.*

Hindu Law—Will—Construction of will—Executory bequest—Gift to an idol not in existence at the testator's death—Existence of idol—Dedication.

No valid gift or dedication of property can be made by will to an idol not in existence at the time of the testator's death.

[406] The power conferred by will to make a gift must be a power to convey property to a person in existence either actually or in contemplation of law, at the death of the testator. *Bai Motivahoo* v. *Bai Mamoobai*, (1897) I. L. R., 21 Bom., 709: L. R., 21 I. A., 93, relied upon.

THE facts of the case appear sufficiently from the judgment of the High Court.

Babu *Saroda Charan Mitter*, Babu *Karuna Sindhu Mukerjee*, and Babu *Jasoda Nandan Paramanik* for the Appellant.

Mr. *W. C. Bonnerjee*, and Babu *Kishori Lal Sarkar*, for the Respondent.

Babu *Saroda Charan Mitter.*—There is a good gift to the idol to be established by the wife. At any rate there is a direction to the wife to give the property to the idol to be established by her. She must be taken to be a trustee for the idol to be established. In any case she is entitled to make a disposition of the husband's property in favour of the idol under the Hindu law, particularly as it was her husband's wish that she should do so.

Mr. *W. C. Bonnerjee*, for the Respondent.—No gift can be made by a Hindu either directly or through the intervention of trustees to a person, (and an idol is a juridical person), unless he was in existence at the time the gift took effect. *Tagore* v. *Tagore*, (1872) 9 B. L. R., 377: L. R., I. A., Sup. Vol., 47. An idol cannot be said to have juridical existence, unless it has been consecrated by the appropriate ceremony performed and *mantra* pronounced. See *Doorga Proshad Dass* v. *Sheo Proshad Pandah*, (1880) 7 C. L. R., 278. A Hindu may leave authority to another to appoint his property in favour of a third person, but the person in whose favour the appointment is to be made must be in existence at the time of the Hindu's death. See *Bai Motivahoo* v. *Bai Mamoobai* (1897) I L R, 21 Bom., 709: L.R., 24 I.A., 93. It is clear on all the authorities that a Hindu widow cannot dedicate the whole of her husband's property to idols to the detriment of his heirs.

Babu *Saroda Charan Mitter* in reply.

The **judgment** of the High Court (**Macpherson** and **Wilkins, JJ.**) was as follows:—

[407] The appellant, in order to succeed in his suit, must show that there has been a valid gift or dedication of the property to the idol, and that he is entitled to be the *shebait*

* Appeal from Original Decree No. 112 of 1896, against the decree of Babu Kaliprosunno Mukerjee, Subordinate Judge of Dinagepur, dated the 19th of March 1896.

Behari Lal Boral, who was the former owner of the property, made a will on the 17th Bysak 1280. In it he expressed his intention to establish the service of an idol, to construct a temple, and to appoint his wife Atarmoni to be the *shebait*. In the event of his being unable to effect this, he provided that she shall, by virtue of his will and in the exercise of powers equal to his own, establish the service of an idol, and by making a will in favour of it manage the properties, construct a temple, and perform the *sheba*. Then there are certain provisions relating to the management and restricting alienation, and authorising her to appoint another person to be the *shebait*. The will concludes by providing that if Atarmoni died before doing those acts, the heirs of his spiritual preceptor and his family priest and his heirs should maintain the *sheba* and manage the properties.

On the 19th Bhadra 1280 he executed an *anumatipatro*. This refers to the will and its provisions, and authorises Atarmoni to adopt one to five sons in succession. It provides that during her lifetime she should possess and manage the properties left by him; that on her death the *dattaka* son should be the *shebait*, and that if he died unmarried his spiritual preceptor and his priest with their sons, grandsons, &c., in succession, should be the *shebaits*, and as such possess the properties and perform the *shebas*. Behari Lal died without making any further disposition of his property, and at the time of his death there was no idol in existence. Atarmoni did not take out probate of her husband's will, and in the ordinary course of succession she would as his widow and heiress take his estate. In 1875 she established an idol, and in 1883 she adopted a son who died soon after the adoption. Atarmoni died in 1887, having made a will by which she appointed the appellant to be the *shebait*. The respondent is the brother of the adopted son.

We agree with the learned Subordinate Judge that Behari Lal made no devise of his property to his widow or to the idol, and that his widow succeeded as his heiress. Reading together **[408]** the will and the *anumatipatro* it could at the most be said he gave a life-estate to his widow with power to make a gift to an idol to be established by her, or that he appointed her executrix with a similar power. It does not seem to us to matter much which view is taken. If there was a gift to the idol it was bad because there was no idol in existence at the time of his death, if there was a power to make such a gift the power was ineffective, because, on the authority of *Bai Motivahoo* v. *Bai Mamoobai* (1897) I. L. R., 21 Bom., 709: L. R., 24 I. A., 93, we think that the power must be to convey to a person who was in existence either actually or in contemplation of law at the death of the testator, and the idol to which the dedication is said to have been made was not then in existence.

We are unable to agree with the learned Vakil for the appellant that the idol was in existence in contemplation of law. The deity, no doubt, is always in existence, but there could be no gift to the deity as such, and there was no personification of the deity, to whom the gift could have been made or who was capable of taking it. We must hold, therefore, that there was no valid gift or dedication to this idol either by Behari Lal directly or by his widow under the powers conferred upon her by the will.

It is argued that, assuming there was an intestacy, and that Atarmoni succeeded as her husband's heiress, the gift of the whole of the property to the idol would still be good because it was made in accordance with the well expressed wish and intention of her husband. But Atarmoni adopted a son under her husband's authority and the adoption related back to the time of her husband's death. On the adoption the widow was divested and the adopted son took. Even assuming that she kept the life-estate she had no

power to make a gift which would enure after her death. We may observe also that the *anumatipatro* in effect revoked the power of appointing a *shebait* conferred on her by the will. An adoption being made, the succession to the *shebaitship* was regulated. In our opinion the appellant cannot in any view of the case succeed, and the appeal must be dismissed with costs.

B. D. B. *Appeal dismissed.*

NOTES.

[This was followed in (1901) 29 Cal., 260; (1908) 11 O.C., 271; see also (1908) 12 C.W.N., 808: 8 C.L.J., 489. But the Full Bench in *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* (1909) 37 Cal. 128 overruled these cases, holding that "the principle of Hindu Law which invalidates a gift other than to a sentient being capable of acquiring it, does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, nor does it make such a bequest void."]

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[409] *The 30th August, 1897.*

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE STEVENS.

Harak Chand..... .....Defendant

versus

Deonath Sahay and others............Plaintiffs.

Bhagbut Prosad Singh............Defendant

versus

Deonath Sahay and others............Plaintiffs.*

Limitation Act (XV of 1877), section 22—Assignment pendente lite—*Substitution of assignees as plaintiffs.*

In a suit instituted within the period prescribed by the law of limitation, the plaintiff assigned over his interest, and the assignees were substituted on the record in the place of the original plaintiff after the said period had expired.

Held, that under section 22 of the Limitation Act (XV of 1877) the suit was barred by limitation. *Suput Singh* v. *Imrit Tewari*, (1880) I. L. R., 5 Cal., 720., distinguished.

THE facts of this case appear sufficiently from the judgment of the High Court.

Harak Chand, defendant No. 13 (in Appeal No. 388), and Bhagbut Prosad Singh, defendant No. 18 (in Appeal No. 366), appealed separately to the High Court.

Dr. *Rash Behary Ghose*, Moulvie *Mahomed Yusuf*, Babu *Karuna Sindhu Mukerjee*, and Babu *Debendra Chandra Mallik*, for the Appellant in No. 366.

Mr. *C. Gregory*, Dr. *Asutosh Mukerjee*, Moulvie *Mahomed Isfak*, and Mr. *J. R. Percival*, for the Respondents in No. 366.

Babu *Iswar Chandra Chakrabarti*, and Babu *Jagat Chandra Banerjee*, for the Appellant in No. 388.

Mr. *C. Gregory*, Moulvie *Mahomed Isfak*, and Mr. *J. R. Percival*, for the Respondents in No. 388.

* Appeals from Original Decrees Nos. 366 and 388 of 1895, against the decree of Babu Boroda Prosanna Shome, Subordinate Judge of Patna, dated the 26th of August 1895.

The **judgment** of the High Court (**Trevelyan** and **Stevens, JJ.**) was as follows:—

This suit was brought on the 4th September 1894 by Deonath Sahay for the purpose of enforcing a mortgage which had **[410]** been executed in the name of one Ganesh Dutt Singh whose servant he was. Pending the suit Deonath Sahay transferred his interest to Amrit Singh and Sri Kishen Singh, who by an order, dated the 17th April 1895, to which we shall hereafter refer, were substituted in his place as plaintiffs.

The main defence in the Court below was that the mortgage was not a genuine transaction, and therefore could not be sued upon.

We have heard the evidence on which the learned Judge decided the case and we have no reason whatever to differ from his conclusion. He found that the mortgage was a genuine one, and that Deonath Sahay was the beneficial owner thereof. A certain number of observations are capable of being made with regard to the evidence, but we think they have been fairly met.

The learned Judge had the opportunity of seeing the witnesses, and it is impossible for us to say that there is any error in his decision. We are not even prepared to say that if we were trying this case as a Court of First Instance we would come to a different conclusion.

Another question, which is a more serious one, has been argued before us. It is contended that the suit is barred by limitation. This defence was not taken in the Court below. But that circumstance does not in any way permit us to exclude it from our consideration. Section 4 of the Limitation Act provides that every suit which is instituted after the period of limitation prescribed therefor shall be dismissed, although limitation has not been set up as a defence. If a suit is barred by limitation it is the duty of the Court to dismiss it. Therefore, as the question is raised in the memorandum of appeal before us, we must determine whether the lower Court was right in not dismissing this suit.

There is no doubt that as originally instituted the suit was not barred by limitation. The question is whether, as now constituted, the defence of limitation is not fatal to it. The suit was brought just within twelve years of the due date. Having regard to the decision of a Full Bench of this Court **[411]** in the case of *Girwar Singh* v. *Thakur Narain Singh*, (1887) I. L. R., 14 Cal., 730, it is admitted that this case is governed by article 132 of the second schedule of the Limitation Act. Therefore twelve years is the period applicable. As we have said Amrit Singh and Sri Kishen Singh were made plaintiffs on the 17th April 1895, it is necessary for us to see what the order then made was. The whole question depends, in our opinion, on the terms of that order.

On the 1st April 1895, Amrit Singh and Sri Kishen Singh filed a petition saying that the plaintiff had sold his entire right and interest in the amount in suit for 8,000 rupees to them; that he has no connection with the suit and no right to take measures under it, and they asked that by striking off the name of the original plaintiff Deonath Sahay their names may be brought in the category of the plaintiffs, and that all the proceedings in the suit may be held in their presence from the date of the petition. On the same day Deonath Sahay filed a petition consenting to the order asked for. On the 7th April 1895 the order was made and is recorded in the order sheet as follows: "No objection being made to-day, let the purchasers' names be substituted *vice* the original plaintiff, and that the case do proceed. In register of suits note is to be made accordingly." The alteration made in the heading of the plaint is as follows: "Under an order dated the 17th April 1895 Sri Kishen Singh *alias* Hazoori Singh, son of Rup Narain Singh, deceased, inhabitant of *mohallah* Andarkila, one of the *mohallahs* of Behar, and Amrit Singh, son of Meherban Singh,

deceased, inhabitant of *mouzah* Onawan, pergunnah Behar, purchasers of the claim of the plaintiff were brought under the category of the plaintiffs." The subsequent proceedings in the suit were headed in the same way, and it does not appear that Deonath Sahay had anything more to do with the suit. He is made a party to this appeal but this does not affect the question. The judgment of the lower Court is headed : "Sri Kishen Singh and another." That seems to show that the Subordinate Judge, who made the order of 17th April 1895, himself understood the name of the original plaintiff was struck out; and that is the order in terms which has been made. If the new plaintiff had been [412] added to the list of plaintiffs no difficulty would have arisen. But it is contended under section 22 of the Limitation Act that as the original plaintiff is no longer a party to the suit, the suit must fail. The first part of that section is as follows : "When after the institution of a suit a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party." There is no doubt that, taking the words of that section to bear their legitimate meaning, the suit must be barred so far as the substituted plaintiffs are concerned. It may, perhaps, appear extraordinary that an assignment pending suit should have this effect, and that although the right of the original plaintiff is not barred the right of his assignee should be barred as soon as it is acquired. It might perhaps have been possible for us to put on that section a construction which does not apply to assignments *pendente lite*, but the proviso seems to show that it does so apply. It shows that the section was not intended to allow any benefit to those whose rights are acquired during suit, as it expresses in one of such cases an exemption from the operation of the section. Our attention has been called to a decision of SIR RICHARD GARTH and MITTER, J., in *Suput Singh* v. *Imrit Tewari*, (1880) I. L. R., 5 Cal., 720. In some respects that case is similar to the present case. There, however, the substituted plaintiffs obtained leave to carry on the suit. No such leave has been obtained here. It is very unfortunate, but we feel ourselves unable to avoid acting upon the plain words of the section. This is not the only case where an assignee may be in a worse position so far as limitation is concerned than his assignor. An assignee from a person who has the exemption given to minors does not obtain the same exemption, and a case similar to the present one might occur with regard to an assignee from a person who was a minor at the time the transaction, which he seeks to set aside, took place. We cannot but feel that we may be doing a certain amount of injustice in this case; but we think that the Legislature has prevented us from coming to any other conclusion. We accordingly dismiss the suit.

The appellants are entitled to their costs in the Court below, [413] but, as the defence of limitation was not raised in that Court, and as the expense of this appeal has been brought about by such omission, we think that the appellants ought to pay the respondents' costs of the appeals in this Court.

S. C. C. *Appeal allowed.*

NOTES.

[I. LEGISLATION—

The Indian Limitation Act, 1908, sec. 22 (2), provides that nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff. This removes the previous conflict of case-law between cases like (1907) 34 Cal., 612 F.B.; (1909) 36 Cal., 675 ; (1909) 36 Cal., 688 ; (1905) 9 C.W.N., 883 ; (1902) 26 Bom., 730 ; [see also (1903) 7 C. W. N., 817] ; and those like (1907) P. R., 3. "The section as amended includes not only cases in which a devolution of interest takes place *pendente lite* owing to death, but also other cases in which such devolution occurs."

II LIMITATION ON APPEAL—

The point of limitation may be raised for the first time in appeal when the necessary facts are on the record :—(1907) 34 Cal., 941 ; 11 C. W. N., 959 : 6 C. L. J., 237.]

[25 Cal. 413]

APPELLATE CRIMINAL.

The 21st October, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

The Legal Remembrancer............Appellant

versus

Chema Nashya............Respondent.*

Evidence Act (I of 1872), section 27†—Information received from the accused—Statement leading to the discovery of a fact—Admissibility of such statement.

If the statement of an accused person in the custody of the police is a necessary preliminary to the fact thereby discovered, it is admissible under section 27 † of the Evidence Act; it is immaterial whether the statement is sufficient to enable the Police to make the discovery by themselves, or is only of such a nature as to require further assistance of the accused to enable them to discover the fact.

Empress of India v. *Pancham*, (1882) I. L. R., 4 All., 198, dissented from; *Queen-Empress* v. *Nana*, (1889) I. L. R., 14 Bom., 260, followed; *Adu Shikdar* v. *Queen-Empress* (1885) I. L. R., 11 Cal., 635, referred to.

THIS appeal was presented by the Local Government under section 417 of the Criminal Procedure Code (Act X of 1882) against an order of acquittal in appeal by the Sessions Judge of Rungpore, setting aside the order of the Deputy Magistrate convicting the accused.

The facts of the case appear from the judgment.

No one appeared on behalf of the accused.

The following **judgments** were delivered by the High Court (BANERJEE and WILKINS, JJ.):-

[414] Wilkins, J.—In this case the accused was convicted by the Deputy Magistrate of Nilphamari, on the 9th March last, with having dishonestly retained certain stolen property, viz., Rs. 910-0 in cash and a *baguna*, and was sentenced under section 411 of the Indian Penal Code to nine months rigorous imprisonment. On appeal the Sessions Judge of Rungpore set aside the conviction and sentence and acquitted the accused, and against this order the appeal which is now before us has been filed by the Local Government under section 417 of the Criminal Procedure Code.

The circumstances of the case as disclosed by the evidence were these: On the night of the 11th February 1897, the house of one Keramutulla Sarkar was burglariously entered and a brass *baguna* with its contents, viz., Rs. 1,000-0 in cash, and two silver ornaments were stolen from it. Information was given to the Police who took up the enquiry, and in the course of their investigation unsuccessfully searched (amongst others) the house of the accused. On the 14th February the accused was questioned by the Sub-Inspector and

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* Criminal Appeal No. 2 of 1897, against the order passed by A. Ahmad, Esq., Officiating Sessions Judge of Rungpur, dated the 15th of April 1897.

† [Sec. 27.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.]

[Margin note: So much of statement or confession made by accused as relates to fact thereby discovered, may be proved.]

made certain statements to him, offering to produce the stolen property. In consequence of these statements, a number of witnesses were taken by accused to a field close to his house, and there at a spot pointed out by the accused the stolen *baguna* was dug out of the ground; then accused took the party to the outer-courtyard of his house, and pointed out a spot in a drain close by: further digging in the slope of the ditch at a place covered with rubbish brought to light an earthen pot containing Rs. 940-0 declared by accused to be part of the stolen Rs. 1,000-0. Upon these facts the Deputy Magistrate convicted the accused.

The defence of the latter was to the effect that complainant had falsely brought the charge against him because he wished to marry a widowed sister of the accused, and the latter would not allow him to do so. But no evidence was adduced in support of this plea. The prosecution witnesses were none of them cross-examined on the point, and the accused merely called witnesses who attempted to show (but failed) that the first search of the accused's premises, including the actual places where the property was dug up, had failed to discover the stolen property, which accord-[416]ingly must have been deposited by or on behalf of the complainant where it was subsequently found.

The Sessions Judge, in acquitting the accused, has entered into certain arguments which are not very easy to understand. It is of course correct to say that, as a general rule, a confession made to a Police officer is not admissible in evidence. But section 27 of the Evidence Act provides that when any fact is deposed to as discovered in consequence of information received from an accused person, in the custody of a Police officer, so much of such information (whether it amounts to a confession or not) as relates distinctly to a fact thereby discovered, may be proved. Consequently, the Magistrate was not in error in recording so much of the accused's statement to the Police as led to the discovery of the stolen property in this case. It is perfectly well proved that the accused did make such a statement, that he did take the search-party to two secret places, that he did indicate that there the stolen property was buried, and that when these places were dug up, the stolen property was then found. The conclusion is irresistible, the guilty knowledge of the accused is clearly established, and no further proof of his dishonesty was necessary. If the Magistrate recorded a little more of the accused's statements to the Sub-Inspector than the law would strictly justify, the accused has not been prejudiced thereby; there is ample evidence, apart from that, against him.

I should, therefore, set aside the order of acquittal passed by the Sessions Judge, and restore the order of the Deputy Magistrate convicting and sentencing the accused under section 411 of the Indian Penal Code, and I would direct the Magistrate to issue his warrant accordingly, in order that the accused may serve out that portion of the original sentence which is still unexpired.

Banerjee, J.--I concur. I only wish to add a few words with reference to the applicability of section 27 of the Evidence Act to this case.

The learned Deputy Magistrate is wrong in saying that "section 27 of the Evidence Act does not apply because, to use the words of STRAIGHT, J., in *Empress of India* v. *Pancham*, (1882) I. L. R., 4 All., 198), [416] it was by the accused's own *act* and not from any *information* given by him that the discovery took place." In the first place, the facts here were different from those of the case cited, the property in this case having been actually found out, not by the accused, but by one of the witnesses who dug up the property at the direction of the Sub-Inspector, upon the place being pointed out by the accused. And in the second place, the view taken by STRAIGHT, J., in the case referred to, has

been dissented from by a Full Bench of the Bombay High Court in a later case, *Queen-Empress* v. *Nana*, (1889) I. L. R., 14 Bom., 260, which in my opinion lays down the correct rule, that where the statement of the accused is a necessary preliminary to the fact discovered, it is admissible under section 27 of the Evidence Act, the question whether the statement is sufficient to enable the Police to make the discovery by themselves, or is only of such a nature as to require further assistance of the accused to enable them to discover the fact being immaterial. In this view, the statement of the accused that the property in question had been kept concealed by him in the place pointed out, though that statement was made while the accused was in police custody, and not in the immediate presence of a Magistrate, would be admissible evidence against him. The view I take is in no way inconsistent with that taken by this Court in *Adu Shikdar* v. *Queen-Empress*, (1885) I. L. R., 11 Cal., 635, as the part of the information or statement that is here used as evidence against the accused under section 27 relates distinctly to the fact thereby discovered and does not go beyond it.

S. C. B.

NOTES.

[This was followed in 2 Sind L R , 27]

[25 Cal 416]

CRIMINAL APPEAL.

The 15th September, 1897

PRESENT

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

Nabi Baksh *alias* Ali Baksh Sheikh............ Appellant

versus

Queen-Empress............Respondent.

Theft—Removing a thing with the object of causing trouble to the owner—Wrongful loss.

The accused, who was charged by his master with having committed theft of a box, stated that he had removed the box and left it concealed in the [417] cowshed to give a lesson to his master. The Sessions Judge in his charge to the jury said ' If the jury find that the accused removed the box to put the owner to trouble, that is causing wrongful loss to the owner, and the act is theft ;" and the jury returned a verdict of guilty finding " that the taking was with the intention of putting the owner to trouble."

Held, the above charge and verdict were based on an erroneous view of the law. It cannot be said that removing a thing to put the owner to trouble is necessarily and in every case causing " wrongful loss."

* Criminal Appeal No. 646 of 1897, made against the order of T. Palit, Esq., Officiating Sessions Judge of Berhampur, dated the 29th of July 1897.

THE facts of the case appear from the judgment.

No one appeared on behalf of the accused.

The **judgment** of the High Court (**Banerjee** and **Wilkins, JJ.**) was as follows: —

The appellant Nabi Baksh *alias* Ali Baksh Sheikh was tried before the Sessions Court of Murshidabad for the offence of theft committed by him while he was a servant of the complainant, and committed after two previous convictions. He was found guilty by the jury and he admitted two previous convictions; and he has been sentenced by the learned Sessions Judge to two years' rigorous imprisonment under sections 381 and 75 of the Indian Penal Code.

He has appealed against the conviction and sentence; and the trial having been by the jury, the appeal lies only on a matter of law (see section 418 of the Criminal Procedure Code); and this Court can alter or reverse the verdict, only if it is of opinion that the verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him. [see section 423, clause (*d*)].

We are of opinion that the verdict of the jury in this case is erroneous owing to misdirection by the Judge. For the learned Sessions Judge in his charge to the jury said: "If the jury find that the accused removed the box to put the owner to trouble, that is causing wrongful loss to the owner, and the act is theft. The jury will consider the accused's statement in this connection." The statement of the accused here referred to was this: "Bebi then told me to produce the things, I brought out this box, which I left concealed in the cowshed, to give a lesson to them." And the jury returned a verdict of **[418]** guilty, finding "that the taking was with the intention of putting the owner to trouble"

Now the above charge and verdict are, we think, based on a clearly erroneous view of the law. It is true that to constitute the offence of theft it is not necessary that the taking should be permanent or with an intention to appropriate the thing taken, or that there should be wrongful gain to some one in addition to wrongful loss to the real owner [see section 378 of the Indian Penal Code, Illustration (*l*), *Queen-Empress* v. *Sricharan Chungo* (1895) I. L. R., 22 Cal., 1017]. But to constitute theft there must be an intention to take the thing in question dishonestly, that is, with intent to cause wrongful gain or wrongful loss, and can it be said that removing a box "to put the owner to trouble" is necessarily and in every case causing "wrongful loss"? The answer must, we think, be in the negative. For, otherwise a person, keeping concealed for a time a valuable thing belonging to a friend, who is a careless man, in jest for the purpose of causing him a little anxiety, or in earnest for the purpose of teaching him the salutary lesson of being careful, would be guilty of theft, a result which the Legislature could never have intended. No doubt the language of section 23 of the Indian Penal Code which defines wrongful loss, and says a "person is said to lose wrongfully when such person is wrongfully kept out of any property as well as when such person is wrongfully deprived of property," might at first sight seem to create a difficulty in the way of accepting the view we take. But the difficulty is only apparent and not real. Of course, when the owner is kept out of possession with the object of depriving him of the benefit arising from the possession even temporarily, the case will come within the definition. But where the owner is kept out of possession temporarily not with any such intention, but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting

or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense.

[419] We, therefore, hold that the verdict in this case was erroneous owing to a misdirection by the Judge, and we reverse it accordingly and acquit the appellant.

Having regard to all the circumstances of the case, we have not thought it necessary to order a retrial.

S. C. B.

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*[25 Cal. 419]

CRIMINAL REFERENCE.

The 8th November, 1897.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

Chundra Kumar Dey, Municipal Overseer............Complainant

versus

Gonesh Das Agarwalla............Accused.

Bengal Municipal Act (Bengal Act III of 1884), section 237, section 238 and section 273—Notice of intention to build—Commencing to build before sanction—Refusal of sanction within the period of six weeks—Liability to fine.

If a person after giving notice in writing of his intention to erect a house under section 237 of the Bengal Municipal Act (Bengal Act III of 1884) commences to build without waiting for the six weeks mentioned therein (as he is not bound to do under the Act there being no such provision in it) he does not necessarily contravene the law.

But if he so acts, the reasonable view must be that he does it at his risk, his act being liable to be treated as one in contravention of any legal order of the Commissioners issued within the statutory period of six weeks, if such order does not sanction the proposed building; the above appears to be the only reasonable view of section 238 of the Act.

REFERENCE under section 438 of the Criminal Procedure Code submitted by the Deputy Commissioner of Lakhimpur.

The facts of the case appear sufficiently from the letter of reference, the material portion of which was as follows :—

"In this case one Gonesh Das Agarwalla, a merchant of Debrugarh, applied to the Municipal Commissioners, on the 20th July 1897, for permission to erect a house on the Strand Road.

"The Vice-Chairman enquired into the case, and as the result of his enquiry a notice was issued on Gonesh Das, directing him not to erect the house and to demolish it, if

* Criminal Reference No. 290 of 1897, made by L. J. Kershaw, Esq., Deputy Commissioner of Lakhimpore, dated the 21st of October 1897.

already built. This notice was served on August [420] 5th, 1897, after the building had been completed. The Vice-Chairman reported the matter to the Chairman, who instituted a prosecution under section 273 of the Municipal Act.

"The case was tried by the Senior Extra Assistant Commissioner who found that the notice under section 238 was served after the building was completed. He was of opinion that the accused should not have proceeded with the building without permission, but should have waited six weeks to allow the Commissioners to pass orders on his application. He was of opinion that the provision of section 238 (1) had been contravened, and that an offence had been committed under section 273 (1).

"The accused was fined Rs. 20.

"I consider the accuracy of the finding of the lower Court extremely doubtful. Section 273 (1) provides that whoever begins to build contrary to the provision of section 238 is liable to punishment. As the accused admittedly made an application to the Commissioners asking for permission to build the house he has clearly not contravened the provision of section 238 (1) and is, therefore, apparently not liable under section 273 (1).

"The Commissioners have a separate remedy. They may direct the demolition of the building already erected without their consent. They have actually, it appears, directed the accused in the notice, dated the 3rd August 1897, to demolish the building, but he has not apparently taken any steps to carry out this order.

"The lower Court (as appears from the explanation of the Magistrate) was of opinion that the accused was legally bound to wait six weeks before he commenced building.

"I venture to differ from this view. The framers of the Act apparently desired to place no restriction to the commencement of operations in pucca buildings. In the erection of huts, the builder is bound under section 243 to give one month's notice before he commences building. There does not appear to be any such provision in the case of pucca buildings.

"I venture to submit on these grounds that the conviction is bad in law and should be set aside."

No one appeared in support of the reference.

The **judgment** of the High Court (**Banerjee** and **Wilkins, JJ.**) is as follows :—

In this case the accused Gonesh Das Agarwalla was convicted by the Extra Assistant Commissioner of Debrugarh under section 273 (1) of the Bengal Municipal Act III of 1884 (as amended by Bengal Acts IV and VI of 1894) for having begun to build a house [421] contrary to the provisions of section 238 of the Act and was fined Rs. 20. The Deputy Commissioner of Lakhimpore has referred the case to this Court under the provisions of section 438 of the Criminal Procedure Code, as he is of opinion that the conviction of the accused is bad in law, inasmuch as the notice issued by the Municipal Commissioners forbidding the erection of the house, and which was served upon the accused after the house had been completed, was too late, and that the accused was not bound to wait for the permission of the Commissioners before commencing to build the house.

It is an admitted fact that the accused did, before commencing to build the house, give a written notice to the Commissioners under section 237 (1) of the Act. The question is whether the accused in commencing to build before getting the permission of the Commissioners, and without waiting for the "six weeks" mentioned in that section, contravened the provisions of section 273 (1) of the Act.

Under section 237 of the Act the Commissioners were allowed six weeks from the receipt of the notice given by the accused to deliberate upon the matter, and to grant or refuse sanction for the proposed building; as a matter of fact they refused to sanction it, within the statutory period, but in the

meanwhile, the accused, without waiting for their decision, commenced and completed the erection of the building.

Section 273 (1) is as follows: "Whosoever............begins to build...... ......any house contrary to the provisions of section 238............shall be liable............to a fine of Rs. 50............"

Section 238 (1) provides: "Should any person commence to erect......... such house.............in contravention of any legal order of the Commissioners issued within six weeks of receipt of a valid notice under the last preceding section, the Commissioners may, by notice to be delivered within fifteen days, require the building to be altered or demolished............"

Thus, if the provisions of both these sections are fulfilled, the Commissioners have two remedies, viz., (1) by prosecution and fine under section 273, and (2) by altering or demolishing the objectionable building.

[422] The question in the present case is, whether the provisions of sections 238 and 273 (1) of the Act were fulfilled, or, in other words, whether the accused can be said to have commenced to erect the house "in contravention of a legal order" which was not communicated to him until after the building had been completed. So far as we understand the Act, the accused was not bound to wait for six weeks before getting a reply to his notice; it is true that the Commissioners are allowed that period within which to come to their decision; but the Act is silent as to the counter-obligation alleged against the accused, whatever the intention of the framers of the Act may have been.

But, though that is so, and though, by commencing to build after giving the notice required by section 237, without waiting for the six weeks mentioned in it, a person does not necessarily contravene the law, yet when he so acts, the reasonable view must be that he does it at his risk, his act being liable to be treated as one in contravention of any legal order of the Commissioners issued within the statutory period of six weeks, if such order does not sanction the proposed building. As he commences to build in anticipation of sanction, his act is valid if the sanction is obtained; but if sanction is refused within the statutory period, the act from its commencement must be held to have been in contravention of the order of the Commissioners, though issued subsequently within the statutory period.

This appears to us to be the only reasonable view of section 238 of the Act. The language of the section is doubtless faulty; but its meaning is clear.

To hold that a building completed before receipt of the order of the Commissioners refusing sanction within the statutory period is unaffected by that order, would be to hold in such cases sections 237 and 238 are a nullity.

For these reasons, we think that the order of the Extra Assistant Commissioner was right and should stand.

S. C. B.

NOTES.

[See also (1909) P.R., 13 Cr.]

[423] CRIMINAL REVISION.

The 1st December, 1897.
PRESENT :
MR. JUSTICE HILL AND MR. JUSTICE WILKINS.

Brown............ (1st Party) Petitioner
versus
Prithiraj Mandal............ (2nd Party) Opposite Party.*

Possession, Order of Criminal Court as to—Criminal Procedure Code (Act X of 1882), section 145—Parties to Proceedings—Manager in Possession.

A person who is in possession of land merely as manager for the actual proprietor should not be made a party to proceedings under section 145 of the Criminal Procedure Code. *Behary Lall Trigunait* v. *Darby*, (1894) I.L.R., 21 Cal., 915, followed

THE facts of the case appear from the judgment.

Mr. *A. M. Dunne* appeared for the Petitioner.

Babu *Kritanto Kumar Bose* for the Opposite Party.

The *Deputy Legal Remembrancer* (Mr. *Gordon Leith*) for the Crown.

The **judgment** of the High Court (**Hill** and **Wilkins, JJ.**) is as follows :—

These proceedings were instituted under section 145 of the Code of Criminal Procedure by one Prithiraj Mandal against Mr. A. P. Brown in the Court of the Sub-Divisional Magistrate of Kurseong. They relate to four plots of land which were claimed by the complainant on the ground that he was in possession of them as tenant. He asserted that he had been dispossessed by Mr. Brown. The proceedings were transferred on the 9th April 1897 to the Court of the Deputy Magistrate of Darjeeling. After the Deputy Magistrate had held a local investigation, he drew up a proceeding under section 145, requiring the parties to put in written statements of the respective cases and to appear before him for disposal of the matter in due course. In the result he arrived at the conclusion that the complainant Prithiraj Mandal was entitled to retain possession of the first and second of the plots; that in respect of [424] the third plot he was entitled to graze his cattle upon it; and with regard to that particular plot he made an order in favour of Prithiraj Mandal under section 147. With reference to the fourth plot his finding was that Mr. Brown was the person in possession, and he accordingly ordered him to be retained in possession.

Exception has been taken to the proceedings and orders of the Magistrate upon various grounds. It appears to us, however, that it is necessary only to refer to the first, as we think it to be conclusive of the case. In the written statement put in on behalf of Mr. Brown, it has been stated, and it has been so found by the Magistrate that he, Mr. Brown, was not the actual proprietor of the land in dispute, but was there merely in the character of a manager for the actual proprietor one Mr. Ephgrave, who appears himself to be a resident of Darjeeling, and to have been present there at the time of these proceedings.

It has been contended before us upon the authority of the case of *Behary Lall Trigunait* v. *Darby*, (1894) I. L. R., 21 Cal., 915, that, having regard to the fact that Brown had no interest in the land but was in possession merely

* Criminal Revision No. 508 of 1897, made against the order passed.

as manager for the actual proprietor, he was not a proper party to these proceedings, and that they are therefore bad *ab initio*. We think that this contention is sound; and that we have no alternative but to give effect to it. In the case to which reference has been made the person against whom the claim was preferred and who was treated as the second party in the case was a Mr. Darby, who was the manager of a certain coal company, which claimed to be in possession of the land. What the Court there said was this: "We think that this rule must be made absolute, and that it is enough for us to say that it must be made absolute, because the persons interested are not before the Court. Mr. Darby, in whose favour this order has been made, in his written statement, states that the property in question belongs to a coal company; and that his position is that of a manager of the company. He does not state that he has any interest except as manager, and does not state that he has any independent, or in fact any, possession, except as representing the company on whose behalf he is managing the mine. We do not think that that kind of **[425]** possession is a possession such as is contemplated by this section, or, as I said just now, that the parties interested are properly before us." We think the principles thus laid down are applicable to the present case, and we accordingly set aside the proceedings *ab initio*.

The case relied upon by the other side, *Protap Narain Singh* v. *Rajendro Narain Singh* (I. L. R. 24 Cal., Criminal Revision, 55) in our opinion has no application here. We further direct that the costs which were made payable by Mr. Brown by the orders of the Deputy Magistrate, dated the 30th June and 2nd July, if paid be refunded.

S. C. B.

NOTES.

[A manager of an absentee proprietor does represent him, see 31 Cal., 48; overruling 7 C.W.N., 208.]

[25 Cal. 425]

The 8th December, 1897.

PRESENT:

MR. JUSTICE HILL AND MR. JUSTICE WILKINS.

Indra Nath Banerjee............Petitioner

versus

Queen-Empress on the complaint of Matilal Mookerjee and others............Opposite Party.*

Nuisance—Cremation—Burning-ghat or cremation-ground - Criminal Procedure Code (Act X of 1882), sections 133, 140, 437—Jurisdiction of District Magistrate to order further inquiry, in a proceeding under section 133 of the Code—"Legalised nuisance"—Private cremation-ground, Duties of owner of—"Public place"—"Trade or occupation"—Order of removal of burning-ghat--Form of Notice.

A District Magistrate has, strictly speaking, no power under section 437 of the Criminal Procedure Code (Act X of 1882) to order a 'further inquiry' into a proceeding under section

* Criminal Revision No. 566 of 1897.

133 of the Code, which has been practically dropped by a Subordinate Magistrate, the proper course being to refer the matter to the High Court.

Although a burning-ghat or cremation-ground may not in itself be a "nuisance" within the meaning of clause 2, section 133 of the Criminal Procedure Code (Act X of 1882), still a Magistrate will have a jurisdiction to take action under that section if it is shown that such a ghat or ground is in such an offensive state, or that cremation is carried upon it in such an offensive manner, as to be a source of injury, danger, or annoyance to persons living in the vicinity.

Queen-Empress v. *Sammadha Pillai*, (1896) I. L. R., 19 Mad., 464, 467, 468; and *Bamford* v. *Turnley*, (1862) 31 L. J., Q. B. (Ex. Ch., 286), referred to and discussed. *Brindabun Chunder Roy* v. *Chairman of Municipal Commissioners of Serampore*, (1873) 19 W. R. Civ., 309, distinguished.

[426] A private proprietor may be guilty of acts done on his private property, which may give rise to a public nuisance; the owner of a cremation ground may be held to create a "nuisance" if he allows the cremation of bodies upon that ground to be so performed as to annoy or endanger the lives and properties of persons living in the neighbourhood.

The proprietor of a cremation-ground cannot be said to be carrying on any "trade or occupation" within the meaning of clause 3, section 133 of the Criminal Procedure Code.

A Magistrate has no power under section 133 of the Criminal Procedure Code to order the removal of a burning-ghat from its position, but he can direct a proprietor to "remove the nuisance," *i.e.*, to take such steps as would result in the cremation of corpses ceasing to be a nuisance to the public.

THE facts of the case, and the arguments adduced, are fully set forth in the judgment of the High Court.

Mr. *Jackson*, Babu *Digamber Chatterjee*, Babu *Debendra Chunder Mullick*, and Babu *Dwarka Nath Mitter*, for the Petitioner.

The *Deputy Legal Remembrancer* (Mr. *Gordon Leith*), and Babu *Samatul Chunder Dutt*, for the Crown.

The **judgment** of the Court (**Hill** and **Wilkins, JJ.**) was as follows :—

This is a rule calling upon the District Magistrate of Burdwan to shew cause why the order of the Sub-Divisional Officer of Katwa, dated the 21st July 1897 making absolute, under section 137 of the Criminal Procedure Code, a conditional order issued by that officer on the 24th April 1897, under section 133 of the Criminal Procedure Code, and calling upon the petitioner to remove a burning-ghat from its present position where it is a nuisance, or to shew cause why such conditional order should not be made absolute, should not be set aside.

The facts appear to be as follows :—

Previous to the 10th June 1893, the burning-ghat or cremation-ground in question was situated on the borders of villages Mohanpur and Naihati; on the application of some of the inhabitants of Mohanpur proceedings were instituted against the proprietor (the present petitioner) under section 133 of the Criminal Procedure Code, and on the 10th June 1893, at the instance of the District Magistrate, the petitioner removed the burning-ghat **[427]** to its present position. In November 1896 some of the inhabitants of Naihati moved the Sub-Divisional Officer under section 133 of the Criminal Procedure Code for the removal of the ghat from its new site, and, on the 4th March 1897, the Deputy Magistrate declined to interfere, not because the ghat as conducted was not a "nuisance" within the meaning of the section but because "as there must exist a burning-ghat for the cremation of the dead, and as he could not find a more suitable spot, it would be futile to take proceedings under

section 133 of the Criminal Procedure Code." The result was that the Deputy Magistrate ordered the application to be "filed."

The Naihati people then moved the District Magistrate in revision of this order, and asked that a proceeding under section 133 of the Criminal Procedure Code might be drawn up against the petitioner to remove the said "nuisance from the Naihati village." Upon receipt of this petition, the District Magistrate ordered it to be forwarded to the Sub-Divisional Officer, who was directed to institute fresh proceedings under section 133. The Sub-Divisional Officer accordingly drew up his proceedings of the 24th April, with the result that he made the order absolute which the petitioner now seeks to have set aside.

We have heard the Deputy Legal Remembrancer, who appears on behalf of the Crown, to show cause against the rule, and we have also heard Mr. *Jackson* for the petitioner in support of this rule. We now proceed to deal *seriatim* with the arguments used by Mr. *Jackson* in support of his contention that the rule should be made absolute.

The *first* ground of objection is that the proceedings are bad, inasmuch as the District Magistrate had no authority to order a further inquiry into the application of the inhabitants of Naihati, which had been practically rejected or refused by the Sub-Divisional Officer. We cannot accept the arguments set up in reply to this, viz., that the proceedings instituted in April 1897 were not in continuation of the application of November 1896, but were fresh proceedings altogether. There is nothing in the petition to the District Magistrate to show that the inhabitants of Naihati complained to him upon a new state of affairs, or upon **[428]** any fresh nuisance which had occurred since the Sub-Divisional Officer had refused to interfere; and the conditional order which was ultimately made absolute was one issued upon the original complaint stated in the application of November 1896. But we may dispose of this objection by saying that, though strictly speaking the District Magistrate may have had no power under section 137 of the Criminal Procedure Code to order a further inquiry into this matter, still we do not think it necessary to set aside the whole of the proceedings upon this ground, for, had the District Magistrate referred the petition to this Court as would appear to have been the proper course, we should certainly have directed the Sub-Divisional Officer to proceed and hold the formal inquiry which he has now held.

The second contention of the learned Counsel for the petitioner is that, as no burning-ghat can be a public nuisance, the Magistrate had no authority to take action under section 133 of the Criminal Procedure Code in respect of this burning-ghat. Mr. *Jackson* supports this contention by referring to certain remarks contained in the judgment of a Divisional Bench of the Madras High Court in the case of *Queen-Empress* v. *Saminadha Pillai*, (1896) I. L. R., 19 Mad., 464, 467, 468. The accused in that case had been convicted under section 290 of the Indian Penal Code for having cremated a corpse at a certain place, and the learned Judges remarked that "it is clear that the act of the accused falls under the limited class of cases sometimes designated as nuisance "legalised." In other words it seems to be one instance of those compromises belonging to social life [alluded to by POLLOCK, C.B., in *Bamford* v. *Turnley*, (1862) 31 L. J., Q. B. (Ex. Ch.), 286] upon which the peace and comfort of that life mainly depend, and in which some apparent natural right is invaded or some enjoyment abridged to provide for the more general convenience or necessities of the whole community." Now the expression "legalised nuisance" used in this connection might at first sight seem to render innocent in law the practice of cremation under any circumstances

whatsoever. But that this is not the true meaning of the phrase, and that it was not so interpreted in the case above referred to, is clear from what immediately follows in the same [429] judgment. The learned Judges go on to say (at p. 467 of the report): "In support of the above view, it is hardly necessary to observe that not only the religious sentiments of all sections of the community, but also the requirements of general health and comfort, absolutely demand that corpses shall be disposed of as early as practicable, so as not to prove hurtful to the living. It is this imperative necessity that, as a general rule, casts upon persons having charge of corpses, not only as a matter of social but also of legal obligation, the duty of arranging for the disposal of those corpses in a reasonably speedy, *decent and inoffensive way*," and further on, at p. 468, "When persons like the accused entitled to use a particular spot dedicated for the communal purpose of cremation use it for that purpose *in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incident to such an act as it is generally performed in this country*, it must be admitted that he does what is perfectly lawful." In fact the case cited does not go further than this; it is an authority upon the point that a cremation-ground properly kept and used cannot be considered a public nuisance, but it does not decide that a cremation-ground kept and used in such a manner as to be offensive or a source of injury, danger or annoyance to the people in general, who dwell in the vicinity, is not therefore a "public nuisance" within the meaning of section 268 of the Indian Penal Code, or a "nuisance" within the meaning of the second paragraph of section 133 of the Criminal Procedure Code.

In support of this branch of his argument, Mr. *Jackson* also relied upon the case of *Brindabun Chunder Roy* v. *Chairman of the Municipal Commissioners of Serampore*, (1873) 19 W. R., Civ., 309, but that case does not seem to us to be very much in point. Its decision turned upon the construction of section 79 of the Municipal Act of 1864, and the conclusion arrived at was that Municipal Commissioners could not close a cremation-ground under that section, merely because they thought that the burning of dead bodies was offensive; it was necessary in order to give them jurisdiction that they should be satisfied upon the evidence of competent persons, that the ground was in such a state as to be dangerous to the [430] health of persons living in the neighbourhood (see pp. 312 and 314 of the report).

We, therefore, hold that, although a burning-ghat or cremation-ground may not in itself be a nuisance within the meaning of clause 2, section 133 of the Criminal Procedure Code, still a Magistrate will have jurisdiction under that clause if it is shown that such a ghat or ground is in such an offensive state, or that cremation is carried on upon it in such an offensive manner, as to be a source of injury, danger, or annoyance to persons living in the vicinity. As a matter of fact this is what the Magistrate in the present case has clearly found upon the evidence given before him.

The third objection taken on behalf of the petitioner is that as this cremation-ground is private property, it is not a "public place" within the meaning of section 133 of the Criminal Procedure Code, and that consequently the Magistrate had no jurisdiction to proceed under the second clause of that section. No doubt this burning-ghat is the property of the petitioner, and is not itself a public place. But the question before us is not so much whether the land itself is public or private, as whether the "nuisance" complained of is on or at a public place. The distinction is clear. It is not the place where the nuisance originates which we have to look to, it is the nuisance itself. And we have no hesitation in saying that in our opinion a private proprietor may be guilty of acts done on his private property, which may give rise to a public

nuisance to those living in the neighbourhood. A private owner who fires off blank charges from a cannon in his compound may give rise to a public nuisance, so far as regards persons riding or driving on a public way just outside the compound. So also the owner of a cremation-ground may fairly be held to create a nuisance if he allows the cremation of bodies upon that ground to be so performed as to annoy or endanger the lives and properties of persons living in the vicinity.

This, we think, is the proper reply to the argument as set forth. It is not enough to say, as has been urged by the Deputy Legal Remembrancer, that clause 3 of section 133 of the Criminal [431] Procedure Code would apply to this case. In the first place the petitioner in the present case cannot be said to be carrying on any "trade or occupation," he merely puts his land at the disposal of any one who wishes to cremate a dead body, and makes his profit by charging a high rent to a tenant who sells wood to the relatives. In the second place the proceedings throughout have been conducted with reference to clause 2, and not to clause 3, of section 133.

For these reasons we think that we should not be justified in setting aside the order of the Sub-Divisional Officer, who has found as a fact upon evidence, which he summarises in his judgment, that the practice of cremating corpses as carried on upon the petitioner's land, amounts to a nuisance within the meaning of section 133 of the Criminal Procedure Code. It is not sufficient for the petitioner to say that it is not he who commits the nuisance which is one which (if it exists at all) is created by the *mudafarashes* or professional corpse-burners paid by the persons who use the cremation-ground. If he permits his ground to be used for such a purpose, it is incumbent upon him to take care that it is used in a proper, decent, and inoffensive manner, whereas the findings are that the process of cremation is so conducted as to be opposed to public decency, and to be a source of annoyance to the neighbours. It is for the petitioner to see that the ground is properly enclosed, and that no offensive matter is allowed to lie about it or to travel beyond its boundaries so as to annoy the public.

But we think that the form of the order absolute made by the Sub-Divisional Officer is open to objection. The Sub-Divisional Officer has directed the petitioner to "remove the burning-ghat from its present position." This, under the section, he had no power to do. What he had jurisdiction to direct was that the petitioner should "remove the nuisance"; in other words take such steps as would result in the cremation of corpses at this place ceasing to be a nuisance to the public. And we think that this is the form in which the notice, to be given to the petitioner under section 140 of the Criminal Procedure Code, should be drawn up. If, as would appear from the Sub-Divisional Officer's order of [432] the 7th August last, a new and more convenient site has been selected for a burning-ghat, and if the petitioner has no objection to remove it to that site, so much the better. But if he desires to retain the ghat where it is, the Magistrate has no authority to force him to remove it, and to prevent its being used for cremation purposes, so long as he takes care that it is not a nuisance to the neighbourhood. To this extent, therefore, and only to this extent, will the rule be made absolute.

B. D. B.

[25 Cal. 432]

CRIMINAL REFERENCE.

The 19th October, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

Queen-Empress

versus

Makund Ram and others . .. .Accused-petitioners.*

Gambling Act (Bengal Act II of 1867), section 6—Common gaming house—Cowries—Instruments of gaming.

Cowries may be treated as instruments of gaming where they are used as counters or as a means to carry on gaming.

The finding of *cowries* in a house upon search made under a warrant will under section 6 of the Gambling Act (Bengal Act II of 1867) raise a rebuttable presumption that the house is used as a common gaming house.

REFERENCE submitted under section 438 of the Criminal Procedure Code by the Officiating Sessions Judge of Cuttack, against a conviction and sentence under section 4 of the Gambling Act (Bengal Act II of 1867). The material portion of the letter of reference was as follows :

"The facts appear to be that a certain house was raided by the police during the night, and the accused were found seated round a heap of pice and *cowries*. The first accused was sent up under section 3 but was acquitted; he was however convicted with the others under section 4. The Magistrate appears to have found that the house was occupied by all the accused except the Brahmins, who seem to be three or four among them.

"The prosecution must prove that the place comes under the definition of a common gaming house in section 1 of the Act taken with section 6. It is, I believe, settled that coins are not instruments of gaming—*Queen-Empress* v. *Vithal Bhaichand*, (1881) I. L. R., 6 Bom., 19. The case of *cowries* is somewhat more doubtful. They [433] are not instruments primarily devised or intended for gaming. In a very recent case, *Queen-Empress* v. *Bala Misra*, (1897) I. L. R., 19 All., 311, it was held that if *cowries* were used in any particular case as instruments of gaming, they should be considered as such for the purpose of the Act. I understand this to apply to the case in which *cowries* are used as counters representing a higher denomination of coins. When the *cowries* themselves are gambled for I think they are not instruments of gaming. The game in the present case was probably some variety of odds and events, and it appears that *cowries* and pice were the things gambled for: 24 *cowries* exchange for a pice. It is impossible to say whether the *cowries* were gambled for as counters or for themselves. I have not been referred to any Calcutta case on the legal status of *cowries*, and I think it would be desirable to have a definite ruling on the subject.

"Another necessary part of the definition of a common gaming house is that it must be kept for the profit of the occupier. Section 6 under certain circumstances raises a rebuttable presumption that it is so occupied. In this case, however, the person who was tried as the

* Criminal Reference No. 271 of 1897 made by W. B. Brown, Esq., Officiating Sessions, Judge of Cuttack, dated the 20th of September 1897.

occupier was actually acquitted on that charge. The Magistrate seems to believe that the house is occupied by all the accused except the Brahmins. Whether this means that they live there permanently, or that they keep it as a club, does not appear. It can hardly be believed that the occupiers made gain or profit out of the two or three Brahmins who were probably servants. On this ground, I think, the building was probably either accused's dwelling house or their club, and was not a common gaming house."

No one appeared in support of the Reference.

The **judgment** of the High Court (**Banerjee** and **Wilkins, JJ.**) was as follows :—

The accused have been convicted under section 4 of Bengal Act II of 1867 and sentenced to pay a fine of Rs. 10 each. The learned Sessions Judge recommends that the conviction and sentence be set aside on the ground that the house in which the accused were found is not shewn to be a common gaming house within the meaning of section 1 of the Act.

To sustain a conviction under section 4 of the Act, no doubt two things have to be established, first, that the accused were found gambling, and, second, that the place where they were found was a common gaming house within the meaning of the Act. The first is clearly established as has been found in the judgment of the Magistrate. As to the second, the mere fact of gambling having taken place in the house on previous occasions was not, as the Magistrate **[434]** appears to think, sufficient to make it a common gaming house within the meaning of the Act, as the condition that it must be kept "for the profit or gain of the person owning, occupying, using, or keeping" it, though inferrible from it, would not be necessarily established by that fact. But if *cowries* are instruments of gaming within the meaning of the Act, the finding of *cowries* in the house upon search made under the warrant issued in this case will, under section 6 of the Act, raise a rebuttable presumption that the house is used as a common gaming house. Now, though coins are not instruments of gaming, as has been held in *Queen-Empress* v. *Vithal Bhaichand*, (1881) I. L. R., 6 Bom., 19, *cowries* are different from coins, and may be treated as instruments of gaming, where they are used as counters, or as a means to carry on gaming. See *Queen-Empress* v. *Bala Misra*, (1897) I.L.R., 19 All., 311. And in the present case, having regard to the fact that there were found both pice and *cowries*, and the latter were being used as means of gaming, we think the presumption under section 6 of the Act may well arise, a presumption which is further supported by the fact of the house having been used for gaming on previous occasions.

We therefore decline to interfere in this case.

S. C. B.

[25 Cal. 432]

CRIMINAL REF.... 1897.

MR. J... MR. JUSTICE WILKINS.

The 19th Oct...

Ram Cha... PRES.......Complainant

...rsus

Jityandria alias Faring Bhuttacharjee...........Accused.*

Criminal Procedure Code (Act X of 1882), section 522—Restoration of possession of immoveable property—Dispossession by use of criminal force.

The words "an offence attended by criminal force" in section 522 of the Criminal Procedure Code(Act X of 1882) mean an offence, of which criminal force forms an ingredient. Section 522 is not applicable to cases where there has been no conviction for criminal force, either separately or as an ingredient of the offence of which there is a conviction, and where there is no finding that any person has been dispossessed of any immoveable property by criminal force.

[433] *Luchmi Das* v. *Pallat Lali*, (1875) 23 W. R. Cr., 51, and *Soshi Bhusan Dutt* v. *Pyari Kishore Biswas*, (1897) 1 C. W. N., CCLVI., followed.

REFERENCE under section 438 of the Criminal Procedure Code by the Sessions Judge of Moorshedabad. The facts of the case appear from the following portion of the letter of reference.—

"The trial was concluded on the 10th December 1896, and all the accused were convicted under section 143 of the Penal Code. They appealed to the District Magistrate, who on the 17th December upheld the conviction.

"On the 26th July the complainant in the case under section 143 of the Indian Penal Code made an application to the Honorary Magistrate who had tried the case, for an order under section 522 of the Criminal Procedure Code. The Honorary Magistrate recorded the following order on the petition: 'Possession be given to the complainant under section 522 of the Criminal Procedure Code.' The petitioner moved this Court to refer the matter to the High Court on the ground that it was illegal. The petitioner was the principal accused and was convicted under section 143 of the Indian Penal Code on the 10th December last. A rule was issued by this Court in the following terms: 'Let a rule issue on the District Magistrate and on the opposite party to show cause why a reference to the High Court should not be made with the recommendation that the order under section 522 of the Criminal Procedure Code be set aside on the following grounds: (a) That the original conviction having been for an offence which did not contain the element of force, section 522 is inapplicable. (b) That in the original case it was not found that there was any dispossession of the opposite party. (c) That the original case having been decided in December last the Honorary Magistrate was not competent to pass an order under section 522 of the Criminal Procedure Code in July.'

"The Honorary Magistrate has not offered any explanation.

"The order appears to me to be clearly illegal and improper. The conviction was under section 143 of the Indian Penal Code, of which offence the use of criminal force is not a constituent element. Section 522 of the Code of Criminal Procedure applies 'whenever a person is convicted of an offence attended by criminal force.' I interpret the phrase 'attended by criminal force,' to mean 'of which the use of criminal force is an ingredient.' The learned pleader for the opposite party argued (1) that the phrase 'attended by criminal force' might mean attended by the use of criminal force or the show of criminal force, and (2) that 'attended by criminal force' might be interpreted to mean not that the use of criminal force

* Criminal Reference No. 275 of 1897 made by L. Palit, Esq., Officiating Sessions Judge of Murshedabad, dated the 25th of September 1897.

must necessarily be an ingredient constituting the offence, but that the commission of the offence of which the accused [436] is convicted was accompanied by criminal force, though there may have been no conviction for the use of such criminal force. I think both the arguments are unsound. 'Criminal force' has been defined in section 350 of the Indian Penal Code, and it is quite clear from that section that criminal force must necessarily mean the use of force and does not include the show of criminal force. Had criminal force included the show of criminal force the definition of assault would have been unnecessary. As to the second contention that the section is applicable if the commission of the offence of which a person is convicted was accompanied by criminal force, although there was no conviction for such criminal force, it amounts to this, that the Court passing the order is to go beyond the conviction, and consider whether there was criminal force used or not apart from the conviction. That certainly could never have been intended. If the section was intended to mean that then it would have run as follows: 'Whenever a person is convicted of an offence and it appears to the Court that any person has been dispossessed of immoveable property by criminal force, the Court may, &c.,' instead of being as it is now 'whenever a person is convicted of an offence attended by criminal force.' I am therefore of opinion that section 522 of the Code of Criminal Procedure is not applicable to cases where there has been no conviction for criminal force either separately or as an ingredient of the offence of which there is a conviction. Even if it be admitted that the section is applicable to such cases, it is to be noted that there is no finding in the Honorary Magistrate's judgment as to the use of criminal force. He no doubt says in giving the account of the prosecution that the men assembled were throwing brickbats, but he nowhere finds that as an established fact.

"The second ground on which the rule was issued was: 'That in the original case it was not found that there was any dispossession of the opposite party.' The Honorary Magistrate's judgment on this point is as follows: 'The accused's main contention is that the said piece of land belongs to the said Nehalia Estate, of which first accused is the executor and rest servants and defendants, on a purchase from one Lakhan Chandra, first witness for defence. Both the parties filed documentary evidence. It appears that Lakhan Chandra purchased it on a sale by the Official Assignee and that the land formerly belonged to one Gahi Babu. The boundary mentioned in the deed executed by the Official Assignee does not exactly tally with that executed in the sale deed of Lakhan Chandra. No party had advanced any evidence of taking actual possession of the land after purchase, but it is clear from the sale certificate, as well as from the deposition of the said Lakhan Chandra, that there lies a land on the south of Pulin Dhar's *hatia* measuring about 25 or 30 cubits by 5 or 6 cubits which is in possession of Pulin Dhar, and it is evident from the deposition of complainant's witnesses, as well as from the evidence of Durga Churn Dey, fifth witness for the defence, that Rajkrishta had a [437] hut, and that it stands on Pulin Dhar's land. As to the other portion of the land which is lying waste it appears that no party was in undisturbed possession, and the parties had a dispute about it. Sub-Inspector Gagun Chunder Neogi said that a proceeding under section 145 of the Criminal Procedure Code was pending in the Berhampore Court between the parties, and both the parties were ordered not to interfere, so this statement clearly supports my aforesaid finding.'

"The case for the prosecution was that the complainant's master Pulin Chandra Dhar had purchased forty years ago a plot of *lakhiraj* land, and that this Rajkrishta, whose name appears in the above extract from the judgment of the Honorary Magistrate, was a tenant of Pulin Dhar's and had a hut on a portion of the land.

"From the above extract from the Honorary Magistrate's judgment it appears that he found that, as regards a portion of the disputed land, it was in no one's undisturbed possession, and that there were proceedings under section 145 of the Criminal Procedure Code pending. As regards the hut he found it to be in the possession of Pulin's tenant Rajkrishta.

"Now the petition praying for an order under section 522 evidently relates to a good deal more than the hut which was in Rajkrishta's possession. The Honorary Magistrate, without specifying what portion of the land the complainant was to be put in possession of, ordered: 'Possession be given to the complainant under section 522 of the Criminal

Procedur ...' It is to be noted that the complainant ... and neve... anything to do with the possession of th... ...atter Rajkrishta was in possession. On this ground too the order is clearly an illegal and improper one.

"The third ground on which the rule was issued raises an important question of law, viz., whether an order under section 522 of the Criminal Procedure Code can be passed subsequently to, and independently of, the decision in the original case. I think not. To allow such an order to be passed subsequently would be productive of the greatest confusion and mischief. Within what limit of time must the order be passed? There is no limit fixed in the section, and if it be held that such orders can be passed subsequently, then the order may, as in this case, be seven months after the decision of the original case: and if seven months afterwards, then why not a year or two years and so on? This clearly could never have been intended by the Legislature. There are good grounds for holding that the order under section 522 of the Criminal Procedure Code should be a part of the original judgment by which there is a conviction of an offence attended by criminal force. One very important reason in favour of taking this view is that, whereas orders under sections 517, 518 or 519 of the Code are subject to appeal, revision and reference, there is no such special provision with regard to an order under section 522. And that I [438] think is due to the Legislature intending that an order under section 522 of the Criminal Procedure Code should form a part of the substantive order of conviction, and should be subject to appeal or revision with the substantive order; otherwise it may happen that an order under section 522 may be passed by the original Court while the substantive order convicting the accused has been appealed against. The conviction may be set aside on appeal, but there being no provision for an appeal against an order under section 522 of the Criminal Procedure Code, it cannot be interfered with. An appeal against an order under section 522 will certainly not lie under the provisions of Chapter XXXI. If, however, section 522 be so construed that an order under this section is to be considered a part of the order of conviction, then, if the conviction be set aside on appeal, the order under section 522 will be necessarily set aside as part of the conviction itself.

"This case exemplifies the danger of allowing an order under this section to be made except as a part of the original order of conviction.

"On the above grounds I would refer this case to the High Court with the recommendation that the order under section 522 be set aside."

Babu *Jogendro Nath Bose* appeared on behalf of the Petitioner.

Babu *Joy Gopal Ghose* on behalf of the Opposite Party.

The **judgment** of the High Court (**Banerjee** and **Wilkins, JJ.**) was as follows:—

This is a reference from the Sessions Judge of Murshedabad recommending that an order of the Honorary Magistrate of Lalbag, giving possession of certain property to the opposite party under section 522 of the Code of Criminal Procedure, should be set aside on three grounds, —*first*, because the offence of which the petitioner has been convicted is not one attended by criminal force, the conviction being for an offence punishable under section 143 of the Indian Penal Code; *secondly*, because it has not been found that the opposite party has been dispossessed of any immoveable property by the use of criminal force; and, *thirdly*, because the order under section 522 does not form part of the judgment in the criminal case as it ought to have done, but was passed several months after the conviction in that case.

We are of opinion that the view taken by the learned Sessions Judge with reference to the first two grounds is correct. Section [439] 522 of the Code of Criminal Procedure says: "Whenever a person is convicted of an offence attended by criminal force, and it appears to the Court that by such force, any person has been dispossessed of any immoveable property, the Court may, if it thinks fit, order such person to be restored to the possession of

the same." "An offence attended by criminal force" means, in our opinion, an offence of which criminal force forms an ingredient. The offence in this case being that of being members of an unlawful assembly, is one into the composition of which the use of criminal force does not enter, though the show of criminal force may in certain cases; and the view we take is supported by the cases of *Luchmi Dass* v. *Pallat Lall*, (1875) 23 W. R., Cr. 54, and *Soshi Bhusan Dutt* v. *Pyari Kishori Biswas*, (1897) 1 C. W. N., CCLVI. But granting that the expression "attended by criminal force" is ambiguous and might include a case in which the offence involves not only the actual use of criminal force, but the show of such force, as an ingredient, it cannot be said that the expression "by such force" in the sentence "and it appears to the Court that by such force any person has been dispossessed" means the show of criminal force and not the actual use of it.

The learned Vakil for the opposite party referred to a passage in the judgment of the Court below as showing that the dispossession was by the use of force; but that would not be sufficient. It must be found that the dispossession was by the use of "criminal force" as defined in section 350 of the Indian Penal Code, the last clause of section 4 of the Code of Criminal Procedure clearly showing that the expression "criminal force" used in section 522 of the Code of Criminal Procedure must be understood in the sense in which it is defined in the Penal Code.

In this view of the matter it becomes unnecessary to consider the other questions raised before us.

The order under section 522 of the Code of Criminal Procedure must therefore be set aside.

S. C. B.

NOTES.

[I. As regards the requirement as to use of criminal force, see also 27 Cal., 174; 5 C. W. N., 250; 25 All., 311; 26 Mad., 49; 11 C. W. N., 467; 36 Cal., 44. In 11 C. W. N., 467 doubts were expressed as regards the in sufficiency of a show of force.

II. The order should be simultaneous with the conviction -4 C. W. N., 308; *contra* 23 Bom., 494.]

[440] *The 23rd October, 1897.*

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

Queen-Empress

versus

Har Chandra Chowdhury and another............Defendants.

Recognizance to keep peace—Surety bond—Liability to forfeiture—Evidence necessary—Criminal Procedure Code (Act X of 1882), section 514.

The mere fact of the person for whom another stands surety being convicted of a breach of the peace ought not to be sufficient to make the surety bond executed by the latter liable to forfeiture without any evidence taken in the presence of the surety to show that the forfeiture has been incurred.

* Criminal Reference No. 268 of 1897 made by R. H. Anderson, Esq., Sessions Judge of Mymensingh, dated the 20th and 21st September 1897, against the order of F. B. Harris, Esq., District Magistrate, and Babu Uma Prosunna Guha, Deputy Magistrate of that District, dated the 27th June 1897 and the 7th May 1897 respectively.

The language of section 514 of the Criminal Procedure Code (Act X of 1882) does not indicate that the final order making a person bound by a bond can be made without taking any evidence in his presence or giving him any opportunity of cross-examining the witnesses on whose evidence the forfeiture is held to be established.

The mere production of the original record or of a certified copy of the original record of the trial in which the principal had been convicted of breaking the peace within the period covered by a bond would not be conclusive, if indeed it would be any evidence, against the surety in a proceeding under section 514 of the Criminal Procedure Code.

REFERENCE under section 438 of the Criminal Procedure Code (Act X of 1882) by the Sessions Judge of Mymensingh.

The facts of the case appear sufficiently from the letter of reference, the material portion of which was as follows:—

"In this case the Deputy Magistrate, Babu Uma Prosanna Guha, by a proceeding, dated 7th April 1897, called on the petitioners to show cause why bonds for Rs. 100 each which they were said to have executed as sureties for Ram Kanta Chango and Hara Charan Chango keeping the peace for a period of one year from the 20th September 1895, should not be forfeited on the ground that Hara Charan Chango and Ram Kanta Chango were convicted on the 30th October 1896 and 20th January 1897, respectively, of an offence punishable by section 324 of the Indian Penal Code committed on the 28th July 1896.

"The petitioner showed cause on the 23rd April. It will be observed that they did not distinctly admit having executed the bonds.

[441] "The Deputy Magistrate without recording any evidence forfeited the bonds by an order, dated 7th May 1897. An appeal was preferred to the District Magistrate, and dismissed on the 27th June, though the amount forfeited was in each case reduced to Rs. 50.

"In my opinion the Deputy Magistrate's order is illegal. These bonds could only be forfeited on proof taken in the presence of the petitioners that the bonds were liable to be forfeited. *In the matter of Mohesh Chunder Roy*, (1882) 10 C. L. R., 571; *Empress* v. *Nobin Chunder Dutt*, (1879) I. L. R., 4 Cal., 865; and *In re Chandra Sekhar Rai*, (1884) I.L.R., 11 Cal., 77.

"Further, as it seems to me, there should have been proof that these petitioners executed these bonds, since they did not admit they had executed them.

"Finally I have considerable doubt whether this penalty could be exacted from the sureties, when it was not exacted from the principals (see the Deputy Magistrate's order).

"With regard to the District Magistrate's remarks I would say (*a*) that the case of *Empress* v. *Nobin Chunder Dutt*, (1879) I. L. R., 4 Cal., 865, appears to me to have much more bearing on the question before us than the District Magistrate thinks. The question referred to the Full Bench was whether a Magistrate is bound by law to record the proof on which he proposes to forfeit a recognizance to keep the peace in the *presence of the person bound by such recognizance*." But the answer was this: 'A Magistrate is not justified in forfeiting a recognizance unless the *party charged with a breach of the peace* has had an opportunity of cross-examining the witnesses, upon whose evidence the rule to show cause has been issued.' Now, when the surety is called on to show cause why his bond should not be forfeited, it seems to me he is then legally in the position of the 'party charged with a breach of the peace.' He did not personally break it, but, in the eye of the law when the principal broke it, the surety broke it. That is what he is penalized for. As I understand the criminal law no punishment of any kind is imposed on a man unless the evidence on which the order of punishment is based is taken in his presence (or at least he has had an opportunity of being present) and he has had an opportunity of showing that on that evidence he ought not to be punished.

"(*b*) The second point in my reference is purely technical I admit. As, however, the petitioner's pleader urges it, and in fact it is a valid though technical objection, I think I am bound to mention it.

"(c) The third point is doubtful. I cannot say I am sure the Magistrate is wrong; still the matter is not free from doubt in a case like this where the [442] principals have been prosecuted and convicted and their bonds have not been forfeited."

No one appeared in support of the Reference.

The following **judgments** were delivered by the High Court (BANERJEE and WILKINS, JJ.):--

Banerjee, J.—The petitioners were called upon by the Deputy Magistrate of Mymensingh under section 514 of the Code of Criminal Procedure to show cause why the bond executed by them as sureties for Ram Kant Chango and Hara Charan Chango keeping the peace for one year should not be forfeited, and why they should not each pay the amount of the bond (Rs. 100), when the said Rama Kanta Chango and Hara Charan Chango had been convicted of an offence under section 324 of the Indian Penal Code. The petitioners showed cause, but their objections were overruled, and the Deputy Magistrate without recording any evidence declared on the 7th May 1897 that the bonds were forfeited; and that order was affirmed on appeal by the Magistrate of the district on the 27th of June 1897, with this modification, that the amount forfeited in each case was reduced to Rs. 50.

The learned Sessions Judge of the District recommends that the orders of the District Magistrate and the Deputy Magistrate be reversed for three reasons: *first*, because they were made without taking any evidence in the presence of the petitioners; *secondly*, because the execution of the bond by the petitioners was neither admitted or proved; *thirdly*, because the principal parties not having been proceeded against, the sureties could not be made liable.

In support of the first reason the cases of *Empress* v. *Nobin Chunder Dutt*, [(1879) I. L. R., 4 Cal., 865], and *In the matter of Mohesh Chunder Roy*, [(1882) 10 C. L. R., 571,] are relied upon by the Sessions Judge. Though the facts of the two cases referred to are different from those of the present, the principle upon which they are based is, I think, applicable to this case, and no order declaring the forfeiture of a bond can be [443] made against any party unless the ground of forfeiture is established by evidence, which is taken in the presence of such party, or is otherwise admissible against him. The mere fact of the persons for whom another stands surety being convicted of a breach of the peace ought not to be sufficient to make the surety bond executed by the latter liable to forfeiture, without any evidence taken in the presence of the surety to show that the forfeiture has been incurred.

It is true that section 514 of the Code of Criminal Procedure by enacting that "whenever it is proved to the satisfaction of any Court by which a bond under the Code is taken that such bond has been forfeited, it shall record the grounds of such proof, and it may call upon any person bound by such bond to pay the amount or to shew cause," indicates that the evidence upon which the Court is satisfied that a forfeiture has been incurred and that the person bound by the bond should be called upon to pay or to show cause, may be taken in the absence of such person, but that does not show that the final order making him liable can be made without taking any evidence in his presence or giving him any opportunity of cross-examining the witnesses on whose evidence the forfeiture is held to be established. Where the bond is given by the person bound down to keep the peace, the judgment convicting him of a breach of the peace is admissible in evidence against him, and may form a sufficient basis for an order under section 514, he having had an opportunity of cross-examining the witnesses on whose evidence the forfeiture is held established. So also in a case in which a surety bond is given on condition that it shall be forfeited if the person for whom it is given is convicted of a breach of the peace,

the judgment in the case in which such person is convicted would be admissible in evidence against the surety under section 43 of the Evidence Act as evidence of the fact of conviction, which is a relevant fact in the case.

But where, as in this case, the bond is given by a surety, and the condition in the bond is that it shall be forfeited, not if the principal party is convicted of a breach of the peace, but if he commits a breach of the peace, the judgment convicting the [444] principal of a breach of the peace is no evidence under the Evidence Act (see section 43) against the surety who was no party to it, to prove that the party bound down to keep the peace has really committed a breach of the peace. Such fact must be proved by evidence taken in the presence of the surety, unless it is admitted by him. There has been no such evidence taken in this case, nor is the fact of a forfeiture having been incurred admitted. That being so, the order complained of must in my opinion be set aside, and the amount, if realized, refunded.

In this view of the case it becomes unnecessary to determine the other two points raised in the reference. I may add, however, that the second ground is not tenable, the execution of the bond having been admitted in the argument as pointed out in the explanation of the Deputy Magistrate. Nor is there any force in the third reason. The mere fact of the principal party not being proceeded against is no ground for holding that the surety is discharged.

Wilkins, J.—I am of the same opinion. Before it can be declared that a bond executed by a surety is forfeited under section 514 of the Criminal Procedure Code, there must be a formal finding arrived at after taking evidence in the presence of such surety, which evidence must prove that the principal person has so acted as to necessitate or render it advisable that the surety should by reason of the act of the principal forfeit his bond. The mere production of the original record or of a certified copy of the original record of the trial in which the principal had been convicted of breaking the peace within the period covered by the bond, would not be conclusive, if indeed it would be any evidence against the surety in a proceeding under section 514 of the Criminal Procedure Code. The proceedings are judicial proceedings, and an order of forfeiture under section 514 can be made only after a proper judicial enquiry and upon legal evidence recorded in presence of the surety.

NOTES.

[In (1911) 11 I. C., 588 (Punjab), the Punjab Chief Court followed 21 All., 86 and not this decision.]

[445] APPELLATE CIVIL.

The 19th November, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

Madhub Ram...........Defendant

versus

Doyal Chand Ghose... ....Plaintiff.*

Landlord and tenant—Suit for rent—Bengal Tenancy Act (VIII of 1885) sections 72 and 73 —Rule 3, chapter I of the Rules made by the Local Government under clause (2) of section 189 of the Bengal Tenancy Act—Liability for rent on change of landlord Notice of transfer—Transfer of putni right over a specific area, whether valid —Regulation VIII of 1819, sections 3 and 6—Transfer of Property Act (IV of 1882), section 6.

Putni right over a specific area lying within a *putni* taluk is transferable.

Sub-section 1 of section 72 of the Bengal Tenancy Act does not require that the notice therein contemplated should be given in any particular manner.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Mohendra Nath Roy* for the Appellant.

Dr. *Rash Behary Ghosh*, and Babu *Hara Kumar Mitter*, for the Respondent.

The **judgment** of the High Court (BANERJEE and WILKINS, JJ.) was as follows:--

Banerjee, J.— This appeal arises out of a suit for arrears of rent brought by the plaintiff-respondent on the allegation that in execution of a decree held by him against Bibi Jarao Kumari, he purchased at a sale held by public auction the interest of the said Bibi Jarao Kumari in a certain quantity of land; that the defendant holds the said land at a certain rent; and that the rent payable in respect of the period in suit is due to him from the defendant.

The defence, so far as it is necessary to be referred to for the purposes of this appeal, was to the effect that the land in suit **[446]** being *basti* land situated in Sulkea within the jurisdiction of the Howrah Municipality, the suit was not maintainable in the form in which it was brought and in the Court in which it was instituted; that there was no relation of landlord and tenant between the plaintiff and the defendant; and that the defendant was not liable for the rent claimed, and it had been paid to Bibi Jarao Kumari, and the plaintiff had given the defendant no notice of his purchase before such payment.

The first Court dismissed the suit on two grounds: *first*, because the plaintiff's purchase which was that of a portion of the interest of Bibi Jarao Kumari, which was a *putni*, was invalid in law; and, *secondly*, because the defendant was not exempted from liability to pay the rent in suit to Bibi

* Appeal from Appellate Decree No. 235 of 1896, against the decree of Babu Abinash Chunder Mitter, Subordinate Judge of Hooghly, dated the 13th of November 1895, reversing the decree of Babu Devendra Bejoy Bose, Munsif of Howrah, dated the 26th July 1894.

Jarao Kumari. On appeal by the plaintiff, the Lower Appellate Court has reversed the first Court's decision, holding that the plaintiff has acquired a valid right by his auction purchase, to claim rent from the defendant, and that the defendant must be taken to have had sufficient notice of the plaintiff's purchase after the date when the plaintiff took possession of the property purchased by him, and any payment made by the defendant subsequent to that date must be taken to have been made by him at his own risk.

In second appeal it is contended for the defendant-appellant that the decision of the Lower Appellate Court is wrong, *first*, because the purchase by the plaintiff of the interest of Bibi Jarao Kumari in a portion of the lands of her *putni taluk* was not valid in law; and, *secondly*, because the defendant was not liable to pay rent to the plaintiff when he did not give any notice to him in due form as required by section 72 of the Bengal Tenancy Act.

In support of the first contention the learned Vakil for the appellant referred to section 3 of Regulation VIII of 1819, and argued that as property in a *putni taluk* was a creation of Regulation VIII of 1819, such property could arise only so far as it was recognised by that enactment; and as the Regulation did not recognise the existence of separate property in any portion of the land of a *putni taluk*, what was sold here was not property, *i.e.*, was not saleable property within the meaning of **[447]** the law, and the plaintiff, therefore, could not have acquired any interest by his auction-purchase.

We are unable to accept this contention as sound. Though, no doubt, clause 1 of section 3 of the *Putni* Regulation speaks of the entire *putni*, section 6 affords indication of the validity, under certain conditions, of a transfer by the *putnidar*, extending, not only to fractional or aliquot parts of a *putni taluk*, but also to any alienation other than that of the entire interest, that is, to any alienation of the interest in any portion of the *putni taluk*, such portion not being an aliquot part or share, but being a portion of the land composing the *putni*. We may also refer to section 6 of the Transfer of Property Act as showing that property of the kind that has been purchased by the plaintiff in this case is transferable, and could therefore be validly attached and sold under the Code of Civil Procedure. The first contention urged on behalf of the appellant therefore fails.

In support of the second contention, reference has been made to section 72 of the Bengal Tenancy Act and to Rule 3, Chapter I of the Rules made by the Local Government under clause (2) of section 189 of the Tenancy Act; and it is argued that as the notice has not been served in the manner prescribed by the said Rule, which is of general application, and should, therefore, be held to apply to this case, the mere fact of notice being presumable from the plaintiff having taken possession, according to the provisions of the Code of Civil Procedure, cannot be considered a sufficient compliance with section 72 of the Bengal Tenancy Act, which makes the giving of notice of the transfer a condition precedent to the liability to pay rent to the transferee arising.

In answer to this contention, the learned Vakil for the respondent urges, in the first place, that the point now raised is different from that which was raised in the written statement of the defendant, in the 9th paragraph of which he said: "If the plaintiff had given any information to or served any notice on the defendant the latter could find out the proper party and pay rents considerately"; in the second place that the provisions of the Bengal Tenancy Act were inapplicable to this **[448]** case, which was a suit for rent on account of *basti* land situated within the limits of a Municipality; in the third place, that even if the Bengal Tenancy Act applied to this case, sub-section 1 of

section 72, which is the provision relied upon, does not require the giving of the notice in any particular manner, and that the requirements of the law were fully satisfied when it was found that the defendant had notice of the purchase; and, lastly, that Rule 3 relied upon by the appellant was in its nature directory and not mandatory, and that all that was required was that the defendant should have notice of the transfer, the provisions relating to the mode in which notice ought to be served being intended only to secure a proper notice.

In answer to the first of these grounds upon which the appellant's contention has been sought to be met, the learned Vakil for the appellant points out that the defendant not only said what is stated in paragraph 9 of his written statement, but in an earlier part of that statement he urged that there had been no notice duly served. In answer to the second reason relied upon by the learned Vakil for the respondent it was urged that as the plaintiff brought his suit under the Bengal Tenancy Act, as he must have done when he claimed damages, and not interest on the arrears of rent, and the Court gave him a decree in accordance with such prayer, it was not open to the plaintiff to urge now that the case was not governed by the Bengal Tenancy Act. And as to the third and fourth grounds it was urged, in reply, that there was no distinction observed in the Bengal Tenancy Act between the giving of notice and the serving of notice, and that Rule 3 relied upon being of general application and mandatory in its character, should be held to govern this case.

We are of opinion that the first ground upon which the learned Vakil for the respondent seeks to meet the appellant's objection is not tenable, as the defendant in his defence not only said what has been pointed out in paragraph 9, but also raised the objection that no notice had been served upon him.

The question raised upon the second ground relied upon by the respondent is not altogether free from difficulty, having [449] regard to the fact that the suit was evidently brought under the Bengal Tenancy Act, and there is nothing found as to the nature and incidents of the holding at its inception; but in the view we take of the remaining two grounds urged for the respondent, it becomes unnecessary to say more with reference to this second ground. We are of opinion that sub-section 1 of section 72 does not require that the notice therein contemplated should be given in any particular manner. In the first place a comparison of sub-section 1 with sub-section 2 of that section would show that, whereas in sub-section 1 all that is said is that the tenant's liability to pay rent to the transferee would not accrue unless the transferee has, before payment to the original landlord, given notice of the transfer to the tenant, sub-section 2 enacts that where there is more than one tenant paying rent to the landlord, a general notice from the transferee to the tenants of the transfer in the prescribed manner shall be a sufficient notice for the purpose of this section. The prescribed manner, which by clause 15 of section 3 means the manner prescribed from time to time by the Local Government by notification in the official Gazette, is therefore expressly limited to the case where there are more tenants than one paying rent to the landlord. That, however, admittedly, is not the case here.

A comparison of section 72 with section 73 also bears out the same view for the notice contemplated in section 73 is required to be given to the landlord in the prescribed manner. Then, again, in other places, such as clause (b) of section 49, where a notice is contemplated, the Act speaks of the notice being served and not simply given; and Rule No. 3 of Chapter 1 of the Rules made by the Local Government under the Act, runs in these words:

"Where no other mode of service of the notice is prescribed by the Tenancy Act, or by these Rules, service shall be effected in the manner prescribed for service of summons on the defendant." This evidently shows that Rule 3 is intended to apply only to those cases where the Act speaks of the service of notice and not merely of the giving of a notice. Rule 3 may apply to cases where the Act speaks of the giving of notice if such notice is required to be given in the prescribed manner. But we do not think it would be reasonable to hold that, although the Act may speak only of the giving of a notice without the qualifying [460] words "in the prescribed manner," nevertheless a notice given in any way other than the prescribed manner should be treated as not being a sufficient compliance with the Act. Seeing that when the Legislature intended that the notice was either to be served or to be given in the prescribed manner, it has expressly said so, and seeing that in the provisions of the law, sub-section 1 of section 72, now under consideration, it has not taken care to say so, we do not think that it would be right to hold that it was nevertheless intended that notice under sub-section 1 of section 72 should be served in the prescribed manner.

What we have said above is sufficient for the disposal of the case. Were it necessary to determine the fourth point raised by the learned Vakil for the respondent, we should have been inclined to hold that Rule 3 of the Rules made under section 189, in a case like this, was intended to be only directory and not mandatory. The two grounds urged before us on behalf of the appellant, therefore, both fail; and the appeal must consequently be dismissed with costs.

We should add that we are indebted to the learned Vakils on both sides for the able arguments that have been addressed to us in this case.

S. C. G. *Appeal dismissed.*

[25 Cal. 460]

The 1st September, 1897.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE STEVENS.

Ram Jewan Misser and others............Plaintiffs

versus

Jagarnath Pershad Singh and others............Defendants.*

Limitation Act (XV of 1877), Schedule II, Article 132—Mortgage—Usufructuary Mortgage—Further Mortgage of the same property—Destruction of Mortgaged property by diluvion—Transfer of Property Act (IV of 1882), section 68, Right to sue under—Limitation.

Plaintiffs advanced money on an usufructuary mortgage of certain land in Magh 1280 (January 1873), and subsequently advanced another sum of money in Sraban 1280 (July

* Appeal from Appellate Decree No. 1073 of 1896, against the decree of Babu Mohendra Nath Mitter, Subordinate Judge of Shahabad, dated the 1st of May 1896, modifying the decree of Babu Lalit Kumar Bose, Munsif of Buxar, dated the 8th of July 1895.

1873) on the security of the same land. The [451] land was washed away in 1892. In an action brought in 1894 under section 68 of the Transfer of Property Act (IV of 1882) for the money of both the mortgages on the ground that the defendants declined to give fresh security the defendants objected that the claim as regards the mortgage of Sraban 1280 was barred before the inundation, under clause 132* Schedule II of the Limitation Act (1877), the money being due on the date of the bond.

Held, overruling the objection of limitation :—

1. With reference to the terms of the mortgage of Sraban 1280, that it was intended to add the money to the amount of the previous mortgage, and to place it on the same conditions, and that the plaintiffs were, therefore, equally entitled to sue for the money upon this mortgage as upon the other.

2. That assuming that there was a right to sue for the money, it did not follow that the plaintiffs were not entitled to have substituted for the security the money which took the place of the security.

3. That on the happening of the event provided for in section 68, the plaintiffs who were admittedly entitled to remain in possession of the property, until the moneys had been repaid, were clearly entitled to have the money substituted for the property.

THIS was a suit by the mortgagee under section 68 of the Transfer of Property Act requiring the defendants, mortgagors, to give them sufficient security for their debt, on the ground that the mortgaged property had been destroyed by inundation, and should the defendants fail to do so the suit was in the alternative for the mortgage-money. There were two mortgages in respect of the property, one a registered usufructuary mortgage, dated the 1st Magh 1280 (14th January 1873) and the other an unregistered mortgage, dated the 21st Sraban 1280 (31st July 1873). The lower Courts found that the inundations took place in Asar and Sraban 1299 (July 1892) and the present suit was brought on the 26th August 1894. One of the objections raised in defence was that the money due on the mortgage of 21st Sraban 1280 was barred by limitation. The terms of the mortgages are sufficiently set forth in the judgment of the High Court. The material portion of the Munsif's judgment was as follows :—

" The parties contracted that the money due on this mortgage bond shall not be payable immediately on the day the bond is written, but at some distant date when the *rehnnama* is satisfied. The plaintiffs could not, therefore, have sued at any time they liked for money due on this mortgage bond. I, therefore, am of [452] opinion that the present cause of action arose when the property was washed away. According to the statement of both the parties the plaintiffs sue within three years of that time, consequently the suit, even though it is for a personal remedy, is not barred by limitation."

The Munsif decreed the entire claim. On appeal, the Subordinate Judge held that the bond of Sraban 1280 was barred by limitation. He observed :—

" If the plaintiff's right to recover the money due under the bond is barred, he cannot recover the money under section 68 of the Transfer of Property

* [Art. 132 :—

Description of Suit.	Period of limitation.	Time from which period begins to run.
To enforce payment of money charged upon immoveable property. *Explanation.*—The allowance and fees respectively called *malikana* and *haqqs* shall, for the purpose of this clause, be deemed to be money charged upon immoveable property.	Twelve years....	When the money sued for becomes due.]

Act on the ground of the mortgage land being lost by diluvion, for his right to recover the money being barred, the security is at an end. There being no time fixed for payment of money in the bond, limitation under article 132, Schedule II of the Limitation Act, runs from the date of the bond. *Nilcomal Pramanick* v. *Kamini Kumar Basu* (I. L. R., 20 Cal., 269).

The appeal was allowed in part and the decree of the original Court was modified by disallowing the claim in respect of the bond of Sraban 1280.

The plaintiffs appealed to the High Court.

Mr. *C. Gregory* for the Appellants.

Moulvie *Mahomed Yusuf* for the Respondents.

The **judgment** of the High Court (**Trevelyan** and **Stevens, JJ.**), was as follows:—

In this case we are of opinion that the learned Subordinate Judge has erred in the conclusion at which he has arrived. The suit was brought under the provisions of section 68 of the Transfer of Property Act to obtain payment of certain mortgage money on the ground that the mortgaged property had been wholly destroyed by having been flooded with water. There were two mortgages, one dated Magh 1280, and the other Sraban 1280. The learned Munsif gave a decree in respect of both the mortgages. But the Subordinate Judge, while upholding the decree in respect of the mortgage of Magh, has upset it with regard to the mortgage of Sraban.

[453] The mortgage of Magh was unquestionably an usufructuary mortgage. The mortgagee was put into possession and was allowed to take the profits of the property as the interest of the money advanced by him, and the mortgagor was to pay the principal of the money on the full-moon day of any Jeyt succeeding the date of the mortgage. The second mortgage is, as we read it, clearly nothing more than a further charge of a further sum of money on exactly the same conditions as the first mortgage. It is very short, and has been translated both by the appellants' and the respondents' advisers, and there seems to be no real distinction between the two translations. Taking the translation put in by the respondents it reads in these terms: "Whereas I borrowed in cash Company's rupees 99—15 annas current coin from Madho Misser and Ram Jewan Misser, of *mouzah* Adrakpore, pergunnah aforesaid, I shall pay the interset thereon at the rate of one rupee per cent. I have borrowed the money along with the registered deed" (that is the deed of Magh) "in which the field of my share is 3½ bighas, and I mortgage this field for this money. I shall first pay this amount together with interest, and after that the money covered by the registered mortgage bond. Therefore I execute this document so that it may be of use when required." The document proceeds to this effect: "I have executed this document as a part of the said mortgage bond:" and in the third place we find this document incorporates the second loan with the first. Meghborn Singh, who is one of the mortgagors, when signing his name says: "I execute this bond for 100 rupees payable along with the mortgage bond." There could be nothing clearer to show that it was intended to add this money to the amount of the previous mortgage and to place it on the same conditions. It follows, therefore, we think that the plaintiff is equally entitled to sue for the money upon this mortgage as upon the other.

It has been argued that the claim in respect of this money is barred by limitation, and it is said that as the right to sue upon this mortgage was barred before the inundation, the right to sue under section 68 of the Transfer of Property Act is also barred.

In the first place it is exceedingly doubtful, to say the least of it, whether there was any right at all to sue for the money. But assuming that there was such a right, it does not by any means follow that the plaintiff is not entitled to have substituted for the security the money which takes the place of the security. It is admitted that the plaintiff is entitled to remain in possession of the property until the mortgage moneys have been repaid. Therefore in the event happening which is provided for in section 68 of the Transfer of Property Act, it is clear that the plaintiff is entitled to have the money substituted for the property. [464]

In the result, we think that the decision of the Subordinate Judge must be set aside, and that of the Munsif restored with costs in this and the Lower Appellate Court. As far as the cross objections are concerned there is nothing in them, and they must be disallowed.

S. C. C. *Appeal allowed.*

NOTES.

[See also 21 Mad., 242; 2 C. L. J., 493; 6 C. L. J., 113; 16 All., 318; 26 Bom., 241; 3 Bom., L. R., 876.]

[25 Cal. 464]

CRIMINAL REVISION.

The 17th January, 1898.

PRESENT:

MR. JUSTICE HILL AND MR. JUSTICE STEVENS.

Chairman of the Serampore Municipality............Petitioner

versus

Inspector of Factories, Hoogly............Opposite Party.

Factories Act (XV of 1881 as amended by Act XI of 1891), sections 15 (g) and proviso (i), 17—Bengal Municipal Act (Bengal Act III of 1884), sections 320, 321—Liability for neglecting to keep a factory in a cleanly state—Criminal Procedure Code (Act X of 1882), section 537—Nuisance—Sanction.

The Inspector of Factories having found the latrines of the Hastings Mill, within the Serampore Municipality, in a filthy state instituted a prosecution against the manager of the mill, but the prosecution failed. He then prosecuted as representing the Municipal Commissioners of Serampore, the Chairman of the Municipality, who, on conviction, was fined Rs. 200 for "neglecting to keep the factory free from effluvia arising from a privy," under the provisions of the Factories Act and of the Bengal Municipal Act, section 320.

Held, that the conviction of the Chairman was unsustainable on the [465] finding that the Municipality and the occupier of the factory were jointly responsible.

Held, further, that it lay upon the occupier of the factory as being primarily liable for breach of any of the provisions of the Factories Act, to give the strictest proof of circumstances exonerating himself from the liability in order to fix it on any other person.

* Criminal Revision No. 795 of 1897, against the order passed by H. F. Samman, Esq., Sub-Divisional Magistrate of Serampore, dated the 28th of October 1897.

THE Civil Medical Officer of Serampore, being the Joint Inspector of Factories, inspected the Hastings Mill, within the limits of the Serampore Municipality, and made a report to the effect that the drains and cesspits of the factory were full of filth and swarming with maggots, and that the latrines were in a neglected condition. Thereupon the Manager as the occupier of the mill was prosecuted under section 15 (*g*) of the Factories Act, but the prosecution failed. Upon that, the present proceedings were instituted against the Petitioner as representing the Municipal Commissioners of Serampore, under orders of the District Magistrate of Hooghly, (he being the Inspector of Factories of that District) for neglecting to keep the latrines of the Hastings Mill clean, under section 15 (*g*) of the Factories Act and section 320 of the Bengal Municipal Act, 1884, the Municipality having undertaken to maintain an establishment for the cleansing of public and private latrines within its limits.

The case was heard by the Sub-divisional Magistrate of Serampore, who in a summary trial convicted the petitioner under both the Acts aforesaid, and sentenced him to pay a fine of Rs. 200.

Against this conviction the Petitioner moved the High Court on the ground, amongst others, that he was not liable under either the Factories Act or the Bengal Municipal Act for the nuisance complained of.

Mr. *Caspersz* (with Babu *Shib Chunder Palit*) for the petitioner referred to *Chisholm* v. *Doulton*, (1889) L. R., 22 Q. B. D., 736 (741), in support of the rule. The rest of the arguments appear from the judgment of the Court.

The **judgment** of the High Court (**Hill** and **Stevens, JJ.**) was as follows:—

This was a prosecution under clause (*g*), sub-section (1) of section 15 of the Factories Act (XV of 1881), as amended by section 14, Act XI of 1891.

[456] It appears that on the 20th of July last the Civil Medical Officer of Serampore, who is a Joint Inspector of Factories, inspected the Hastings Mill between the hours of 9 and 11 A.M. and found the latrines used by the operatives in a filthy state, the cause of that condition of things being that the pipe between the inner and the main outer cesspools had become blocked with solid nightsoil, jute and other things.

In the first place a prosecution was instituted against the manager of the mill, but the prosecution failed.

The present case was then instituted.

The sanction required by proviso (1) to section 15, Act XV of 1881, as amended by section 14, Act XI of 1891, was accorded to the prosecution of the Municipal Commissioners of Serampore. Process was at first issued against the Chairman of the Municipality. An order was afterwards passed for the issue of summons to all the Municipal Commissioners, but it was eventually revoked, and the case proceeded against the Chairman, who is described in the summary-trial record made by the Sub-divisional Magistrate by whom the case was tried as "representing the Municipal Commissioners of Serampore." In that capacity the Chairman was convicted of "neglecting to keep a factory free from effluvia arising from a privy" and under the provisions of clause (*g*), sub-section (1) of Act XV of 1881 read with section 17 of the same Act and section 320 of Bengal Act III of 1884 he was sentenced to pay a fine of Rs. 200, which the Magistrate directed to be paid out of the Municipal fund.

The ground on which the Municipality has been found to be liable is that under section 320 of Bengal Act III of 1884, it has undertaken to maintain an establishment for the cleansing of public and private latrines within its limits, that it levies a fee from the Hastings Mill accordingly under the provisions of

section 321, and that it is therefore bound under section 320 to " make suitable provision " for the cleansing of the latrines of the mill. The criminal liability under section 15 of Act XV of 1881 is held by the Magistrate to attach to the Municipality by the operation of the latter part of section 17 of the Act as amended by Act XI of 1891. That section runs as follows :—

[457] " Every occupier of a factory shall be deemed primarily liable for any breach therein of this Act or of any order or rule made thereunder; but he may discharge himself from such liability by proof that such breach was committed by some other person without his knowledge or consent, and in that case the person committing such breach shall be liable therefor "

We are now asked to set aside the conviction on several grounds, of which the principal are that the proceedings are informal, because the person prosecuted was the Chairman of the Municipality, whereas the sanction accorded was for the prosecution of the Municipal Commissioners ; that sections 15 and 17 of the Factories Act refer only to persons immediately connected with a factory ; that there is nothing to show that the Municipal Act is to be read with the Factories Act; that there is no provision of law authorising the prosecution of Municipal authorities, and that in any case neither the Municipality nor the Chairman can be held liable under the provisions of section 17 of the Factories Act on the Magistrate's own finding, that the manager of the factory and the Municipality were jointly responsible for the obstruction which was the primary cause of the nuisance.

We may remark in passing that we are not prepared to say that the sanction did not sufficiently comply with the provisions of section 15 of the Factories Act and even assuming it to be otherwise, the defect would, we think, be cured by the provisions of section 537 of the Code of Criminal Procedure. It does not seem to us necessary to enter at length into a consideration of all the questions which have been raised before us, because we are clearly of opinion that assuming that the Municipal Committee or their Chairman could at all be made criminally liable under the provisions of section 17 of the Factories Act, the conviction is unsustainable on the findings of the Magistrate.

It has been found that a special establishment of sweepers is maintained by the Municipality for the cleansing of the latrines of the mill, but that they receive an extra allowance from the mill for night work, and are required to report themselves during the night to the mill officers. The Magistrate has held accordingly that the Municipality has undertaken the responsibility of [458] keeping the latrine clean by day, and the mill that of keeping it clean by night. It has not been found that the establishment of sweepers provided by the Municipality is insufficient ; but it has been found that neglect on the part of the sweepers brought about the direct cause of the nuisance, namely, the obstruction of the pipe between the cesspools, and that for that obstruction the mill ,and the Municipality are jointly responsible. The Magistrate has, however, here drawn a subtle distinction in which we are unable to follow him. He says that, although the mill and the Municipality are jointly responsible for that which caused the effluvia to arise, the Municipality must be held responsible for the arising of the effluvia, because the discovery of the effluvia by the inspecting officer took place in the day time, when it was the turn of the Municipality to keep the latrine clean. He goes on to deal with the question whether the occupier of the mill had knowledge of the existence of the nuisance, and he concludes with the proposition that though it is possible that the occupier was aware of it, the burden of proving this lay upon the Municipality,- a proposition which seems to us clearly erroneous.

The provision of section 17 of the Factories Act, by virtue of which this conviction has been had against the Chairman of the Municipality, is of a highly penal character and must be construed strictly in favour of the accused. We think that in order to fix liability on any person other than the occupier of a factory it is incumbent upon the latter to give the strictest proof of circumstances exonerating himself, and it is plain on the face of the section that the burden of proving absence of knowledge or consent on his part lies entirely upon him.

In the present case on the Magistrate's finding of joint responsibility the occupier is not discharged from his liability under section 15 of the Factories Act and therefore the liability cannot be fixed on any other person. The conviction is for this reason unsustainable.

We accordingly set it aside, and direct that the fine, if realised, or so much thereof as may have been realised, be refunded.

B. D. B. *Conviction set aside.*

NOTES.

[See also (1905) 29 Bom., 423 where it was held that the manager was not *ipso facto* liable as manager.]

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[459] PRIVY COUNCIL.

The 2nd, 6th, 8th July and 10th December, 1897.

PRESENT:

LORDS HOBHOUSE, MACNAGHTEN, AND MORRIS, AND SIR R. COUCH.

Dowlat Koer............Proponent

versus

Ramphul Das and others............Impugnants.

[On appeal from the High Court at Fort William in Bengal.]

Will—Evidence as to execution.

The question whether an alleged Hindu will was genuine or not was raised by the relations of the deceased, on an application, under the Probate and Administration Act V of 1881, for administration with the will annexed, filed by the proponent.

It was *held* upon evidence, which was very conflicting, in some respects obscure and unsatisfactory, and in reference to which the Court below had differed, that the will was genuine, and that the High Court was not justified in reversing a decree to that effect.

It was also *held* that it is the duty of a Judge in such cases patiently to investigate the actual facts, placing himself as it were in the position of the alleged testator with all his actual surroundings; not to approach the subject from the point of view of what a testator ought or would be likely to have done on some preconceived idea of Hindu usages and habits of thought.

APPEAL from a decree (10th July 1891) of a Divisional Bench of the High Court, reversing a decree (11th November 1893) of the District Judge of Gaya.

This appeal arose out of a petition filed on the 9th June 1893 by the appellant for administration, with the will annexed, of Narain Das, which purported to be for her benefit. It was dated the 18th May 1893, and the testator died on the 3rd June following. The proponent stated that she was one of the widows of the testator, who died at his residence at Tikari in the Gaya District, leaving, beside herself, another widow named Rajkali, a mother named Uttim, and a brother named Babban Das, who were the present respondents. The latter filed objections to the will impugning it as not the genuine will of Narain Das.

The disputed will, after reciting that the testator had married three wives, of whom Rajkali and Dowlut Koer were alive, proceeded thus, as translated :—

[460] " Whereas shortly after my marriage with Massumat Rajkali Koer, and the performance of her ruckhsarti ceremony, I cut off all communication with her on account of her bad temper, disobedience, and also for several other reasons, and have kept my connection only with Massumat Dowlat Koer, my third wife, because she is the only wife who has been obeying and serving me, and has all along kept me pleased and happy by her amiable conduct and obedience. Therefore I, the declarant, have always been living with her alone. And whereas my second wife Rajkali Koer has been residing against my wishes with Ramphul Das *alias* Babban Das, my brother who is a drunkard, and a bad character, and who has always lived separate from me, and with whom I, the declarant, have ceased to have any connection."

He then left his whole property, as the alleged will declared, absolutely to the proponent subject to monthly charges of Rs. 25 each in favour of Rajkali Koer and Uttim Koer. The document bore the signatures of the testator and twelve witnesses, including that of the writer.

The facts of the case are stated in their Lordships' judgment, where the judgment of the District Judge, Mr. Alfred C. Brett, is referred to, and the terms of his order appear. Both the Judges in the Appellate Court alluded to the alleged will having made no provision, except a subsistence allowance, for the other wife or for the mother of the testator, or for his own shrad, and examined the evidence at length. The evidence as to the execution of the will was, in the opinion of the Appellate Court, such that the Judge should have declined to act on it. That evidence they considered to have become less valuable upon an endeavour to test it by the probabilities derived from the face of the will itself, and other sources. The Judge, in their judgment, should have held the will unproved.

On this appeal—

Sir *E. Clarke*, Q. C., Mr. *J. D. Mayne*, and Mr. *J. T. Woodroffe*, appeared for the Appellant.

Mr. *H. H. Asquith* Q.C., and Mr. *C. W. Arathoon*, for the Respondents.

Their Lordships' **judgment** was delivered by

Lord Macnaghten.—The only question in this case is whether a certain paper writing, purporting to be dated the 18th of May 1893, and to bear the signature of Narain Das, who died on the following 3rd of June, is his will or a forgery.

[461] The instrument in dispute was propounded on the 9th of June 1893 by the appellant Dowlat Koer, who was living with Narain Das as his wife at the time of his death, and had lived with him for about twenty years on that footing, whether she was lawfully married to him or not. It was challenged at once by the three respondents Babban Das, a younger brother of Narain Das, Uttim Koer his mother and Rajkali Koer his wife, and his only living wife, if Dowlat was not married to him.

After a trial which lasted fourteen days Mr. Brett, the District Judge of Gya, found for the will and decided in favour of the appellant, but refused her the costs of the suit on the ground that, the will was not registered. On appeal to the High Court Mr. Brett's decision was reversed by TREVELYAN and AMEER ALI, JJ. They dismissed the appellant's petition with costs in both Courts.

In any view of the case there is much that is obscure and much that is unsatisfactory. But after carefully considering all the circumstances, and giving due weight to the objections of the learned Judges of the High Court, their Lordships have no hesitation in accepting the conclusion at which the District Judge arrived and pronouncing in favour of the will.

Narain Das seems to have been a little over fifty years of age when he died. He was a man of low caste --a Bari At one time he was a table attendant of the Rani Asmod Koer. For some services to the Raja Run Bahadur, who became her heir, he was rewarded by valuable mokurruri grants and thus acquired a good deal of property. When in the service of the Rani he formed a connection with Dowlat Koer, a maid servant in attendance on his mistress and then a young widow. Dowlat Koer says that Narain Das married her in privacy according to the simple rites of the "Sagai" ceremony. The respondents represent her as merely a concubine discarded in favour of the lawful wife. The District Judge thought the weight of evidence was in support of Dowlat's contention. Their Lordships agree with him in this. It seems more probable that there was a marriage between Narain and Dowlat than that there was not. The point, however, is not very material. Nor is it material to enquire whether Narain's connection with Dowlat when it first **[462]** began preceded or followed his marriage with Rajkali. There again if it were necessary to come to a conclusion their Lordships would be disposed to agree with the District Judge, who does not seem to have fallen into the error attributed to him by the High Court of mistaking dates by confusing the younger Rani with the elder. Be that as it may, it is quite plain that Dowlat was not abandoned for Rajkali. For many years and down to Narain's death Dowlat was the favourite, and her influence with him seems to have been paramount. He had no issue. Rajkali and Dowlat were both childless and so was his first wife who died before he married Rajkali.

Narain had two houses within the enclosure known as the fort of Tikari. They stood about 400 yards apart. One is spoken of as the north house, the other as the south house. The south house, according to the District Judge who inspected both, is in every way the larger, the more convenient, and the better built of the two. It was bought in Dowlat's name and rebuilt by Narain for her accommodation. "After he had made a fine place of it," says one of the witnesses for the respondents, "he put Dowlat into it." In this house Narain lived with Dowlat, and her nephew Tunu, who was Narain's treasurer or cashier, and her brother Chhedi, who used to be addressed by Narain as "Chhedi Bai" or "brother Chhedi." Narain's office was there. There he kept all his valuables, his deeds, his money, and his jewels, and there the customary nuzzars or complimentary offerings were presented in his honour. The north house was a humbler edifice and maintained on a poorer scale. It was occupied by Uttim and Rajkali and Babban and Babban's two wives. "In the north house," said Babban in cross-examination, "we got no fixed monthly allowance from Narain; but I should say he sent us at the average Rs. 50 a month. His net income was say Rs. 20,000 a year."

It is common ground that Narain's illness lasted five or six months. Though he seems to have been confined to the house during the greater part of

that period, and though he was gradually getting worse, it is not disputed that he was perfectly competent to dispose of his property at the time when he is said to have made his will. In fact he did not become insensible until **[463]** the last few days, or, as Babban says, the last few hours before he died.

In these circumstances if it could be shown that Narain was minded to settle his affairs before his death, or willing to face the question at all, one would certainly expect to find provision made for Dowlat Koer and her relations. They seem to have held the first place in his affections. At any rate they were about him during his long illness. They must have foreseen the end. They were hardly likely to be indifferent to their own interests, or to shrink from pressing their own claims and disparaging the merits or exaggerating the faults of absent rivals. On the other hand, the inmates of the north house for all practical purposes were out of sight. What amount of intercourse there was between the north house and the dying man it is impossible to say. It is admitted that Uttim often came to see Narain during his last illness. Rajkali came but once, if Dowlat and Tunu are to be believed. Dowlat speaks of one visit by Babban and Rajkali. She puts the date of that visit, "soon after the deed to Tunu," which will be mentioned presently and which was dated the 28th of April 1893. "They remonstrated with Narain," says Dowlat, "for alienating his property to my relations. They spoke contemptuously of me. This led to the interchange of abuse and they left in anger." Tunu also says that Rajkali came once to complain and that Narain's reply was this: "All the property is mine to deal with as I like." On this part of the case unfortunately no help is to be got from the other side. They pretended that Narain never ceased to live with the inmates of the north house. Uttim and Rajkali and Babban too in his examination-in-chief say that Narain lived continuously at the north house, that he fell ill there, that about two months before he died they took him to the south house for change of air, and migrated with him in a body. "We all stayed there," says Rajkali, "till the death of Narain, and then we said 'let us go and worship at the house where our family gods are' "—and so they all migrated back to the north house on the following morning. The District Judge, who examined the ladies himself, had no difficulty in rejecting this story as an impudent attempt to impose upon the Court. It is shown to be untrue by the ignorance which Uttim **[464]** and Rajkali both displayed about the south house. I do not believe, says Mr. Brett, they were there at all. It is disproved by entries in the accounts and by Babban's own admissions on cross-examination. It is directly contradicted by a petition signed and presented by Babban himself on the 28th of May asking for the intervention of the police to prevent Dowlat and her relatives despoiling the south house on Narain's approaching death. Narain Das, it is stated in the petition, "has been ill in his residential house for the last five or six months. Now he is becoming worse, and there is no hope of his life, he may die to-day or to-morrow. Babu Narain Das has a kept woman who lives along with her brother and sister's son with the said Babu Saheb."

About six weeks before his death Narain made a partial disposition of his property. The evidence does not explain what led him to do so. But the fact is undisputed and not unimportant.

On the 21st of April 1893 he executed in favour of Chhedi a permanent and heritable *mokurruri* lease of a *mouzah* producing, according to Babban, a net annual profit of Rs. 600, a sum just equal to the annual allowance he was making for the north house. The lease was duly registered on the 23rd by the sub-registrar who attended at the south house for the purpose.

On the 28th of April Narain executed in favour of Tunu a permanent and heritable *mokurruri* lease of a *mouzah* called Khurey producing, according to Babban, a net annual profit of Rs. 3,000. It was duly registered on the 30th. This lease, as originally drawn and executed, was in favour of Dowlat. It was intended to have the document in that form registered at the same time as the lease to Chhedi. A petition stating its execution and asking the sub-registrar to attend for the purpose of registering it was presented on the 22nd, together with a similar petition relating to Chhedi's lease. But when the sub-registrar came he was asked to postpone the registration of the lease of Khurey on the ground that some alteration was required, and the writer of the deed was not present. A petition was then put in stating that only one deed **[465]** was ready, and so only the lease to Chhedi was registered on that occasion. So far there is no dispute. There is a conflict of evidence as to the reason for not completing the registration of the lease of Khurey as originally drawn. Babban says he was told "one afternoon" when he was in the north house "about six weeks before Narain's death" that one "Gur Sahai had come from Gya with a lease." "I went over," he adds, "to see what was up. I saw my brother and Gur Sahai and Tunu and others. I asked Narain what he was doing. He said 'I am giving a life lease of Khurey to Dowlat.' She was on one side. He commenced to sign his name. He had got half through the signature when Gur Sahai said the deed was hereditary. Then Narain refused to sign and flung the paper down." Dowlat's account of the transaction is this: "Narain was ill," she says, "five or seven months. After he got ill he gave a lease to my brother Chhedi and to Tunu, my sister's son. To Tunu he gave the lease of Khurey. He had intended to give me the lease, perpetual lease. This was written out, but I refused. I said 'You give one village to Chhedi and want to give one to me; what is to become of the rest?' He said 'I will give the rest to Tunu.' I said 'No' give Khurey to Tunu and give me the rest.' He consented. The lease to me was destroyed and Khurey was leased, perpetual lease, to Tunu eight days afterwards." Babban's story cannot be true. It is extremely improbable; the lease to Chhedi and the lease to Dowlat were both prepared on Narain's written instructions; the lease given to Chhedi was hereditary; the lease given afterwards to Tunu was hereditary too. But apart from the improbability of the story it will be observed that there is no room for the incident described by Babban. It could not have happened on the 21st, for the petition of the 22nd asking the sub-registrar to come over states that the lease was executed. It could not have happened on the 23rd. Babban says it was in the afternoon that he went over to see what was up. But the sub-registrar, who is above all suspicion, and who was called for the respondents, after stating that on the 22nd of April two petitions were put in to him to go to Tekari "to register two deeds executed by Narain Das," says: "I went on 23rd April arriving there very early; it was the hot weather. I saw Narain. He **[466]** had two deeds. But he apparently wished to amend one but could not find the writer." Dowlat's account may be true. To a certain extent she is corroborated by Babban himself. After stating that Khurey was afterwards given as a hereditary lease to Tunu he adds: "This was on the advice of Dowlat Koer." Whether Babban had any special reason for saying so or not the statement is a remarkable tribute to the influence which Dowlat had over Narain.

Putting aside the visit of Rajkali and Babban to complain of alienations of property in favour of Dowlat's relations (if the visit really took place), the evidence is a blank as to what occurred between the date of the gift to Tunu and the 18th of May, the date of the alleged will. Dowlat Koer says that

between the date she refused the lease and the date the will was given she had no talk about the will with her husband. She felt sure, she says, that he would do what he promised. Her reticence on the subject of the. will during the period in question was naturally commented upon by the learned Counsel for the respondents. It is certainly a matter for observation. But it does not go very far. It is possible that Dowlat's story may be true throughout. It is at least as possible that it may be true in the main, though she may have deviated from the truth in her anxiety to make out that Narain was ready to fulfil his promise of his own free will and without any pressure from her.

The document put forward as Narain's will and the fulfilment of his promise to Dowlat is simple enough in its dispositive clauses. His entire property is left to Dowlat Koer absolutely subject to the payment to Uttim and Rajkali each of Rs. 25 a month.

The document purports to bear the signature of Narain Das and the signatures of twelve witnesses including the writer.

No one comes forward to say that Narain's alleged signature is not his own handwriting, and yet his handwriting must have been well known to some of the persons who were witnesses for the respondents. The District Judge notices the point, but observes that it may have been an accidental omission, and says that he does not wish to lay too much stress upon it. The omission, however, acquires much greater signi- [467] ficance from what took place in the Court of Appeal. One of the learned Judges in the High Court was familiar with the native character, and evidently not disposed to overlook the assistance to be derived in such a question as this from a comparison of handwriting. He scrutinized the signatures appended to the document in question. He saw, or thought he saw, some indication tending to show that the signatures had not all been written at the same time. He compared the signature of one witness with a signature which that witness subscribed to his deposition in Court, and came to the conclusion that the two signatures were not made by the same person. But as to the signature of Narain Das, he says nothing, although he had actually before him in documents put in evidence signatures of Narain which were unquestionably genuine.

The alleged writer of the will was one Sheo Pershad, a young mukhtar. It seems that in May 1893 there was a local investigation going on in regard to some litigation in connection with a village called Paluhan, which was situated about two miles from Tikari. A number of lawyers and others concerned in the inquiry were gathered together at Tikari. Among them came Sheo Pershad and Sheo Sahai, another young mukhtar. They put up in the same house at Tikari. They were old acquaintances, they said, of Narain. They heard he was ill and went to see him on the 12th. On the 16th he sent for them and consulted them about making over his property to Dowlat Koer. At first a deed was suggested, but the amount of the stamp duty seemed a formidable objection, and so after some discussion they advised a will. He told them how he wished to dispose of his property and they prepared a draft from his verbal instructions. It was their joint production. They left the draft with Narain that evening. On the evening of the 18th they were summoned again to Narain's house in order to complete the transaction. Sheo Pershad "faired out" the draft. Witnesses were collected and the will was duly executed. They both saw Narain execute it and they both attested his execution. That was their story. Of the other ten seven deposed to seeing Narain sign the will. They signed as witnesses and saw the other witnesses sign. That leaves three of the alleged witnesses to be accounted for. One [468] was absent from illness. The remaining two were Kali Churn and Bunkey Behari, a

young pleader in the Gya Court, whose name on the will appears in English with the word "witnessed" also in English before it. Kali Churn was summoned as a witness by the petitioner. He evaded service and then was arrested. When he was brought into Court neither side would call him. He was called by the Judge. He said the writing of his name on the will resembled his, but was not his, and he tried to make out an *alibi*. The Judge did not believe the *alibi* and thought his evidence of no weight. Bankey Behari was also distrusted by both sides and called by the Judge. He admitted that one day just after the application for probate when he was in the Bar Library he was taxed with having signed Narain's will and that he did not deny it directly. What he said was, "As far as I recollect I have not signed any will." "Those," he adds, "were the words I uttered. I meant to absolutely deny my signature. But I did not say that I had never signed." Before Mr. Brett he was more positive and more intelligible. He declared that his name on the document in dispute was not his signature. "My signature," he said, "has been forged." To some extent, however, his evidence curiously corroborates the appellant's case. He admits that on the evening of the 18th of May somebody came to him and said Narain wanted him. "The messenger," he says, "told me that Narain Das had heard I was in Tikari, and that others were with him and he wanted to see me as he was ill. He said, perhaps, that the men were writing something." "My grandfather," he said in another part of his evidence, "was a pleader of the Raj, and Narain Das had been an influential servant, so it did not strike me as peculiar that he sent for me." All this is entirely in accordance with the story told by the witnesses for the appellant. As to what followed there is a direct conflict of evidence. The appellant's witnesses say, Bankey Behari obeyed the summons and witnessed Narain's will. He says he "was tired and did not go," showing, as the Judge thought, an indifference to his professional prospects remarkable, to say the least of it, in so youthful a practitioner. The District Judge in whose Court he practises did not believe him. The High [469] Court did. They found no resemblance between the signature he made at the foot of his deposition in Court and the signature shown to him a few minutes before and denounced by him as a forgery. They seem to have thought a difference in the handwriting at that critical moment conclusive in his favour. Moreover, they thought the writing on the will "an unformed writing like that of a schoolboy"—the signature "of a beginner just learning to write," while the signature on the deposition was "in the running hand of a person much accustomed to writing in English." On the other hand, the District Judge observes that the words on the will have a genuine look about them . . . . they do not look like an imitation. Their Lordships have had the will before them. So far as regards the character of the writing they are unable to agree with the learned Judges of the High Court. No fault is to be found with the signature. It seems to be written boldly and would pass for the writing of a well educated English gentleman.

It is unnecessary to discuss in detail the evidence of the witnesses for the appellant. The District Judge has gone through it very carefully noticing apparently everything that struck him as suspicious in statement or demeanour. On the whole he came to the conclusion that there was no sufficient reason for refusing credence to the appellant's story. One circumstance may be noticed in passing which, in the view of TREVELYAN, J., tells strongly against the appellant, while the District Judge thinks it throws no light on the case. It is this: Narain's accounts were kept by Tunu. The accounts for the last year are missing. If they had been forthcoming, and if they could

have been trusted, they might have been useful in clearing up some disputed points. The absence of these accounts gave rise to a good deal of argument before the District Judge. But he was, he says, "unable to form any definite opinion as to the question as to on whom the disappearance casts suspicion." TREVELYAN, J., felt no difficulty on that score. "There is," he says, "no doubt to my mind that this book can only have been kept back by Dowlat's party." And then he proceeds to draw the inference which suppression of evidence invariably suggests. Their Lordships do not think it by any means clear [470] that Dowlat's party ought to be held accountable for the non-production of the last year's book of accounts. At any rate, it is obvious, that an unscrupulous man concerned in forging a will would not scruple to manipulate accounts for his own purposes, if he thought he could do so without fear of detection. As the whole book was written up by Tunu, there would be no difficulty in his replacing an incriminating page by a new leaf with all necessary entries to confirm his story. It is difficult to see why Tunu should have suppressed a piece of evidence which he might so easily have made to serve his purpose.

The District Judge and the learned Judges of the High Court both deal with the main question at issue on a broad view of the whole case. It is little wonder that they come to opposite conclusions, for they approach the matter from very different points of view. Patiently, and with every appearance of impartiality, the District Judge sets himself to investigate the actual facts. He tries to place himself in the position of the alleged testator with all his actual surroundings. On the other hand, AMEER ALI, J., who claims to be intimately acquainted with the usages and habits of thought of his Hindu fellow-countrymen, though not himself, it may be presumed, a member of their community, approaches the question from the point of view apparently of a pious Hindu gentleman, scrupulous and exact in the discharge of every moral and religious duty--so scrupulous indeed and so exact that in the opinion of the learned Judge it becomes a matter of grave importance that no provision is to be found in the will for the worship of a family idol, whose worship, as it appears, was maintained during the testator's lifetime by the annual expenditure of the sum of one rupee. Tried by so high a standard the will is found wanting in many things. But for all that it is not an unlikely disposition for such a man as Narain Das to have made under the circumstances. As regards the monthly allowance to Uttim and Rajkali it will be observed that the aggregate of the two allowances is precisely the sum which Narain had been in the habit of providing for the maintenance of the north house. And it is perhaps remarkable that the allowance to Uttim, which seems to the High Court so niggardly as to throw doubts on the genuine-[471]ness of the will, is the exact amount which Rajkali and Babban allotted to her when they assumed to divide the inheritance between them on the 6th of July 1893 under a deed of compromise.

The learned Judges of the High Court have embarked upon an enquiry as to the truth of the charges against Rajkali and Babban contained in the introductory part of the will. Their Lordships cannot think that the enquiry is much to the purpose. There is certainly no evidence in support of these charges. But in estimating their value and importance one cannot help seeing that something must be attributed to the zeal of the two young mukhtars who would probably exert all their skill to amplify and embellish whatever Narain may have said in disparagement of those whom he proposed to disinherit. Something, too, may be due to the ill-feeling between the inmates of the two houses which must have been tolerably bitter, if one is to judge from the steps which Babban thought fit to take against Dowlat,

when Narain lay a-dying. Whatever the will may say to the discredit of Babban, all that seems to be alleged against Rajkali is ill-temper coupled with disobedience. We know that Narain preferred living with Dowlat whatever the reason was. The will hints at "several other reasons"—a suggestion one would think too vague to be taken seriously. But in its vague generality, AMEER ALI, J., finds a deep meaning. He has no doubt that those apparently innocent words were intended to convey "an insinuation of unchastity." It is obviously quite impossible to accept that construction on the faith of a statement, whatever may be its source or apparent authority, which the appellant had no opportunity of meeting by direct evidence or testing by cross-examination. In the Court of First Instance, as far as we can see, the point was not even suggested. It is not alluded to in any one of the 27 reasons set forth in the memorandum of appeal, and certainly it is satisfactory to find that it escaped the notice of Rajkali and her advisers. In her petition of objection put in on the 14th of July 1893 she alleges that "several of the statements made in the alleged will are false." She avers that "she was never disobedient to her husband nor was he ever displeased with her," but she makes no reference to the imputation of unchastity which she naturally would have resented, [472] if she had supposed that the will contained any insinuation of the sort. In the course of the litigation and at the trial the appellant certainly made a direct charge of unchastity against Rajkali, a charge for which there appears to have been no foundation whatever. But it would be a mistake to connect that charge with anything in the will. It seems to have been provoked by the attacks which Babban and Rajkali made on the appellant at the time of Narain's death. Insulted as she was and treated with great cruelty it is hardly surprising that Dowlat Koer should attempt to retaliate with any weapon she could think of.

Some minor points were pressed. There was the non-registration of the will—due perhaps to Narain's state at the time. Then it was said that the witnesses to the will were in social position inferior to the persons who attested the lease to Chhedi and the lease to Tunu. That may be accounted for by the circumstances under which the will was executed, and after all the inferiority may not have been so great as it was represented. At least we find that one of the witnesses to the two leases, who is described as a "rais" or "big man," says of himself "my profession is service, but I am not in any employ." Then it was pointed out that the witnessses to the will were on their own showing singularly reticent as to the transaction in which they say they were engaged. So they were, and this reticence is one of the difficulties in the case. But even here the evidence is not all one way. Sheo Pershad, for example, says he told some mukhtars. Among others, he says, he told Gopal Lal whom he pointed out in Court. About the 23rd May he says he told him that Narain Das was ill and had made a will. Now Gopal Lal seems to have been an adherent of Babban and to have been the writer of the deed of compromise between Babban and Rajkali which has already been mentioned, and he was not called to contradict Sheo Pershad's statement.

It is not necessary, however, to discuss these points further. On a review of the whole case their Lordships are of opinion that the appellant has established the genuineness of the will, and that the High Court were not justified in overruling the decision of the District Judge.

[473] Their Lordships will, therefore, humbly advise Her Majesty that the decision of the High Court ought to be reversed with costs and the

judgment of the District Court restored. The respondents will pay the costs of the appeal.

Solicitor for the Appellant: Mr. *H. G. Dallimore.*

Solicitors for the Respondents: Messrs. *T. H. Wilson & Co.*

C. B. *Appeal allowed.*

[25 Cal. 473]

PRIVY COUNCIL.

The 11th November and 8th December, 1897.

PRESENT:

LORDS WATSON, HOBHOUSE, AND DAVEY, AND SIR R. COUCH

Suleiman Kadr Bahadur............Plaintiff

versus

Mehndi Begum............Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Benami Transaction—Onus of Proof—Purchase, ism farzi, *in the name of a person other than the real purchaser—Proof of the actual transaction.*

In liquidation of a mortgage debt the mortgagors sold the mortgaged property and executed a sale deed with a recital that they had received from the wife of the mortgagee the amount of the mortgage debt and interest with also a small sum of money.

In after years the husband, now plaintiff, and the wife, defendant, contested which o the two was the real purchaser.

Held, that the burden of proving that the mortgagee gave the consideration for the sale was upon him at the outset, as he claimed contrary to the tenor of the admitted document; which burden had been discharged by his evidence that the substantial consideration for the sale by the mortgagors was the extinction of the mortgage debt due to him.

This proof shifted on to the wife the burden of showing that this extinction was effected by her money, or of showing that she had continuous possession in accordance with the sale deed. She did not prove that any money was paid by her, either to the vendors or to the mortgagee; nor was there such an amount of possession proved as affected the question either way. The conclusion was that the wife's name was used *ism farzi* for the husband's, as alleged.

APPEAL from a decree (11th August 1892) reversing a decree (12th April 1890) of the District Judge of Lucknow.

The plaintiff in the suit giving rise to this appeal was Mirza Suleiman Kadr, and the defendant was his wife, Nawab Mehndi [474] Begum Sahiba, who was living apart from her husband. Both were members of the ex-Royal family of Oudh. (See I. L. R., 21 Cal., 135.)

The question between them was as to which of them was the real purchaser of the property in suit under a purchase evidenced by deed of the

14th May 1875, which purported to convey to the wife, an arrangement which the husband, now appealing, contended was *ism farzi* for himself.

On the 10th May 1870, before the marriage of the parties which took place in July 1871, the plaintiff became mortgagee of the property (houses in Lucknow) for Rs. 8,500, at 6 per cent. per annum repayable in five years.

On the 14th May 1875, while the parties were still living together, the mortgagors executed a sale deed of the property to the wife. The recitals and other contents of that document appear in their Lordships' judgment. In 1886 the husband and wife separated, and this suit was commenced on the 2nd August 1888. The plaint alleged that the possession of the property by the wife began in May 1888, and prayed a declaration that the sale deed had been taken by the husband as purchaser in his wife's name, he being the real vendee, and that the transaction was *ism farzi* for his benefit. The defence was that the wife had purchased the property with her own money in 1875, having since then been in adverse proprietary possession.

The issue raised questions on these contentions, and the District Judge decided that " the sale deed was fictitiously executed in the defendant's name," making a decree which declared the plaintiff entitled to the property.

The Appellate Court, composed of the Judicial Commissioner and the Additional Judicial Commissioner, reversed the lower Court's decree. In their judgment the plaintiff had failed to discharge the burden of proof upon him, both as to title and possession. They dismissed the suit with costs in both Courts.

The plaintiff having appealed, -

Mr. *C. W. Arathoon*, for the appellant, argued that the respondent had not proved the payment of the purchase money by her, **[475]** or her possession for more than a brief period, it having been necessary for her to prove her case, when it had been shown that the consideration for the purchase of the property was the discharge and extinction of the mortgage debt. The appellant had explained why the sale deed had been in the name of the respondent; so that the source of the money, whereby the mortgage and sale were obtained, was the governing question. The whole evidence was before the Appellate Court to consider its effect.

Mr. *J. D. Mayne*, for the respondent, referred to the burden of proof that was on the plaintiff to outweigh the presumptions that arose from the statements in the sale deed. The use of the wife's name, and those statements threw the burden on to the appellant, and it had not been effectively discharged.

Mr. *C. W. Arathoon*, in reply, referred to the judgment in *Sham Lall Mitra* v. *Amarendro Nath Bose*, (1895) I. L. R., 23 Cal., 460, (475). This had cited *Debia Chowdhrain* v. *Bimola Soondree Debia*, (1874) 21 W. R., 422, as establishing, on the authority of *Ram Surran Singh* v. *Pran Peary*, (1870) 13 Moo. I. A., 551, that the right of a party to an *ism farzi* transaction of this kind was to have the true position ascertained, and that effect should be given to it, although he had taken part in concealing it at another time.

Their Lordships' **judgment** was delivered on the 8th December 1897 by

Lord Davey.—The appellant is a son of the late King of Oudh. The respondent is his wife. They were living together in the year 1875, but in the year 1886 they separated and they have since lived apart. By a mortgage bond, dated the 10th May 1870, two ladies mortgaged certain houses and lands to the appellant to secure Rs. 8,500 with interest at the rate of 8 annas per cent. per mensem for a stipulated period of five years. Nothing was paid by the mortgagors on account of either principal or interest, and on the 14th May 1875

a sale deed of the mortgaged property was executed by the mortgagors, whereby, after reciting the mortgage and that the mortgagors had not been [476] able to pay anything up to date, and that according to accounts it appeared that they had then to pay to the appellant the sum of Rs. 11,000 on account of principal and interest, it was witnessed that the mortgagors sold the mortgaged property in lieu of Rs. 11,000 to the respondent, and that the mortgagors having received the purchase money in full from the said vendee had paid it to the appellant in liquidation of the debt due to him under the deed of the 10th May 1870. It appears from the endorsement on the sale deed that a further sum of Rs. 250 was paid in cash to the mortgagors, and this sum seems to have found its way back into the hands of the appellant's then agent.

The question on this appeal is what the transaction recorded in this sale deed really was. The appellant contends that the sale deed was executed *ism farzi* (fictitiously) in the name of the respondent, and that he was the real purchaser and assumed proprietary possession of the property comprised in the deed. The respondent, on the other hand, alleges that she purchased the property in suit with her own money and has ever since been in adverse proprietary possession thereof.

The burden of proof is in the first place upon the appellant who claims against the tenor of the deed. He states in his evidence that the consideration for the sale was the mortgage money plus interest, and the sum of Rs. 250 which he says that he paid through his then agent one Achche Sahib, and again that the mortgage money was not recovered in cash but formed part of the consideration. The substance of his evidence is that no money passed in the transaction except the Rs. 250. He accounts for the production of the title deeds by the respondent by saying that they were in the custody of Achche Sahib who was formerly his agent, but had been dismissed, and who was prior to and at the time of the suit acting exclusively for the respondent. He further says that Achche Sahib advised him to have the sale deed in the name of the respondent in consequence of some threatened litigation. The appellant's evidence is confirmed by that of Kirpa Ram and Maharajah Tej Krishna Sahib who were relatives of the vendors and negotiated the transaction on their behalf. They both state that the consideration was not received in cash [477] except as to the Rs. 250, which was taken back from the vendor's agent by Achche Sahib, and that the sale deed was executed in the name of the respondent by the orders of the appellant. The evidence of the vendors, who were both purdah ladies, is less precise, but to the same effect.

It is apparent from this evidence, and indeed it is not denied, that no money in fact passed from the nominal purchaser to the vendors, and from the latter to the mortgagee, and that the narrative of the deed is not, therefore, in accordance with the facts. The effect, and doubtless the object, of the deed is to make it appear that the consideration to the vendors for the sale proceeded to them from the respondent, so as to give her an apparent title for value, whereas the real consideration to the vendors being the extinction of the mortgage debt, which was the property of the appellant, it proceeded from him. Their Lordships think that this circumstance and the other evidence of the appellant and his witnesses are sufficient to call upon the respondent for an answer and to shift the burden of proof upon her. This burden she may discharge by showing that the purchase money, though not paid by her to the vendors, was paid to the appellant out of her moneys, or by evidence of continuous possession in accordance with the deed. The respondent was called as a witness by the appellant. In her evidence she states as follows: -

"My husband told me that there was no use in keeping money, that he had a house in mortgage which I should buy, that it was very cheap, that I

will get rents and that it will be sold for Rs. 11,000. I told him that he should speak to my aunt (Ammi Jan), if she accepts I will accept. The plaintiff then spoke to her and she consented. Thereupon I also consented. Then the plaintiff told my aunt that the Rani's mukhtar had come, and if she, my aunt, gives the money the plaintiff will make arrangements for the purchase. Thereupon my aunt sent Rs. 10 000 in cash with the plaintiff and asked Achche Sahib to send for the remaining Rs. 1,000 thereafter. This Rs. 10,000 belonged to me and was kept in deposit with my aunt. Then I sent Agha Nawab, my mukhtar, who got the deed executed. The plaintiff got the remaining Rs. 1,000 from Achche Sahib. The latter paid the money on my [478] behalf as my mother had told him to pay. Then Agha Nawab got the deed of sale duly executed and registered, and then gave over to me the said deed of sale as well as the mortgage deed. Agha Nawab took Rs. 250 more from me which he said the plaintiff had told him to pay to Kripa Ram, mukhtar of the Ranis. Since purchase the house in dispute has been all along in my possession . . The above facts were known to Agha Nawab, Mirza Muhammad, Daroga, Achche Sahib, Saiyid Mustafa and others whose names I cannot recollect. . . When my aunt paid the money to the plaintiff I was sleeping; when I got up my aunt told me that she had paid the money and Taijan Mahaldar told me that she had carried the money with the plaintiff." Achche Sahib states he was told that Rs. 1,000 was short and was asked to pay it, and paid it to Taijan Mahaldar and so far he confirms the respondent's evidence. He further states that he did not see the price Rs. 11,000 paid. Achche Sahib, however, was a dismissed servant of the appellant. He says he resigned the appellant's service, because the appellant gave him orders to oppress the respondent, and he is now the agent of the respondent and was made a defendant in the appellant's suit for restitution of conjugal rights. The District Judge described him as "a most shifty and unsatisfactory witness." On the other hand the respondent did not call as witnesses her aunt, her mother, Taijan, Agha Nawab or Saiyid Mustafa and there is no explanation of their absence. Nor were any questions addressed to the appellant in cross-examination with a view to showing that money was paid to him by the respondent's direction or on her behalf. There is, therefore, no real corroboration of the respondent's evidence, and their Lordships cannot accept her evidence as reliable proof that any money was paid by her either to the vendors or the mortgagee on their account.

The evidence as to possession is vague and unsatisfactory on both sides. The balance, perhaps, inclines in favour of the respondent, but in the opinion of their Lordships there is not such an amount of possession proved as to affect the question either way.

Their Lordships will, therefore, humbly advise Her Majesty [479] that the order appealed from be reversed, and instead thereof an order be made dismissing the respondent's appeal to the Court of the Judicial Commissioner with costs. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent Messrs. *Young, Jackson, Beard and King.*

C. B.

NOTES.

[In (1901) 29 Bom., 306 it was pointed out that sec. 82, Indian Trusts Act, 1882, did not take away the effect of this ruling.]

[25 Cal. 479]

PRIVY COUNCIL.

The 10th November, 1897.

PRESENT:

LORDS WATSON, HOBHOUSE AND DAVEY, AND SIR R. COUCH.

Pertab Bahadur Singh............Plaintiff

versus

Badlu and others............Defendants.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Oudh Land Revenue Act,(XVII of 1876), sections 52, 53—Claim to resume grant.

A proprietor in Oudh claimed to resume a perpetual lease as having been granted by his ancestor at a favourable rent, without the sanction, but otherwise under the circumstances, contemplated by section 52 of the "Oudh Land Revenue Act," XVII of 1876, so that the grant was resumable.

Held, that the claim failed. The undefined charges, expenses of management, and other payments incidental to the lease, might have been such as to make the rent paid a reasonable one as between lessor and lessee; and that the favourable nature of the rate of rent had not been established.

APPEAL from a decree (8th June 1894) of the Judicial Commissioner of Oudh, affirming a decree (30th April 1891) of the District Judge of Rae Bareli.

The question raised on this appeal was whether a perpetual lease of three villages in the district of Partabgarh granted by a *talukdar* of Tarwal, the ancestor of the plaintiff, who was his heir and the devisee under his will, was or was not resumable under section 52 of the Oudh Land Revenue Act, XVII of 1876.

Section 52 enacts as follows: "All grants, whether in writing or otherwise, by proprietors, or the persons whom they represent, of land to be held exempt from the payment of rent, or at a favourable rate of rent, are hereby declared to be liable to resumption, [480] unless such grants have been sanctioned or confirmed by the Governor-General in Council or the Chief Commissioner."

The plaintiff's ancestor and predecessor in estate, Raja Ajit Singh, *talukdar* of Partabgarh, executed on the 7th March 1874, in favour of Bhikha Ahir, the father of the defendants, a perpetual lease (*naslan bad naslan*) of three villages. It was agreed in the deed of lease that the lessee should pay annually to the lessor for rent, Rs. 2,191, and should be liable to contributions such as *bhent* (presents), *nachna* presents to dancers, *rasad* (supply) and other dues paying also the *patwaris* and *chaukidars*, and defraying the village expenses. The lessee was not to alienate on pain of the lease becoming void.

Lessor and lessee both died in 1889.

The suit was brought on the 6th September 1890 for a declaration that the lease was liable to resumption by the present owner of the proprietary right, on the ground that it was granted at a favourable rate of rent, without the sanction referred to in section 52 of the Oudh Land Revenue Act, 1876.

The defendants, some of whom were minors, answered that the lease was not a grant within the meaning of the section, and was a lease at a reasonable rate. It was added that the villages had been granted in consideration of services during the troubles in Oudh. The Raja, having received the grant of the *taluk* Tarwal, thereupon made the grant of the lease now in question to the defendants' father for services at the same time.

Whether the rent was a favourable one, and whether section 52 was applicable to permit the resumption, were questions raised by the issues.

The plaintiff filed accounts showing the gross rental of the villages comprised in the lease, at the date of the grant, and at the date of suit brought.

The District Judge was of opinion that the lease was not a grant within the meaning of section 52, and that the rent reserved by the lease in 1874 was not a favourable one. He therefore dismissed the suit.

[481] On an appeal heard by a Court consisting of the Judicial Commissioner and the Additional Judicial Commissioner, the lease was held to be a grant within the meaning of the Act. But the Court found that the plaintiff had failed to prove that the lease was granted at a favourable rate of rent: and the suit was dismissed.

The material part of the Judicial Commissioner's judgment was as follows:—

"It appears to me that the words 'at a favourable rate of rent' mean at a rent which is not a fair, reasonable and equitable rent." Badlu, one of the defendants, distinctly pleaded that the rent was reasonable; and it was incumbent on the plaintiff to prove the issue framed by the lower Court, *viz.*, whether the rent reserved by the lease was favourable.

"This the plaintiff attempted to do by producing evidence with the view of showing what the gross rental (including *sair* and *sewai* items) of the three villages was in 1280 Fasli (when the lease was granted) and 1296 Fasli (when these proceedings were instituted, respectively, according to the *jamabandis*, corrected where necessary by the imposition of full rents on lands held by the lessee's family. The gross rental of the three villages (including *sewai* and *sair* items) according to the *jamabandis*, as corrected by the *patwaris*, amounted to about Rs. 3,960 and 3,980 in 1280 Fasli and 1296 Fasli respectively average Rs. 3,970. According to the uncorrected *jamabandis* the gross rental in 1280 Fasli and 1296 Fasli was Rs. 2,728 and Rs. 3,094, respectively.

"The appellant contends that this evidence is sufficient, and that it must be inferred under the circumstances that the rent fixed by the lease (Rs. 2,191) was favourable. It appears to me, however, that it is not sufficient for the plaintiff to prove that the gross rental (including *sair* and *sawai* items) of the three villages according to the corrected *jamabandis* was much in excess of the rent reserved by the lease: but that it was also incumbent upon him to show by some standard or criterion that the rent reserved by the lease was not fair and reasonable, but favourable. In the absence of such standard or criterion how is the Court to determine in the case of a lease of a village whether the rent is a fair and reasonable one or otherwise? The appellant has not attempted to show by the evidence that the three villages or any of them had been previously leased or could have been leased at a rent in excess of that entered in the lease; nor has he endeavoured to show what percentage of the gross rental is ordinarily left to the lessee of a village in the pargana, district or division in which the three villages in question are situated, *i. e.*, what percentage of the gross rental is ordinarily considered to be a fair and reasonable rent payable by the lessee of a village, and to what extent the liability to contribute *bhent*, *nachna*, *rasad*, etc., on the occasions of marriages and deaths in the lessor's family would affect the letting value of a village.

[482] "In the absence, therefore, of any evidence showing what rent might fairly and reasonably have been obtained by the *talukdar* by a perpetual lease of the three villages in question under conditions similar to those contained in the lease under consideration, I

would hold that the plaintiff has failed to prove that the lease was granted at a favourable, rate of rent."

The Additional Judicial Commissioner concurred in dismissing the suit.

On the plaintiff's appeal,—

Mr. *J. D. Mayne*, for the appellant, argued that the lease was granted at a favourable rent within the meaning of section 52. The defendants had not denied that the rent was at a favourable rate. The amount expended by the lessee had not been stated, nor what result had followed upon expenditures. Their pleadings substantially admitted that the rate was favourable, and they accounted for its being favourable by the statement of meritorious service rendered by the grantee to the grantor; the accounts produced by the plaintiff were at all events *primâ facie* evidence that the rent was a favourable one and it had not been rebutted.

The respondents did not appear.

Their Lordships' **judgment** was delivered by

Lord Hobhouse.—Their Lordships see no reason for differing from the Courts below in this case. The Courts below have treated the matter as a question of inquiry whether the rent was a favourable one or not, and they have held, as it appears to their Lordships quite justly, that the appellant has not produced any proof to show that the rent was a favourable rent. The undefined charges, the expenses of management, and so forth, may have been such as to make it a perfectly reasonable rent as between lessor and lessee. The case, therefore, fails, and their Lordships must humbly recommend Her Majesty that the appeal be dismissed. As the respondents do not appear there will be no costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Lawford, Waterhouse and Lawford.*

C.B

[483] CRIMINAL REFERENCE.

The 21st December, 1897.
PRESENT:
MR. JUSTICE BANERJEE AND MR. JUSTICE HILL.

Corporation of Calcutta
versus
Eastern Mortgage Agency Co., Ld.*

Calcutta Municipal Consolidation Act, Bengal Act (II of 1888), section 87, and Schedule II, Rule 7, clause (6)—License tax—Liability to tax of Company carrying on business through Agents in Calcutta, and not having a registered place of business.

A joint-stock company carrying on money-lending business through Agents in Calcutta, where it has no registered place of business, is liable to pay license tax under section 87 and Schedule II of the Calcutta Municipal Act of 1888.

Corporation of Calcutta v. *Standard Marine Insurance Company*, (1885) I. L. R., 22 Cal., 581, distinguished.

THIS was a reference made by an Honorary Presidency Magistrate of Calcutta under section 432 of the Criminal Procedure Code (Act X of 1882).

The facts of the case and the questions referred for the opinion of the High Court appear from the following letter of reference:—

"During the official years 1893-94, 1894-95 and 1895-96, commencing on the 1st of April and ending on the 31st March every year, Messrs. Gillanders, Arbuthnot & Co., merchants, carried on as they still carry on business in Calcutta as agents of the Eastern Mortgage Agency Company, Limited, a Joint Stock Company registered and having their principal place of business in England and having a paid-up capital of more than ten lakhs of rupees. The defendant Company have no place of business in India. The business of the Company, as carried on by their agents, Messrs. Gillanders, Arbuthnot & Co., consists in lending money on mortgages in Calcutta. The moneys so advanced belong to the defendant Company, and the profit or loss in those transactions accrues to the defendant Company, and not to Messrs. Gillanders, Arbuthnot & Co. Messrs. Gillanders, Arbuthnot & Co., take out licenses in their own name for the business carried on by them in Calcutta, and have done so for the years 1895-96 and 1896-97. The defendant Company took out licenses in their name through Messrs. [484] Gillanders, Arbuthnot & Co. for the official years 1893-94 and 1894-95 under sections 87 and 88 of Act II (B. C.) of 1888, the licenses being granted under class I in the second schedule to the Act. No license, however, has been taken out by the defendant Company for the official year 1895-96, and the present proceedings were instituted in consequence by the Corporation. The defendant Company made no application to the Commissioners for exemption in accordance with Rule 7, clause (b) in the second schedule to the Municipal Act. Rule 7 down to the end of clause (b) is as follows:—

(7) The liability of any person to take out a license and the class under which he is liable shall be determined in the following manner.

Any person who has taken out a license for the preceding year or been fined under section ninety for not taking out a license during such year, shall be presumed to be liable and entitled to take out a license under the class in which he was then placed in the year for which the tax is being levied.

* Criminal Reference No. 2 of 1897, made by J. C. Dutt, Esq., an Honorary Presidency Magistrate of Calcutta, dated the 16th of December 1897.

(b) Any person who, in consequence of any change in his profession, trade or calling or place of business, or for any other reason, considers himself entitled to take out a license in a lower class than before, or to be altogether exempted, may present an application to that effect to the Commissioners at any time before the first day of July. If no application is made by that date he will be liable to take out a license as prescribed in clause (a).

The Commissioners shall pass orders on such application, and the license shall be taken out in accordance with such orders unless appealed against under clause (e).

It is urged on behalf of the Corporation that the defendant Company are liable to take out a license under section 87 of the Municipal Act inasmuch as they exercise in Calcutta within the meaning of that section one of the professions, trades or callings prescribed in the second schedule to the Act, namely, the profession, trade or calling of money-lender, and further that the fact that licenses for the official years 1893-94 and 1894-95 were taken out by the defendant Company, and no application for exemption was made on their behalf before the 1st of July 1895 in accordance with Rule 7, clause (b) quoted above, absolutely precludes the Company from raising the question of liability or non-liability under section 87 of the Act, and the defendant Company are therefore bound to take out a license for the official year 1895-96.

On behalf of the defence it is contended that exercising a profession, trade or calling in Calcutta does not mean exercising a profession, trade or calling through agents in Calcutta by a person or company having no registered place of business in India, and that therefore the defendant Company do not come under section 87 of the Act, that this has been held by the High Court in the case of *Corporation of Calcutta* v. *Standard Marine Insurance Company* [(1895) I. L. R., 22 Cal., 581]. That Messrs. Gillanders, Arbuthnot & Co., having [486] taken out a license for the year 1895-96 for the business carried on by them including the business of the defendant Company which they carry on as their agents, it will be taxing the same business twice over if the defendant Company be held liable to take out a license; that apart from the fact that the agents of the defendant Company were not acquainted with the provisions of the Municipal Act, Rule 7, clause (b), referred to above cannot override section 87 of the Act, and does not preclude a person from contending that section 87 does not apply to him, and that therefore he is not liable. As this case is of some importance, and the points involved in it frequently come up for decision, I have thought it advisable to submit the following questions for the opinion of the High Court.

1. Do the words in section 87 of the Municipal Act "exercise in Calcutta any of the professions, trades, or callings prescribed in the second schedule" mean and include the exercising through agents in Calcutta of any such profession, trade or calling by a person or company having no registered place of business in Calcutta?

2. Is the Eastern Mortgage Agency Company, Limited, bound under section 87 of the Act or Rule 7 clause (b) in the second schedule to the Act to take out a license for the official year 1895-96 under class I in that schedule?

In connection with the second question I have found that Messrs. Gillanders, Arbuthnot & Co., came to know of the decision in the case of the *Corporation of Calcutta* v. *The Standard Marine Insurance Company, Limited*, in April 1895, but they not only did not apply to the Commissioners for exemption before 1st July 1895, but took out the license for the official year 1894-95 on the 27th of March 1896.

As to the first question it seems to me that all that their Lordships decided in the case of the *Corporation of Calcutta* v. *The Standard Marine Insurance Company, Limited*, was that the Standard Marine Insurance Company, Limited, were not liable to take out a "personal license" inasmuch as the business of insurance was not one of the occupations mentioned in the second schedule to the Act, and that the said company were also not liable to take out a "local" license as keepers of a place of business under class VI, because they had no place of business in Calcutta. It was not decided, so far as I can make out, as to whether the said Company would have been held liable to take out a personal license if the business of insurance had been one of the occupations mentioned in the second schedule to the Act. I think, therefore, that the decision in that case does not apply to the present case. I am inclined to

hold, however, that the defendant Company in the present case are not liable to take out a license under section 87. The mere carrying on of business through agents does not seem to me to be within the meaning of that section, especially when the agents take out a license for the business carried on by them, which includes the business of the defendant Company. The tax levied by the Municipality is not in respect of the income derived from a business, but for the privilege of carrying on the business itself. **[486]** Such cases therefore as those of *Erichsen* v. *Last*, (1881) L. R., 8 Q. B. D., 414; *Werle & Co.* v. *Colquhoun*, (1888) L. R., 20 Q. B. D., 753, which are under the Income Tax Act, stand on a different footing, and have no application to a case like the present.

As to whether the defendant Company are bound under the circumstances stated above to take out a license for the official year 1895-96, I am inclined to hold that they are bound to take out a license for that year. The wording of Rule 7, clause (*b*) seems to me to be imperative and to give no discretion to the Court in the matter. The fact that no application for exemption was made before the 1st of July 1895 seems to me to be fatal to the defence; and the plea of ignorance of the Municipal Law cannot of course be entertained in the face of the well known maxim *ignorantia juris non excusat*."

The parties were not represented at the hearing of the reference.

The **judgment** of the High Court (**Banerjee** and **Hill, JJ.**) was as follows:—

In this case Mr. J. C. Dutt, an Honorary Presidency Magistrate of Calcutta, has referred for the opinion of this Court the two following questions of law under section 432 of the Code of Criminal Procedure.

Do the words in section 87 of the Municipal Act "exercise in Calcutta any of the professions, trades, or callings prescribed in the second schedule" mean and include the exercising through agents in Calcutta of any such profession, trade or calling by a person or company having no registered place of business in Calcutta?

Is the Eastern Mortgage Agency Company, Limited, bound under section 87 of the Act or Rule 7, clause (*b*) in the second schedule to the Act to take out a license for the official year 1895-96 under class I in that schedule?

We are of opinion that upon the facts stated in the reference the first question should be answered in the affirmative. There is no reason why a Joint Stock Company exercising through an agent in Calcutta the profession, trade or calling of a money-lender, should not be held to exercise in Calcutta one of "the professions, trades, or callings prescribed in the second schedule," within the **[487]** meaning of section 87 of Act II of 1888 (B.C.) the profession, trade or calling of a banker and a money-lender being distinctly mentioned in the said schedule. We quite agree with the learned Presidency Magistrate in thinking that the case of *Corporation of Calcutta* v. *Standard Marine Insurance Company*, (1895) I. L. R., 22 Cal., 581, does not decide the present question, the point decided in that case being that an Insurance Company carrying on business by an agent in Calcutta is not bound to take a personal license, as it does not exercise any profession, trade or calling prescribed in the second schedule to the Act, the business of an Insurance Company not being mentioned in that schedule, and that it is not bound to take any local license, as it has no place of business in Calcutta. In the present case the defendant Company must, upon the authority of that case, be held not bound to take any local license; but the case referred to is no authority for the position that it is not bound to take a personal license, when the profession, trade or calling which it exercises is mentioned in the second schedule to the Act. Nor can we accept as correct the view taken by the learned Presidency Magistrate that the defendant Company is not bound to take out any license because it carries on business by an agent, and because the Municipal license tax is not a tax on income, but is a tax levied for

the privilege of carrying on business within the limits of the Municipality. It is quite true that the license tax is levied for the last mentioned privilege, and the capital of the Company is taken into account only in judging of the value of the privilege; but the privilege is exercised none the less, and should therefore be paid for none the less, when the profession, trade or calling is exercised through an agent than when it is exercised directly by the company itself. In the view we take upon the first question, it is not necessary for us to say more in answer to the second question than this, that the Eastern Mortgage Agency Company is liable as much under section 87 as under Rule 7, clause (*b*) of the second schedule, to take out a license for the year 1895-96 under class 1.

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[488] REFERENCE FROM THE RECORDER OF RANGOON.

The 19th January, 1897.

PRESENT:

SIR FRANCIS MACLEAN, KT., CHIEF JUSTICE, MR. JUSTICE MACPHERSON, AND MR. JUSTICE TREVELYAN.

Mahomed Hady............Plaintiff

versus

Swee Cheang and Company............Defendants.*

Recorder of Rangoon, Jurisdiction of—Reference to High Court, Calcutta—Lower Burma Courts Act (XI of 1889), section 42—Doubt—Conflicting Decisions—Decision of Superior Court—Power of Recorder to refer.

The Recorder of Rangoon, in a suit tried by him, referred to certain decisions of the High Courts at Calcutta, Bombay and Madras, which were in conflict; and, not agreeing with the decision of the Calcutta High Court, referred the case to the High Court in its appellate jurisdiction.

Held, that as the decisions of the High Court at Calcutta are binding on the Recorder he had no jurisdiction to make the reference, and that it must be returned.

THIS was a reference from the Recorder of Rangoon in the following terms:—

"This is a suit to recover the sum of Rs. 3,300, being the difference between the contract and market rates on a contract for 4,000 bags of rice. The making of the contract is not disputed, but the defendant pleads that it is void under section 30 of the Contract Act; that he carries on business as a speculator in the rise and fall of prices of rice; that by the custom of the Rangoon market a market rate of rice is fixed by a committee authorized thereto, on the last day of each month; and that an agreement of the nature sued on is treated as fulfilled when the difference between the settlement rate and the contract rate is paid, and that the parties to the agreement are speculators in differences, and entered into the agreement, having

* Civil Reference No. 11 of 1896 made by W. F. Agnew, Esq., Recorder of Rangoon, dated the 23rd September 1896.

in view the custom of the market and with the full knowledge that the actual delivery of rice was in no wise a necessary or intended incident of the contract.

"At the hearing it was contended on behalf of the plaintiff, on the authority of *Juggernath Sew Bux* v. *Ram Doyal*, (1883) I. L. R., 9 Cal., 791, that evidence was not admissible to show that the contract was void. In that case the contract was for the sale of Government securities, and upon the evidence the learned **[489]** Judge of the Small Cause Court found that it came within sections 23 and 30 of the Contract Act, and referred the following questions for the opinion of the High Court :—

"First, whether upon the facts, as found by me, the contract was an agreement by way of wager and therefore void within the meaning of section 30, and contrary to public policy under section 23 of the Indian Contract Act?"

"Second, whether the tender was a good legal tender?"

"The High Court held that the contract being in writing, and there being no ambiguity about it, evidence was not admissible to vary or contradict its terms. It was argued that evidence was admissible for the purpose of showing illegality, but GARTH, C.J., said: 'I have considerable doubt whether oral evidence is admissible for the purpose of showing that the contract is in its nature illegal. So long as there is no ambiguity about it, the question whether it is illegal or not depends, as it seems to me, upon the terms of the contract itself.' In *Anupchand Hemchand* v. *Champsi Ugerchand*, (1888) I.L.R., 12 Bom., 585, a similar question was raised, and the Bombay High Court held that oral evidence was admissible to prove that the contract, which on the face of it was for goods to be delivered at future dates, was in reality a contract by way of wager, SARGEANT, C.J., saying that the provisions of proviso I to section 92 of the Evidence Act, which allow evidence to be given of any fact which would invalidate any document, did not appear to have been considered from that point of view in *Juggernath Sew Bux* v. *Ram Doyal*, (1883) I.L.R., 9 Cal., 791. The point was again raised before the Madras High Court in *Eshoor Dass* v. *Venkatasubba Rau*, (1894) I.L.R., 17 Mad., 480, and the decision of the Bombay High Court was followed and that of the Calcutta High Court dissented from.

"The English authorities are clear that parol evidence is admissible to show what the true nature of the transaction is, and that the Court is not bound to look at the form of the document only. *In re Watson*, (1890) L. R., 25 Q. B. D., 27; *Madell* v. *Thomas*, (1891) L. R., 1 Q. B., 230; *Universal Stock Exchange* v. *Strachan*, (1896) L. R., App. Cas., 166.

"The weight of authority is therefore decidedly in favour of admitting the evidence. But the decision in *Juggernath Sew Bux* v. *Ram Doyal*, (1883) I. L. R., 9 Cal., 791, is absolutely binding upon me, and I must therefore hold that the contract being on the face of it unambiguous, parol evidence is not admissible to show that it is in reality illegal.

[490] "But there being this difference of opinion, and as the case is one of the highest importance to the mercantile community of Rangoon, for I am informed that the same point must arise in numerous cases now pending in this Court and in the Court of Small Causes, I refer the following question under section 42 of the Lower Burma Courts Act for the opinion of the High Court. When a written contract is on the face of it unambiguous, is parol evidence admissible for the purpose of showing that the contract is in reality illegal?"

Mr. *Jackson* for the Plaintiff.—I take the preliminary objection that the Recorder is not in a position to refer the case, because, as he himself says, there is a decision of this Court which is absolutely binding on him. His judgment shows that he had no doubt on the matter; and therefore he cannot refer the case under section 42 of the Lower Burma Courts Act. He should have decided the case, and let the unsuccessful party appeal. The reference must be returned.

The *Advocate-General* (Sir *Charles Paul*) and Moulvie *Mahomed Yusuf* for the Defendant.—The Recorder has the power to refer. He dissents from the decision of this Court, which decision is absolutely wrong—see section 92 (*a*) of the Evidence Act, and he finds that the Bombay and Madras High Courts

have also dissented. Therefore he has a doubt on the matter; and, if so, he can refer the case for the opinion of this Court. [MACLEAN, C.J.—Can he in his judicial capacity express a doubt as to the soundness of a decision of this Court?] I submit he can. This Court has no power to return the reference. Section 42 of the Lower Burma Courts Act says that on receiving the reference, the Court "shall decide the question referred therein." The section must be read so as to assist the administration of justice. The Calcutta decision, being opposed to section 92 (*a*) of the Evidence Act, and to the current of authority, this Court ought to answer the question put by the Recorder.

Mr. *Jackson* in reply.—If a reference like this be permitted, the very next time the Recorder finds himself in disagreement with a decision of this High Court he could refer the case again on the ground that he differed from the decision just given; and that might go on indefinitely. The contention that this Court **[491]** must decide the point comes to this,—that, although the Recorder had no power to send the case up, yet, if he did so, the Court is bound to decide it.

The following **judgments** were delivered by the High Court:—

Maclean, C. J.—A preliminary objection is taken by Mr. *Jackson* that this reference does not come within section 42 of the Lower Burma Courts Act (Act XI of 1889), and consequently that we cannot hear it. We will deal with that objection. By the above section the Recorder of Rangoon, if he entertains any doubt upon any question of law, or of custom having the force of law, or as to the construction of any document, or the admissibility of any evidence affecting the merits, may, if he think fit, draw up a statement of the question and submit it to the High Court. In this case what has happened is this: Upon the point at issue in the case there are conflicting decisions of this Court with those of the High Courts of Madras and Bombay. Under these circumstances the position of the Recorder is clear. He is not bound by the decisions of the High Courts of Madras and Bombay, but he is bound by the decision of this Court. He should therefore have followed, as he was bound to follow, the decision of this Court, and have left the party who felt aggrieved by his decision to appeal under section 40 of the Act. What doubt, then, has the learned Recorder expressed in the reference upon any question of law arising in the case? He has expressed none; on the contrary he has stated in the most explicit terms that he is bound by the decision of this Court.

If he entertain any doubt, it is a doubt as to the soundness of the decision of this Court. Personally he may, but judicially he cannot, indulge in that doubt. He is bound by the decision. Were it otherwise, in every case in which the learned Recorder doubted the soundness of a decision of this Court he might send up a reference. This cannot be the meaning of the section. I do not think this reference comes within section 42, and that the preliminary objection must prevail.

The papers will be returned to the Recorder with this expression of our opinion.

[492] Macpherson, J.—I concur.

Treveylan, J.—I should like to say that I think it clear, having regard to the terms of section 42 of the Lower Burma Courts Act, that the doubt which the Recorder entertains must be a doubt as to the way in which he ought to determine the particular question of law, or of usage having the force of law, or as to the construction of any document, or the admissibility of any evidence affecting the merits which may arise in the case before him. No

other doubt can possibly be the basis of any reference having regard to the terms of the section. In this case the Recorder himself says that the decision of the Calcutta High Court is absolutely binding upon him. That being so, there is, in my opinion, no basis for this reference.

H. W.

[25 Cal. 492]

CRIMINAL REVISION

The 14th December, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE HILL.

Lutfur Rahman Nuskur............Petitioner

versus

Municipal Ward Inspector............Opposite Party.

Calcutta Municipal Consolidation Act (Bengal Act II of 1888), sections 381, 382—Burial ground—Certificate for closing a burial ground, Requisites of.

The Municipal authorities issuing a certificate under the provisions of section 381 of the Calcutta Municipal Act (Bengal Act II of 1888), prohibiting the use of a burial ground, must definitely specify the point of time from which the period fixed by them under that section is to run.

THE Municipal Commissioners of Calcutta issued a certificate, dated 28th April 1897, prohibiting the use of a certain burial ground, under section 381 of the Calcutta Municipal Consolidation Act of 1888 in the following terms: "No person shall after two months bury or permit to be buried any corpse in, within, or under the ground to which the certificate relates," without specifying the point of time from which the "two months" were to run. The **[493]** certificate was published in the *Calcutta Gazette* on the 2nd June 1897. And the petitioner, who was one of the proprietors of the burial ground, was tried and convicted under section 382 of the aforesaid Act for having permitted corpses to be buried there on the 28th June and 9th July 1897.

The petitioner moved the High Court under section 439 of the Criminal Procedure Code to set this conviction aside, mainly on the ground that the certificate issued did not definitely specify the time as required by section 381 of the Municipal Act.

Babu *Debendra Chunder Mullick* for the Petitioner.

No one appeared to show cause.

The **judgment** of the High Court (**Banerjee** and **Hill, JJ.**) was as follows:—

* Criminal Revision No. 756 of 1897, against the order passed by Babu Shamadhava Roy Deputy Magistrate of Sealdah, dated the 1st of October 1897.

This is a rule calling upon the District Magistrate to show cause why the conviction and sentence in this case should not be set aside on the ground that the provisions of section 382 of the Calcutta Municipal Consolidation Act (Bengal Act II of 1888) have not been contravened by the petitioner in this case.

No one appears to show cause, and the learned District Magistrate, in his letter to the Registrar of this Court, says that the Deputy Magistrate who tried this case has no cause to show. The offence complained of is stated in the record in these terms: Permitting corpses to be buried at the Talbagan burial ground after it had been closed, as seen on the 28th June 1897 and 9th July 1897. The plea of the accused was that he could not say whether there was any burial on those two particular dates mentioned, but since then several burials have taken place; that he was one of the proprietors of Talbagan burial ground; and that he did not know that it was closed, and therefore allowed the burial of corpses on that ground. There was evidence adduced to show that the burials alleged did take place there. Upon that fact being proved, and the Magistrate being of opinion that the period of two months allowed in this case for closing the burial ground ran from the date of the certificate mentioned in section 381 of the Act, which was the 28th of April 1897, he has convicted the petitioner under section 382 of the Calcutta Municipal Consolida-[494] tion Act (Bengal Act II of 1888) and sentenced him to pay a fine of Rs. 10 and annas 8 as costs.

The contention urged on behalf of the petitioner before us is that the conviction is wrong, because the certificate issued under section 381 of the Act does not definitely specify any time as required by the section; and that if it does name any, it has not been shown that burials have taken place since the expiry of such time. Section 382, under which the petitioner has been convicted, runs thus: "Whoever after due publication of such certificate buries or burns, or causes, permits or suffers to be buried or burned, any corpse contrary to the last preceding section, shall be liable to a fine not exceeding Rs. 200."

The offence in this case is said to consist in the petitioner having permitted, or suffered, corpses to be buried in the burial ground in question contrary to the provisions of section 381. Now section 381 enacts—we refer only to so much of it as has bearing upon this case—that if after certain preliminaries are complied with, the Commissioners shall "certify that a fitting place for interment or burning (as the case may be) exists within a convenient distance and is available, no person shall, after a time (not less than two months) to be named in such certificate, bury or burn, or permit or suffer to be buried or burned, any corpse in, upon, within or under, the ground to which the certicate relates;" and the latter part of section 381 enacts that "every such certificate shall be published in the *Calcutta Gazette*, and a translation thereof in Bengali shall, in the case of a burial or burning ground, be affixed conspicuously on some part of the said ground."

In the present case the certificate that was made by the Commissioners, and is filed with the record as Ex. II., bears date the 28th April 1897, and runs in these terms: "The Commissioners in meeting hereby certify that the condition of the cemeteries of Gobra, New Kasia Bagan, Talbagan and Khoyrati is in such a state as to be dangerous to the health of persons living in the neighbourhood thereof, and that a fitting place for interment exists within a convenient distance and is available. No person shall after two months bury or permit to be buried any corpse in, within or under the ground to to which the [495] certificate relates;" and this certificate was published in the *Calcutta Gazette* on the 2nd June 1897. There was also what purports to be a translation in Bengali of the certificate affixed on some part of the burial

ground. The certificate, Ex. H., though it specifies the period as being two months, does not name the time from which the two months will run. In what purports to be a translation of it in Bengali, certain words are inserted, which do not occur in the original, and which have the effect of making the period run from the date of the certificate. That will appear from Ex. D. And the questions for determination are, whether the provisions of section 381, so far as they require the naming of a period in the certificate and the publication of the certificate in the two-fold manner prescribed by the section, have been complied with; and if these requirements have been complied with, whether the burials in question took place after the expiry of the period mentioned in the certificate.

We are of opinion that the first question must be answered in the negative. For though a period is named in the certificate, Ex. H. the point of time from which the period is to run is not mentioned. We do not think that it would be reasonable to hold that in the absence of any express mention of the point of time from which the period is to run, it must be taken to run from the date of the certificate itself, because the law requires that a time should be mentioned in the certificate, and it also requires that the certificate should be published in the *Gazette* and affixed on a conspicuous part of the burial ground in question. These two provisions clearly indicate that before the use of a burial ground, closed under this section, can be treated as an offence punishable under the next following section, the public should have sufficient notice given to them; and to ensure this, section 381 provides that a time should be mentioned in the certificate, which must not be less than two months; and it is for the authority issuing the certificate to determine the point of time from which the period of two months or such other period as may be fixed is to run, the point of time being evidently intended to be so determined that it may not be anterior to the date of the publication contemplated by the last paragraph of the section, that is to say, the publication in the *Gazette*, and the posting of the certificate in some conspicuous [496] part of the ground. It would be manifestly contravening that intention to hold, in a case like this, that in the absence of any express mention of the point of time from which the period is to run, the starting point should be the date of the certificate, especially when it appears in this case that it was not published until the 2nd of June; nor was it affixed conspicuously on the sopt until the 21st of May.

That being so, it becomes unnecessary to consider the second question. We must hold that the provisions of section 381 have not been complied with in the matter of the issuing and publishing of the certificate.

The conviction and sentence in this case must, therefore, be set aside, and the fine, if realized, refunded.

B. D. B. *Conviction set aside.*

[25 Cal. 496]

FULL BENCH REFERENCE.

The 4th February: 1898.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE O'KINEALY, MR. JUSTICE TREVELYAN, MR. JUSTICE GHOSE AND MR. JUSTICE AMEER ALI.

Poorno Chunder Ghose and others............Plaintiffs

versus

Sassoon and others............Defendants.*

Limitation Act (XV of 1877), section 13—Absence of defendant from British India—Defendant carrying on business in British India through an authorised agent.

Section 13† of the Limitation Act, which excludes the time during which a defendant has been absent from British India in computing the period of limitation for any suit, applies even where, to the knowledge of the plaintiffs, the defendants, partners in a firm, are during the period of their absence carrying on business in British India through an authorised agent.

Harrington v. *Gonesh Roy*, (1884) I. L. R., 10 Cal., 410, overruled.

THIS was a reference by the Chief Judge of the Small Cause Court to the High Court on 15th March 1897. The case stated [497] for the opinion of the High Court by the Chief Judge of the Small Cause Court was as follows:—

"In this case Poorno Chunder Ghose, Kedar Nath Mukerji and Khetter Nath Sircar carrying on business under the style of Poorno Chunder Ghose, Kedar Nath Mukerji, sued Messsrs. E. D. Sassoon & Co. for Rs. 771-6-0, the balance price of myrabollams sold by the plaintiffs to the defendants under a contract, dated 12th July 1893, delivery to be taken by the 20th August 1893. The facts are admitted, but the defendants pleaded that the plaintiffs' suit was barred by limitation. I found that the plaintiffs' suit was not barred by limitation, and gave a decree with costs in their favour. The plaintiffs' pleader argued that the suit was not barred on several grounds, some of which I found against him. Both parties have asked me to refer the case to the High Court; if their Lordships are of opinion that the plaintiffs' claim is barred by limitation, then the plaintiffs' suit will be dismissed with costs; if their Lordships are of opinion that the plaintiffs' claim is not barred by limitation, then the decree in the plaintiffs' favour for Rs. 774-6-0 with costs will stand.

"In order to understand fully how the question of limitation arises, it is necessary for me to refer to a cross-suit which was tried by me at the time when this suit was first tried. In that suit Messrs. E. D. Sassoon & Co., sued Kedar Nath Mukerji, Poorno Chunder Ghose and Khetter Nath Sircar carrying on business in partnership for Rs. 572-1-0 as compensation for inferiority in quality and for short weight of the myrabollams bought under the contract, dated 12th July 1893. Kedar Nath Mukerji and Poorno Chunder Ghose sued Messrs. E. D. Sassoon & Co. for Rs. 77-6 0, balance of price of the myrabollams. The two suits came on before me, and I gave my judgment on the 17th day of February 1896. Khetter Nath Sircar pleaded in the suit brought by Messrs. E. D. Sassoon & Co. that he was not a partner of Kedar and Poorno, and asked that the suit should be dismissed against him with costs. On the evidence I was satisfied that Khetter Nath Sircar was a partner of Kedar and Poorno.

* Reference to the Full Bench in the reference from the Presidency Small Cause Court, No. 1 of 1897.

Exclusion of time of defendant's absence from British India.

† [Sec. 13:—In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded.]

Just before delivering judgment the pleader for Khetter Nath said that if I was of opinion that Khetter Nath was a partner, he would ask me to add him as a plaintiff in the suit brought by Kedar and Poorno. I declined to add Khetter Nath at that stage and gave judgment dismissing both suits, Kedar's and Poorno's, on the ground that Khetter Nath ought to have been a plaintiff. Thereupon Kedar Nath Mukerji and Poorno Chunder Ghose moved the High Court under section 622 of Act XIV of 1882. On the 7th May 1890, Mr. Justice AMEER ALI set aside my order of dismissal in Kedar's and Poorno's suit, and ordered me to re-try the suit. His Lordship was of opinion that I ought to have added Khetter Nath Sircar as a plaintiff when I was asked so to do.

"The judgment of the High Court was read on the 8th July 1896 in the [498] Officiating Chief Judge's Court. The case came on before me on my return from furlough on 9th December 1896, but nothing was done on that day. On the 14th January 1897 the case came on again before me, and Khetter Nath Sircar was added as a plaintiff at the request of plaintiffs' pleader and with his own consent. Messrs. E. D. Sassoon & Co.'s pleader then pleaded that the suit was barred by limitation. The cause of action arose on the 20th August 1893. Khetter Nath Sircar was added as a plaintiff on 14th January 1897 more than three years afterwards. If the claim of a necessary party to a suit is barred by limitation at the time when he is added as a party the whole suit is barred—See *Ramdoyal* v. *Junmenjoy Coondoo*, (1887) I. L. R., 14 Cal., 791. I held the plaintiffs' suit was barred unless they could show me that limitation did not run against them."

The plaintiffs' pleader contended that limitation did not run against them on the four following grounds :—

"*Firstly.*—That Khetter Nath Sircar was not a necessary party to the suit. I held that he was a necessary party, and that plaintiffs had recognised that fact by applying to me to have him made a plaintiff.

"*Secondly.*—That Khetter Nath Sircar became a plaintiff on May 7th, 1896, when Mr. Justice AMEER ALI said he ought to have been made a plaintiff. I decided that Khetter Nath Sircar did not become a plaintiff until January 14th 1897, when he was placed on the record as a plaintiff. He might have been added on July 8th, 1896, when the judgment of the High Court was read, but no application to add him was made then. If he became a plaintiff on May 7th, 1896, there was no necessity for the application of January 14th, 1897—See *Rampartab Samrathrai* v. *Fooli Bai*, (1896) I. L. R., 20 Bom., 767 (776).

"*Thirdly.*—The plaintiffs' pleader contended that in two letters, dated 23rd January 1894 and 7th February 1894, Messrs. E. D. Sassoon & Co. acknowledged their debt to the plaintiffs in the following words : "Please call at our office to settle your account, as we have received the result of your 100 tons myrabollams," and "since writing you on the 23rd ultimo we have neither seen nor heard from you ; we now again request you to call and settle about the shipments of your myrabollams guaranteed by you at London, failing which we shall demand the same through our attorneys without any reference." Mr. Abrahams, an assistant in Messrs. E. D. Sassoon & Co., gave evidence and said the letters were not an acknowledgment of a debt to the plaintiffs, but a demand on the plaintiffs to pay what was due to the defendants as compensation for inferiority in quality, and for short weight of the myrabollams sold by the plaintiffs to the defendants. The letters support Mr. Abrahams, and I decided against the plaintiffs on this point.

[499] "*Fourthly*—The plaintiffs' pleader contended that the suit was not barred, inasmuch as the partners in the defendants' business were all absent from British India. J. E. Sassoon, M. E. Sassoon and E. E. Sassoon are the only partners in the defendants' business. M. E. and E. E. Sassoon always reside in Europe. J. E. Sassoon resides in Bombay, and goes home about once in three years ; he went to England in February 1896, and returned in November 1896, and during that time there was no partner in British India. The defendants had a place of business here which was carried on by a manager to the knowledge of the plaintiffs, as appears from the description of the defendants on the point. The defendants' manager held a power-of attorney, which authorised him to institute and defend suits.

On the authority of *Atul Kristo Bose* v. *Lyon & Co.*, (1887) I. L. R., 14 Cal., 457 found for the plaintiffs on this point, and decreed the case in their favour. *Harrington* v. *Gonesh Roy* is opposed to *Atul Kristo Bose* v. *Lyon & Co.*, but is a prior case, and I considered that I was bound to follow the later case.

The *Advocate-General* (Sir *C. Paul*) for the defendants.—This suit is barred by limitation. Section 13 of Act XV of 1877 cannot apply in a case like the present one. Here, although the partners in the defendants' firm were not resident in India during the whole of the three years, the business of the defendants' firm was carried on in British India by a manager who held a power-of-attorney authorising him to institute and defend suits. The case of *Atul Kristo Bose* v. *Lyon & Co*, (1887) I. L. R, 14 Cal., 457, does not apply. At the time of the suit the defendants were carrying on business here, and that was made the subject of jurisdiction. There has been no absence sufficient to bring the case within the exception of section 13 of Act XV of 1877. That section only applies where actual residence is needed to give a ground of jurisdiction. Here the carrying on of the business is the ground of jurisdiction. If this were not so, the only partner in a Calcutta firm might be absent for six months in every year, and the period of limitation would be extended to six years. If he was absent for eleven months in every year the period of limitation would be extended to 36 years. If he was only present in India for quarter of a month in each year, the period of limitation would go on for 144 years. This is not the intention of the Legislature. The judgment of WILSON, J., is based on a fallacy as [500] appears from the report. If not you are led to an unreasonable construction. As long as the defendants were carrying on business here through their manager they were never absent according to the section of the Code of Civil Procedure Section 13 of Act XV of 1877 is intended to apply to cases where the defendant cannot be got at, but that is not the case here. The decision of TOTTENHAM and NORRIS, JJ., (1884) I. L. R., 10 Cal., 440, is correct. The case before the Privy Council, (1852) 5 Moo. I. A, 234 (260), construes the statutes of James, the words in that case deal with the words "return" in the statute. The statute gives a cause of action on the return. Section 7 says the plaintiff shall have a right of action on the return. Statutes, however, are always intended to be construed in a reasonable way. See the case of *In re Dhunput Sing* (1893) I.L.R., 20 Cal., 771, and on Appeal to Privy Council, (1895) I. L. R., 23 Cal., 26, where it was held that although the person was not present he could commit an act of insolvency through his *gomastha*. See the case of *Hawkins* v. *Gathercole* (6 De G. M and G, 1) on the necessity of considering the intention of the statute.

Mr. *Woodroffe* for the Plaintiffs —The words of the section are clear, *Beake & Co.* v. *Davis*, (1882) I.L.R., 4 All., 530. Act XV of 1882, Presidency Small Cause Courts Act, says the foundation of the jurisdiction is that all the defendants at the time of the institution of the suit must reside within the local limits. The laws are adapted to what happens in the ordinary course of business. If the defendants choose to be absent from British India that is not the plaintiffs' fault, and they are entitled to the exception given by section 13 of Act XV of 1877. Assuming a partner has an agent within the jurisdiction will he be exempted from the provisions of section 13 ? Mitra's Limitation Act, p. 602. The case before the Privy Council, (1852) 5 Moo. I.A., 234, is in plaintiffs' favour. So also is the case of *Atul Kristo Bose* v. *Lyon*, (1887) I.L.R, 14 Cal., 457, and *Rampartab* [501] *Samrathrai* v. *Foolibai*, (1896) I.L.R., 20 Bom. 777. If the Limitation Act gives the plaintiff a right to bring a suit within certain periods, the fact that he can effect service of the summons on the agent of the

defendants under the Civil Procedure Code is *nihil ad rem*. The law of limitation is not controlled by the question of jurisdiction. The words in the Act are expressed. In the case of *Harrington* v. *Gonesh Roy*, (1884) I. L. R., 10 Cal., 440, this point was not argued. Starling's Limitation Act, p. 62.

The Reference by MACLEAN, C.J., MACPHERSON and TREVELYAN, JJ., to the Full Bench on 24th January 1898, was as follows:—

The facts of this case appear in the case stated for the opinion of this Court by Mr. A. P. Handley, the Chief Judge of the Court of Small Causes of Calcutta.

The question that has been argued before us is, whether, having regard to the fact that the defendants' firm has to the knowledge of the plaintiffs been represented in Calcutta by a manager holding a power-of-attorney which authorized him to institute and defend suits, the provisions of section 13 of the Limitation Act of 1877 have any application.

It is contended on behalf of the plaintiffs that the period during which no one of the defendants was in British India, *viz*., from February 1896 to November in the same year, should be excluded in computing the period of limitation.

After hearing the argument we agree with this view, but having regard to a decision to the contrary in the case of *Harrington* v. *Gonesh Roy*, (1884) I. L. R., 10 Cal., 440, we refer this case for decision by a Full Bench.

The cases of *Atul Kristo Bose* v. *Lyon*, (1887) I. L. R., 14 Cal., 457, and *Ruckmaboye* v. *Lulloobhoy Motichund*, (1852) 5 Moo. I. A., 234, have also been cited to us.

We reserved liberty to Mr. *Woodroffe*, Counsel for the plaintiffs, to argue any other questions which may arise in the case [502] should the opinion of the Court be against him on the question to which we have referred.

The case came on for hearing before the Full Bench on 4th February 1898.

The *Advocate General* (Sir *C. Paul*) for the Defendants.

Mr. *Woodroffe* for the Plaintiffs.

The following **judgments** were delivered by the Full Bench (MACLEAN, C.J., and O'KINEALY, TREVELYAN, GHOSE and AMEER ALI, JJ).

Maclean, C. J.—I had the advantage of hearing this case argued before the Division Bench of which I was a member, and I have had the further advantage now of having heard the case re-argued by the learned *Advocate General*, but the later arguments have not shaken the view I entertained and expressed when the case was before us on the previous occasion. The facts in this case have been found in the reference, and the short question we have to decide is, whether or not, having regard to section 13 of the Limitation Act, and to the fact found in the reference that all the partners in the defendants' firm were absent from British India from February to November 1896, the time of such absence is to be excluded in computing the period of limitation prescribed for the suit. It is conceded by the defendants that, if such time be excluded, the suit has been instituted within the prescribed period, and is not barred by the statute.

It is found as a fact in the case, that the defendants had a place of business, I assume, in Calcutta, which was carried on by a manager, to the knowledge of the plaintiffs, and that the defendants' manager held a power-of-attorney which authorized him to institute and defend suits.

It is contended for the defendants that section 13 only applies to cases where the jurisdiction is founded upon residence, and that it does not apply to cases in which the carrying on of a business in Calcutta is the basis

of the jurisdiction, in other words, that the section does not apply, and could not have been intended to apply, when the defendants, to the knowledge of the plaintiffs, have a place of business in [503] Calcutta carried on by a manager, who is authorised to institute and defend suits, and when in fact, the defendants, to the knowledge of the plaintiffs, are represented in British India by a duly authorised agent. In support of this contention the case of *Harrington* v. *Gonesh Roy*, (1884) I. L. R., 10 Cal., 440, is strongly relied on by the defendants. I doubt, however, whether, having regard to the clear and precise language of section 13, that decision is well founded, for it seems to me that, whatever may be the common sense of the decision, it can only be arrived at by interpolating into the section words that are not there, words to the effect that the time of absence is not to be excluded if the defendants are, during the period of personal absence, represented by a duly constituted agent in British India. Although we have been referred to the case of *Hawkins* v. *Gathercole*, (1855) 6 DeG. M. & G., 1, as to the manner in which statutes are to be construed, I do not see my way to put the construction upon the section for which the defendants contend; if we did so, I think we should be rather legislating than adjudicating upon the section as it stands. It may well be that it would be expedient not to allow the time of absence from British India to be excluded, if the defendants be carrying on business in British India, and be represented by a duly authorised agent during such absence; but, if this change is to be made, it must be made by the Legislature. Reading the language of section 13—a section be it remembered in a Limitation Act, the provisions of which must be construed strictly, and which, when set up as a defence, must not be extended to cases which are not strictly within the enactment, whilst exceptions or an exemption from its operation are to be construed liberally [see per Lord CRANWORTH in *Roddan* v. *Morley*, (1857) 1 DeG. & Jones, 1 (23)] reading, I say that section according to the ordinary significance of the words used, I think we are not warranted in holding that the section does not apply to cases where the defendants are, during the period of absence, carrying on business in British India through an authorised agent.

In other words, I do not see my way to getting over the clear and precise language of the section, feeling as I do that the words [504] of the section are too strong against the view contended for by the defendants, and that we could only support that view by the interpolation of words to the effect I have stated above. This I do not think we are justified in doing. My opinion is supported by the case of *Atul Kristo Bhose* v. *Lyon & Co.*, (1887) I. L. R., 14 Cal., 457, in which decision, notwithstanding the able criticism of the *Advocate-General* upon it, I concur, and is strengthened by the consideration that the words in the corresponding section of Act IX of 1871 as to service of a summons to appear and answer in the suit have been omitted in the present section.

With reference to the further argument which has been addressed to us to-day that section 9 of the Limitation Act must be read in conjunction with section 13 of the same Act, it is no doubt a cardinal rule of construction that in construing any Act of Parliament one may look at the whole Act to ascertain what the intention of the Legislature was, but to my mind, notwithstanding the decision to which our attention has been called in the case of *Narrowji Bhimji* v. *Mugniram Chandaji*, (1880) I. L. R, 6 Bom., 103, I am unable to see how section 9, even if read with section 13, can assist the defendants in the present case. Section 9 only says that "when once the period of limitation has commenced to run in any case, it will not cease to do so by reason of any subsequent disability or inability to sue." I do not see the application of that section to the present case. Here there is neither subsequent disability or, in

my judgment, inability to sue. What disability or inability is suggested? None so far as I have heard. In his work on the Law of Limitation Baboo Upendra Nath Mitter, the author, at page 240, gives this definition of disability and inability: "Disability," he says, "is want of a legal qualification to act." "Inability is want of a physical power to act." I do not say these definitions are exhaustive: few definitions are, but so far as they go I am not prepared to dissent from them. It is perhaps unnecessary to prosecute this matter further, for I am unable to see where, in this case, the disability or inability existed. I think therefore that the Chief Judge of the Court of Small Causes was **[505]** right in holding that the case came within section 13 of the Limitation Act, and that the plaintiffs have brought their suit within time.

O'Kinealy, J.—I agree in thinking that the suit has been brought within time, and that the view taken by the Chief Justice of section 13 of the Limitation Act is correct.

Trevelyan, J.—I agree entirely with what has fallen from the learned Chief Justice.

Ghose, J.—And so do I.

Ameer Ali, J.—I also agree with the learned Chief Justice.

Maclean, C.J.—We can only award such costs as the Rules allow; and this we do, to be paid by the defendants in the suit.

Attorneys for the Plaintiffs: Babu *R. C. Mitter.*

Attorney for the Defendants: Mr. *Sowton.*

C. E. G.

NOTES.

[See also (1904) 29 Bom., 68.]

[25 Cal. 505]

REFERENCE TO FULL BENCH.

The 4th February, 1898.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE O'KINEALY, MR. JUSTICE TREVELYAN, MR. JUSTICE GHOSE AND MR. JUSTICE AMEER ALI.

Moll Schutte & Co.............Plaintiffs

versus

Luchmi Chand............Defendant.*

Contract—Sale of unascertained goods—Breach of Contract—Power of Re-Sale—Contract Act (IX of 1872), section 107—Damages.

The plaintiffs sold to the defendant under an "Indent" contract ten cases of tobacco at an agreed price. On arrival the defendant refused to pay for and take delivery of the goods on the ground that they were not the goods contracted for. After notice to the defendant the

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* Reference to a Full Bench, in reference from the Presidency Small Cause Court, No. 3 of 1897, on case stated for opinion by E. W. Ormond, Esq., Officiating Chief Judge of that Court.

plaintiffs re-sold the goods and sued to recover the expenses of the re-sale, and the difference between the price realized and the contract price with interest.

Held, that clause 1 of the Indent Contract gave the plaintiffs a right to re-sell the goods, and sue for the damages mentioned therein. Section 107 of the Contract Act had no bearing on the case.

Yule & Co. v. *Mahomed Hossain*, (1896) I.L.R., 24 Cal., 124, dissented from.

[506] THIS was a case stated for the opinion of the High Court by the Officiating Chief Judge of the Small Cause Court on 14th September 1897; the terms of the reference were as follows:—

"The questions which I have the honour to submit for your Lordships' decision deal with two distinct matters—one relating to the plaintiffs' right of re-sale under the contract in suit and the other relating to the necessity of filing an award under section 525 of the Civil Procedure Code.

"The plaintiffs sold to the defendant under an 'Indent' contract ten cases of tobacco at a net price C. F. I. The contract is sent herewith for reference, if required, the first clause of which is as follows:—

"The goods are to be shipped by steamer to Calcutta and to be at our risk as soon as they are landed, I/we herewith pledge myself/ourselves to pay for them before delivery within 30 days after arrival of the bill of lading from Europe, failing which you are authorized to re-sell the goods or any portion of them, or at your option cancel this indent, and you have absolute discretion as to when and how to re-sell the goods. In case of any re-sale, we shall pay to you any loss or deficiency arising from such re-sale together with interest at 12 per cent. per annum. Should there, however, be any surplus after payment of the indent-price, charges, costs and expenses of resale the same shall belong to you.

"The plaintiffs ordered ten cases only of tobacco and caused them to be shipped and consigned to themselves for the purpose of fulfilling this contract. The goods duly arrived, but the defendant refused to pay for and take delivery of the goods on the ground that they were not the goods contracted for; the plaintiffs subsequently re-sold the goods after notice and now sue to recover the expenses of such re-sale and the difference between the price realized and the contract price together with interest as stipulated for in clause 1 of the contract. The defendant contends that the plaintiffs had no right to re-sell the goods, etc., as he (defendant) had never approved of the goods. I found that the goods imported by the plaintiffs for the defendant and tendered to him were in accordance with the contract, and I hold that upon default in payment by the defendant, the plaintiffs had the right to re-sell the goods and sue for the above damages under clause 1 of the contract whether the property in the goods had actually passed to the defendant or not. I decreed the suit therefore in favour of the plaintiffs for the amount claimed, making my judgment contingent upon the opinion of the High Court at the request of the defendant's pleader. No evidence as to any market-rate was adduced, and if the plaintiffs are not entitled to the damages as stated above, the suit must be dismissed.

"The case of *Yule & Co.* v. *Mahomed Hossain*, (1896) I. L. R., 24 Cal., 124, which was referred from this Court, decided that in a contract for the sale of goods to arrive, the [507] 'buyer' not having approved of the goods, the property in the goods had not passed to him under section 83 of the Contract Act; and that the proviso for re-sale in the contract itself could have no application 'as no such power is required to enable a man to sell his own goods.' It will be seen that the High Court decided a point which was not included in the reference, it having been assumed in this Court that a right of re sale arose to the plaintiffs in that case upon default by the defendant in taking delivery and making payment. I presume that that case was not intended to decide that a proviso for re-sale in a contract should have no application even though the parties agree in express terms that the right of re-sale and to recover the abovementioned damages should arise whether the property in the goods had passed to the party in default or not. Such a stipulation in a contract (for the sale of goods to be imported) merely provides a practical, convenient and reasonable method

for ascertaining the actual damages sustained by the importer in case of default by the other party to the contract. In the present case it would seem from clause 4 of the contract that the parties intended that the plaintiffs should be at liberty to re-sell and to recover the above damages even though the defendant had not approved of the goods, *i.e.*, even though property in the goods had not passed to the defendant under section 83 of the Contract Act. The word "re-sell" itself does not mean selling the property of the defaulting party, but rather selling the goods contracted for " against " the party in default in order to ascertain the amount of damages to be recovered from him.

" The first question, therefore, that I submit for your Lordships' decision is :—

" 1. The defendant having committed default in payment (for goods tendered to him which were in accordance with the contract) does clause 1 of the contract give the plaintiffs a right to re-sell the goods and to sue for the damages mentioned in clause 1, irrespective of whether the property in the goods had passed to the defendant or not?

" In case it should be found necessary to determine the question of the property passing to the defendant or not, I hold that the property had passed to the defendant for the following reasons :—

" (*a*) Property can pass by agreement at any time. The parties agreed that the plaintiffs should have a right of re-sale in a certain event (*viz.*, upon default in payment by the defendant); if the property passing is a necessary incident to that right, the property must be deemed to have passed when the plaintiffs exercised their right of re-sale.

" (*b*) If risk attaches to the buyer it is a very strong argument that the property was meant to be in him. Clause 1 of the contract, therefore, would show that the property in the goods was in [508] defendant from the time of arrival. In the above case of *Yule & Co.* v. *Mahomed Hossain*, the contract contained a clause to the effect that the goods should be at the 'buyer's risk from the delivery due date ; but this fact in all probability was not brought to the notice of the High Court, for it was not mentioned in the case submitted by this Court, and the arguments of Counsel as to the property passing appear from the report to have been confined to the question of property passing under section 83 of the Contract Act.

" (*c*) I think the property in the goods passed from the plaintiffs to the defendant at the time of shipment under section 84 of the Contract Act. The contract is called an Indent, the price covered ' cost, freight and insurance,' and clause 15 of the contract is a request by the defendant to the plaintiffs to take charge of the goods on arrival on the defendant's account. It would seem, therefore, that the plaintiffs shipped the goods and insured them on account of the defendant, although done in his own name.

" I submit, therefore, this second question :—

" 2. Did the property in these goods pass to the defendant at or before the time of the resale by the plaintiffs?

" The third question submitted refers to the necessity of filing an award in this suit under section 525 of the Civil Procedure Code and is framed by the defendant's pleader is as follows :—

" 3. Is the suit maintainable in its present form—plaintiffs not having made the award a Rule of Court—when the latter part of clause 4 of the contract says that the award may be made a rule of the High Court?

" The facts material to this part of the case are as follows : The defendant objected to the goods as not being goods of the description contracted for ; the parties referred the matter to arbitration under the contract ; the arbitrators disagreed and thereupon appointed an umpire who decided that the goods were in accordance with the contract. The plaint merely states these facts and asks for damages by way of re-sale. In clause 4 of the contract it is provided that the arbitrators *before* acting shall appoint an umpire ; but at the time the umpire was surveying the goods to the defendant's knowledge, the defendant agreed to be

bound by his decision. I held therefore that the defendant was bound by the umpire's award. Direct evidence also was given to show that the goods were in accordance with the contract, and I found this as a fact, although the awards, or rather the report of the umpire for the "award," does not direct any sum of money to be paid by defendant to the plaintiffs, but in effect states that the goods are in accordance with the contract. The defendant contends that the matter having once been [509] submitted to arbitration, the plaintiffs' remedy under the contract is gone; that their remedy rests solely upon the award which can only be enforced by making the award a rule of the High Court under section 525 of the Civil Procedure Code in accordance with clause 4 of the contract, and therefore this Court has no jurisdiction to try this suit. The defendant at the same time impugns the validity of the award on the ground that the umpire was not appointed by the arbitrators before acting, and apparently he was never desirous of having the matter re-submitted to arbitration. I held against all these contentions. The summary procedure provided under section 525 of the Civil Procedure Code does not prevent a plaintiff from suing upon the award in the ordinary way, and the clause in the contract as to making the award a rule of Court is also permissive. The plaintiffs are not bound under the contract to go to arbitration or to obtain an award before suing for a breach of the contract, and unless the defendant sets up an award in answer to the plaintiffs' claim, I see no reason why the plaintiffs should not succeed in a suit for such breach. If the award is bad (as the defendant contends it is) the whole proceedings relating to the submission are void and the parties are relegated to their original position under the contract."

Mr. *O'Kinealy* for the Defendant.—Here there was a refusal to take delivery of the tobacco on the ground that they were not the goods contracted for. Can there be a re-sale of the goods so as to bind the seller and buyer. The first three clauses of the Indent deal with the rights of the parties and what they are to do if a dispute arises between them. I rely on the case of *Yule & Co.* v. *Mahomed Hossain* (1896) I. L. R., 24 Cal., 124 (126). If the buyer does not examine the goods within ten days property does not pass. The seller ought to sue for the value between the contract price and the market price of the day. They are still the vendor's goods. Buyer is liable in damages for breach of the contract. Under section 74 of the Contract Act, whether it is stipulated damages or penalty, the Court can give what they please. Section 73 rules what a person is entitled to when the contract is broken. Supposing the property has not passed, then there can be no re-sale. The property in the goods had not passed under section 83 of the Contract Act.

Mr. *Dunne* for the plaintiffs.—This case is distinguishable from the case of *Yule & Co.* v. *Mahomed Hossain* (1896) I. L. R., 24 Cal., 124 (126)., There the [510] question as to the right of re-sale was never really referred. On the facts the property may have been shown to have passed. That case was decided on a reference in which the facts were never dealt with. A vendor cannot, when goods are at the risk of the buyers, change them. The plaintiffs can only re-sell the goods under section 107 of the Contract Act.

The JUDGMENT of the High Court (MACLEAN, C.J., and MACPHERSON and TREVELYAN, JJ.), referring the case to a Full Bench on 24th January 1898 was as follows:—

The facts of this case appear in the case stated for the opinion of this Court by Mr. E. W. Ormond, Officiating Chief Judge of the Court of Small Causes at Calcutta.

The question that has been argued before us is, whether, under the terms of the first clause of the contract, the plaintiffs were at liberty to resell the goods, and are entitled to recover the loss on such re-sale.

It has been contended on behalf of the defendant that the plaintiffs are not entitled, either under the contract or under section 107 of the Indian

Contract Act, to re-sell the goods, and that they are only entitled to the difference between the contract rate and the market rate at the time of breach.

In support of their contention they have relied upon the decision of this Court in the case of *Yule & Co.* v. *Mahomed Hossain,* (1896) I. L. R., 24 Cal., 124. As the terms of the contract in that case were similar to those in the present case, and as we differ from the view taken by the learned Judges in that case with regard to the rights of the plaintiffs under a contract of that description, we refer this case for decision by a Full Bench.

Mr. *O'Kinealy* for the Defendant.

Mr. *Dunne* for the Plaintiffs.

The **opinion** of the Full Bench was delivered by

Maclean, C.J., -(O'Kinealy, Trevelyan, Ghose and Ameer Ali, JJ. *concurring*).

Maclean, C.J.—If it had not been for one passage in the **[511]** judgment in the case of Yule & *Co.* v. *Mahomed Hossain,* (1896) I. L. R., 24 Cal., 124, I should scarcely have thought that the point which we have to decide, and which has been submitted to us, was susceptible of serious argument. The passage I refer to is at page 128 of the report, and it is as follows:—

"To such a case as this neither section 107 of the Contract Act nor the proviso for re-sale in the contract itself can have any application, as no such power is required to enable a man to sell his own goods."

I may point out in passing that that passage scarcely appears to me to have been necessary for the decision of the case, having regard to the real question which was then submitted by the reference. The question we have first to decide is the first question submitted to us in the reference. In my opinion that question ought to be answered in the affirmative. Section 107 of the Contract Act has, in my judgment, no bearing on this case. I base my decision on the terms of the contract between the parties. Here the parties, two mercantile men, perfectly competent to contract, have made their own bargain, and one of the terms of that bargain is that if there were any such default on the part of the purchaser as is mentioned in clause 1 (as there was) the vendor was to have the right to re-sell the goods, and any loss or deficiency arising from such re-sale, with interest thereon at the rate of 12 per cent. per annum, was to be paid by the purchaser to the vendor. We are told upon the authority of the passage in the case to which I have referred, and upon that authority alone, that such a re-sale is bad, and that the course which the vendor (the plaintiff) took in this case was not justified under the contract. I am quite unable to assent to that view. There is nothing in the contract which is contrary to public policy. It is a perfectly good contract. It is not an unreasonable contract for two mercantile men to have made, and having made it why should not effect be given to it? It is said that the term "resell" can only apply to a case where the property has passed to the purchaser, and that that term pre-supposes a previous valid and effectual sale. In the ordinary **[512]** acceptation and use of the term there was a sale to the defendant, and the bargain was that if he did not pay the purchase-money the plaintiff might re-sell the goods and hold the defendant responsible for any loss. There is nothing in the contract about the property having or not having passed, or that the re-sale was only to be made if it had passed.

The clause was intended to provide for the very case which has arisen, and I think it would be rather a shock to mercantile men to be told that when a clause like this has been introduced into a mercantile bargain no effect can be given to it. I hope that is not the law. I do not think it is the law. If

such a clause as this were only to become operative if and when the property in the goods had passed to the defaulting purchaser, the operation of such a clause would, probably, not be effective in many cases. But I do not think such is the meaning of the clause. As I have said before, the first question must be answered in the affirmative.

That being so, the second question submitted to us does not arise, and the third question, when the matter was before us originally, was abandoned by the learned counsel who appeared for the defendant. As regards the costs we can only give such costs as are provided for by the Rules, and this we do, and order the defendant to pay to the plaintiffs such costs.

Attorneys for the Plaintiffs: Messrs. *Morgan & Co.*

Attorneys for the Defendant: Mr. *N. C. Bose.*

C. E. G.

NOTES.

[This was followed in (1899) 22 All., 56; (1898) 23 Mad., 18; (1905) 32 Cal., 816.

In (1912) 39 Cal., 568 there was no appropriation of the goods to the contract, and on this ground, it was held that there could be no resale and that the so-called 'resale' did not furnish the basis for calculating damages.]

[25 Cal. 512]

REFERENCE TO FULL BENCH.

The 22nd and 29th December, 1896, and 29th January, 1897.

PRESENT:

SIR FRANCIS MACLEAN, KT., CHIEF JUSTICE, MR. JUSTICE O'KINEALY, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN, AND MR. JUSTICE JENKINS.

Queen-Empress
versus
Abbas Ali.*

Forgery—Using a forged Document - Penal Code (Act XLV of 1860), sections 463, 471—"Fraudulently," Meaning of.

Deprivation of property, actual or intended, is not an essential element in the offence of fraudulently using as genuine a document which the accused knew or had reason to believe to be false—*Queen-Empress* v. *Haradhan*, (1892) I. L. R., 19 Cal., 380, overruled.

[513] THIS was a reference made under section 35 of the Letters Patent and section 434 of the Code of Criminal Procedure, by JENKINS, J., to a Full Bench in the following terms:—

"1. Under clause 25 of the Letters Patent and section 434 of the Code of Criminal Procedure, I reserve and refer for the decision of the Court the question of law which (as hereinafter stated) has arisen in the course of the trial of the abovenamed accused and the determination of which will affect the event of the trial.

"2. The accused was tried before me and a common Jury at the Criminal Sessions now pending on a charge expressed in the following terms:—

"That he, the said Abbas Ali, on or about the fourteenth day of August in the year of Our Lord one thousand eight hundred and ninety-six in Calcutta

* Reference to a Full Bench, by JENKINS, J., sitting in the exercise of Original Criminal Jurisdiction.

aforesaid fraudulently and dishonestly used as genuine a certain forged document, to wit, a document purporting to be a certificate of competency as an Engine-room First Tindal and purporting to be signed by one H. Abern, Chief Engineer of the Steam Launch *Nicol*, and being a forged document (intended to be used for the purpose of cheating) knowing or having reason to believe the same to be a forged document and thereby he, the said Abbas Ali, committed an offence punishable under sections 465 and 471 of the Indian Penal Code."

"3. Ultimately the case went to the Jury, as though the words enclosed in brackets had been omitted from the charge, and by their unanimous verdict the accused was convicted under sections 465 and 471 of the Indian Penal Code.

"The certificate mentioned in the charge and hereinafter referred to as Exhibit E was in the following form :—

"This is to certify that Abbas Ali has served with me as Engine-room First Tindal in Steam Launch *Nicol* for a period of one year and one month, and he is still in service. I found him a sober, intelligent, smart and trustworthy man."

CALCUTTA; H. ABERN,
The 12th August, 1896. *Chief Engineer.*

[514] "The materiality of the certificate and the use to which it was put will appear from the evidence of Dino Nath Mukerji, and the facts hereinafter alleged taken in conjunction with Act VII of 1884, and the Regulations issued under that Act to which as well as to the application forms hereinafter mentioned I refer.

"The evidence of Dino Nath Mukerji, so far as material, is as follows :—

"I am an examination clerk at the Calcutta Port Office.

"I have held the post eight years continuously and did so during last August.

"I have an Assistant, Anukul Chandra Neogy.

"My duty is to receive papers and testimonials from candidates and fees, *i.e.*, candidates who want to go up for examination to obtain certificates under Act VII of 1884.

"I receive those testimonials in accordance with Rules under the Act.

"These are the printed regulations of the Government of Bengal under that Act.

"They were printed in the Gazette: they have been in force since 1890. I act under the orders of the Port Officer.

"My practice is as follows : —

"When a man comes for examination as an Engine driver of a sea-going steamer he comes to me and delivers his testimonials to me. I look into the certificates to see, if he has the required service or not. Then if the men can write their applications themselves I give them the forms of application.

"If any one cannot write then I write out the application for him. Then I receive the fees and take him before the Port Officer to sign his name or affix his mark on the application form in the presence of the Port Officer who then signs his name. I keep the application form with me till the last date of receiving candidates' papers, and then on that last day before the office closes I forward those applications to the **[515]** Resident and Engineer Examiners at the Government dockyard.

"Engine drivers are examined there and not in the Port Office. There is Board of Examiners nominated by the Government. After the

examination is over the applications are returned to the Port Office, showing the result of the examination signed by the Examiners.

"There are regular dates which are notified in the newspapers. I make a note on the application forms with regard to the vessel the applicant has served in, the period, and capacity of his service; these particulars I get from the certificate which the applicant produces.

"I always make that entry with regard to the certificates before the applicant is taken to the Port Officer to sign. If a man comes up and fails he must produce a fresh testimonial of further service since his failure, but there is no period of subsequent service demanded: if this subsequent service did not cover a period of two months I in practice reject the application. He must produce a certificate of having served as principal Serang or Tindal in the Engine-room of a sea-going steamer for three years signed by a certificated Engineer under whom he has served.

"In the case of failure six months must elapse before a candidate may present himself again."

"On the 14th August 1896 the accused produced Exhibit E to Dino Nath Mukerji at the Port Office, Calcutta, and at the same time asked Dino Nath Mukerji to write out for him (the accused) the requisite application for examination.

"The evidence in the case establishes that the accused used Exhibit E for the purpose of having the requisite application for examination filled up and of qualifying himself as a candidate for the examination of engine drivers under Act VII of 1884, and further that he used Exhibit E as genuine, though he knew it to be a false document made with the intent that it should be used in the manner in which it was in fact used by him. Exhibit E, if not a forged document, would **[516]** with the other testimonials produced by the accused have satisfied the conditions, as to testimonials under which candidates are entitled to have the requisite applications filled up, and become qualified for examinations held under Act VII of 1884; without Exhibit E those conditions would not have been satisfied.

"The question which I reserve is whether the facts hereinbefore stated are sufficient to satisfy the intent prescribed by section 463 of the Indian Penal Code, and whether having regard to those facts the accused fraudulently or dishonestly used Exhibit E within the terms of section 471 of the Indian Penal Code."

The *Officiating Standing Counsel* (Mr. *A. M. Dunne*) represented the Crown.

No one appeared on behalf of the accused.

The *Officiating Standing Counsel*.—Apart from the words "fraudulently or dishonestly," there is no doubt that the certificate was a false document; it had not been signed or made by the person by whom it purported to have been made. It was made and used for the purpose of committing a fraud within the meaning of section 463. The intention to defraud is the intention to commit a fraud upon somebody; it is not necessary that there should be an intent to deprive any person of some property. The Penal Code is intended to carry out the English law on the subject of forgery. In England the charge would be that the act was one that intended to defraud; and that would be upheld. In the case of *Queen-Empress* v. *Haradhan*, (1892) I. L.R., 19 Cal., 380, the Court felt a difficulty in construing the word "fraudulently," and the learned Judge drew a distinction between primary and the more remote intention. But an act cannot be split up like that. *Reg.* v.

Toshack, (1849) 4 Cox., C. C. 38: 1 Den., Cr. C., 492, is exactly in point; there the indictment was that the accused had forged certificates for the purpose of inducing the Trinity House Examiners to pass him; the gist of the offence was the intent to defraud. In the case of *The Empress* v. *Dhunum Kazee*, (1882) I. L. R., 9 Cal., 53 (60), NORRIS, J., himself deals with the question [517] of fraud, and shows that the element of wrongful gain or loss does not come into it, but that it is sufficient that there should be an intention to defraud. It is a fraudulent making if there was a fraud in the making of the document, or if there was an intention to commit a fraud by means of the document—*Lolit Mohun Sarkar* v. *Queen-Empress*, (1894) I. L. R., 22 Cal., 313 (321). *In Reg.* v. *Hodgson*, (1856) Dearsley and Bell, 3, there was no intent to commit any particular fraud; but if there had been any particular person to be deceived the decision would have been different. The decision in *Queen-Empress* v. *Haradhan*, (1892) I.L.R., 19 Cal., 380, has been dissented from in *Queen-Empress* v. *Soshi Bhushan*, (1893) I. L. R., 15 All., 210. [O'KINEALY, J.—I think NORRIS, J., really found that the intention was wanting.] Possibly. [MACLEAN, C.J.—In the case of *Queen-Empress* v. *Shosi Bhushan* the prisoner got the benefit of a course of lectures for nothing.] It is true there was also a question of dishonesty. [JENKINS, J.—And the professor lost his fees.] No doubt the dishonesty alone was sufficient to convict the accused. In the present case the offence consists in the fraud; not in his attaining the results he aimed at. It is the intention to deceive that constitutes the offence--*Queen-Empress* v. *Ganesh Khanderao*, (1889) I.L.R., 13 Bom., 506 (514). [JENKINS, J.—The question is, whether, the purpose being limited, as it was in this case, there was an intention to defraud. It comes to this, whether "defraud" does not imply some deprivation of property.] That is so. The term 'fraudulently' is used apart from 'dishonestly' and is not intended to cover the same ground. [JENKINS, J.—Does not section 496 of the Penal Code help you?] Yes, greatly The essence of the offence there is getting a marriage performed with a fraudulent intention. [JENKINS, J.—On the other hand, in section 239, there is a distinction between fraudulent intention and an intention to commit a fraud.] I submit that no distinction is intended; but that, on the contrary, if *A* delivers counterfeit coin to *B*, he would be guilty, and if he delivers it to *B*, not with the intention of defrauding *B*, but with the intention that *B* [518] should commit a fraud upon *C*, *A* would be equally guilty. [TREVELYAN, J.—There is a high text-book authority in Morgan and Macpherson's note, where they say that fraud does not relate only to loss of property.] If the view of NORRIS, J., in *Queen-Empress* v. *Haradhan*, (1892) I.L.R., 19 Cal., 380, were correct, the definition of "dishonestly" would not be necessary, as it would be included in the definition of "fraudulently." It cannot be supposed that a higher element is required to make a document a false document than to make a false document a forgery. [JENKINS, J.—Section 262 separates the two terms—" whoever *fraudulently* or *with intent to cause loss*.]"

Maclean, C. J.—We are unanimously of opinion in this case that the conviction must be upheld. But as the point is of importance, we will reduce our judgment into writing.

C. A. V.

The **opinion** of the Full Bench was delivered by

Maclean, C.J. (O'Kinealy, Macpherson, Trevelyan and Jenkins, JJ., *concurring*)—The accused in this case was tried before Mr. Justice JENKINS and a common jury on a charge of having fraudulently or dishonestly used as genuine a certain forged document, to wit, a document purporting to be a

certificate of competency as an Engine-room First Tindal and purporting to be signed by one H. Abern, Chief Engineer of the Steam Launch *Nicol*, and being a forged document, knowing or having reason to believe the same to be a forged document, and that thereby he committed an offence punishable under sections 465 and 471 of the Indian Penal Code.

The certificate in question purported to be a testimonial of service and good character.

It seems that in accordance with the provisions of Act VII of 1884 and the regulations issued under that Act, examinations are from time to time held in Calcutta of those who desire to obtain certificates of competency as engine drivers of ocean-going steamers. As a condition precedent to his qualification for any such examination each candidate has to produce to an appointed officer a certificate or testimonial **[519]** of his having served as principal or first serang or tindal in the engine-room of a steamer for the prescribed period, and this certificate has to be signed by a certificated engineer under whom he has served.

On the production of the required certificate or testimonial a form of application is filled up, and then signed by the candidate in the presence of the Port Officer; thereupon the candidate is entitled to present himself for examination.

On the 14th of August 1886 the accused produced the certificate mentioned in the charge to Dinonath Mukerji, the officer deputed to receive and examine candidates' certificates.

It is established by the evidence that this was done by the accused for the purpose of having the requisite application for examination filled up and of qualifying himself as a candidate for the examination of engine-drivers under Act VII of 1884, and further that the accused used the certificate as genuine, though he knew that it was a document made with the intention of causing it to be believed that it was made by a person by whom it was not made, and with the further intention that it should be used in the manner in which it was in fact used by the accused.

It also appears that the use to which the certificate was put by the accused was an essential and necessary condition of the success of his scheme.

A verdict of guilty was returned in accordance with the ruling of the Judge, who, however, reserved and referred for our decision the question whether, having regard to the decision in *Queen-Empress* v *Haradhan*, (1892) I. L. R., 19 Cal., 380, his ruling and the conviction could be upheld.

The *Queen-Empress* v. *Haradhan* has been dissented from in *Queen-Empress* v. *Shoshi Bhushan*, (1893) I. L. R., 15 All., 210, and the point reserved has no doubt been the subject of conflicting decisions.

It will, however, serve no useful purpose to enter into a minute examination of the several authorities to which we have been **[520]** referred: the law is contained in the Code, and whether the conviction now under consideration is sanctioned by its provisions is best to be determined by an examination of the Code itself.

Now section 471 of the Indian Penal Code is in the following terms: "Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document."

It will be seen that the essential elements of the offence are (1) that the document in question should be a forged document, (2) that the accused should have used it as genuine, and (3) that he should have so used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document.

A forged document is a false document made wholly or in part by forgery (section 470), and we learn the meaning of a false document from section 464 which (omitting the portions immaterial to the present purpose) provides, that a person is said to make a false document who dishonestly or fraudulently makes a document with the intention of causing it to be believed that such document was made by a person by whom he knows it was not made. Forgery is in turn defined by section 463, which is in the following terms: "Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

This referential definition of a forged document is to a certain extent tautologous, but be that as it may, it is clear that the person against whom the offence is charged must have acted dishonestly or fraudulently, and the sole question in the present case is whether that can be predicated of the accused Abbas Ali.

"Dishonestly" is defined by section 24, which provides that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing dishonestly; and the meaning of the expression [521] wrongful gain and wrongful loss is made clear by section 23. "Fraudulently" is defined by section 25 in the following words:—

"A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise." As a definition this provision is obviously imperfect, and perhaps introduces an element of doubt, which did not previously exist; for it leaves it to be determined, and that really is the point on which the present case turns, whether the word "defraud" as used in section 25 implies the deprivation or intended deprivation of property as a part or result of the fraud. The word defraud is of double meaning in the sense that it either may or may not imply deprivation, and as it is not defined in the Code and is not, so far as we are aware, to be found in the Code except in section 25, its meaning must be sought by a consideration of the context in which the word fraudulently is found.

The word "fraudulently" is used in sections 471 and 464 together with the word "dishonestly" and presumably in a sense not covered by the latter word. If, however, it be held that fraudulently implies deprivation either actual or intended, then apparently that word would perform no function which would not have been fully discharged by the word dishonestly and its use would be mere surplusage. So far as such a consideration carries any weight, it obviously inclines in favour of the view that the word "fraudulently" should not be confined to transactions of which deprivation of property forms a part.

There appears to us, however, to be a still more potent reason based on the language of section 463 for arriving at this conclusion.

Section 463 defines the offence of forgery, and in so doing prescribes the intents necessary to that offence. The words of the section are as follows: "Whoever makes any false document or part of a document, with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract or with intent to commit fraud or that fraud may be committed, commits forgery."

The section contemplates two classes of intents, and it is clear [522] (especially if regard be had to the context) that it is not an essential quality of

the fraud mentioned in the section that it should result in or aim at the deprivation of property. If this be so, it cannot be supposed that the definition of a false document, which is but a part of the definition of forgery, requires as a condition of criminality an intent different in its quality and its aims from that prescribed by section 463.

It appears to us, therefore, that deprivation, actual or intended, is not a necessary ingredient of the intent to defraud referentially imported into section 464, and by a similar train of reasoning we are led to the like conclusion as to the true construction of section 471.

Though we are in no way bound by the decisions of the English Courts, still we are fortified in the view we take of the expression "intent to defraud" by the decision in *Reg* v. *Toshack*, (1849) 4 Cox C.C. 38: 1 Den. C. C., 492. We therefore hold, so far as the question reserved and referred for our decision is concerned, that the accused Abbas Ali was rightly convicted of the offence with which he was charged.

H. W.

NOTES.

[Similar decisions were given in (1905) 28 Mad., 90 ; (1898) 21 All., 113 ; (1906) 28 All., 358, (1901) 5 C W. N. 897.]

[25 Cal. 522]

REFERENCE TO FULL BENCH.

The 31st January, 1898.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN, MR. JUSTICE BANERJEE AND MR. JUSTICE JENKINS.

Tepu Khan and others............Defendants

versus

Rajani Mohun Das (Plaintiff)............and others Defendants Nos. 4 to 10.*

Evidence Act (I of 1872), sections 11 and 13—Judgment not inter partes*—Admissibility in evidence of judgment in former case—The subject matter of the former suit not being identical with that of the latter suit, judgment irrelevant.*

The rule laid down in the cases of *Gujju Lall* v. *Fatteh Lall*, (1880) I. L. R., 6 Cal., 171, and of *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry*, (1886) I. L. R., 13 Cal., 352, has been materially qualified by the decisions of the Privy Council, in the cases of [523] *Ram Ranjan Chakerbati* v. *Ram Narain Singh*, (1894) I. L. R., 22 Cal., 533 : L. R., 22 I. A., 60, and *Bitto Kunwar* v. *Kesho Pershad*, (1897) L. R., 24 I. A., 10.

Under certain circumstances, in certain cases, the judgment in a previous suit, to which one of the parties in the subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit.

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* Reference to the Full Bench in Appeal from Appellate Decree No. 1747 of 1895.

In a case where the previous suit was to recover a two-thirds share of the property in question, and the subsequent suit was by a different plaintiff to recover the remaining one-third share of the same property :—

Held, in the subsequent suit, the judgment in the previous suit was not admissible in evidence, the subject-matter in the two suits not being identical.

THIS case was referred to the Full Bench by MACLEAN, C.J., and BANERJEE, J.

The facts of this case, so far as they are necessary for purposes of this report, and the arguments, appear sufficiently from the ORDER OF REFERENCE which was as follows :—

BANERJEE, J.—" This appeal arises out of a suit brought by the plaintiff, respondent, for possession of a one-third share of a plot of land measuring 21 bighas, on the allegation that the said land appertained to resumed estate No. 9870 of the Dacca Collectorate, which belonged originally to the *proformâ* defendants; that defendant No. 4 was in possession of two-thirds share of the same, having purchased it at a sale in execution of a decree; that the plaintiff purchased the remaining one-third share thereof from the *proformâ* defendants after they and their predecessors had held possession of the same for upwards of twelve years, and that the plaintiff had been unjustly kept out of possession of the land in dispute by the principal defendants since 1891.

" The principal defendants in their defence urged that the suit was barred by limitation; that the suit was also barred under sections 13 and 43 of the Code of Civil Procedure; that the land in dispute originally belonged to one Mr. Panioty, who held it for upwards of a hundred years; that by successive **[524]** transfers the land came to the hands of the defendants; and that defendant No. 4, with the object of ousting the defendants from the same, instituted several suits against them; but being unsuccessful now caused the plaintiff to bring this suit. The defendant No. 4 supported the plaintiff.

" The first Court found after a local investigation by an Amin that 8 bighas and odd cottahs of the disputed land appertained to the plaintiff's estate, but it dismissed the suit altogether on the ground of limitation.

" Against the decision of the first Court the plaintiff preferred an appeal, and the principal defendants put in a cross-appeal, urging that the Munsif had improperly refused to admit certain judgments in evidence. The Lower Appellate Court has decreed the appeal of the plaintiff and dismissed the defendant's cross-appeal.

" In second appeal it is contended for the defendants, *first*, that the Court of Appeal below was wrong in holding that the judgments tendered in evidence by the defendants were inadmissible; and, *secondly*, that the decree in favour of the plaintiff should in any case have been limited to a one-third share of 8 bighas and odd cottahs only.

" The second point need not detain us long, as the learned Vakil for the respondents concedes that the decree ought to be limited in the manner contended for on behalf of the appellants.

" The first point, however, involves a question which is not altogether free from difficulty.

" If the cases of *Gujju Lall* v. *Fatteh Lall*, (1880) I. L. R., 6 Cal., 171, and *Surendra Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry*, (1886) I.L.R., 13 Cal., 352, upon the authority of which the Lower Appellate Court, has held the judgments tendered in evidence for the defendants to be

inadmissible, are good law, the first ground urged before us must fail. But if those cases have in effect been overruled by the decisions of the Privy Council in *Ram Rajan Chakerbati* v. **[525]** *Ram Narain Singh*, (1894) I. L. R., 22 Cal. 533 : L. R., 22 I. A., 60, and *Bitto Kunwar* v. *Kesho Pershad*, (1887) L. R., 24 I. A., 10, then the question arises whether the judgments referred to are admissible in evidence.

"In the two cases relied upon by the Lower Appellate Court, namely, *Gujju Lall* v. *Fatteh Lall*, (1880) I. L. R., 6 Cal., 171, and *Surender Nath* v. *Brojo*, (1886) I. L. R., 13 Cal, 352, it was held by this Court that a former judgment, which is not a judgment *in rem* nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit either as *res judicata* or as proof of the particular point decided, unless between the same parties or those claiming under them. But in the case of *Ram Ranjan Chakerbati* v. *Ram Narain Singh*, (1894) I.L.R., 22 Cal., 533 : L.R., 22 I.A., 60, it was held by the Privy Council that a judgment passed in a suit to which the plaintiff was no party, was admissible against the plaintiff as evidence showing the rent paid ; and in *Bitto Kunwar* v. *Kesho Pershad*, (1887) L. R., 24 I. A., 10, their Lordships of the Privy Council, speaking of the judgment in a former suit against one of the defendants, Bacha Tewari, observe : "This decision is not conclusive against Bacha Tewari as the suit was not between the same parties as the present suit, but their Lordships agree with the Subordinate Judge that it was admissible as evidence against him." These two decisions of the Privy Council must be taken to have in effect overruled the cases relied upon by the Lower Appellate Court. That being so, the question arises whether, apart from those cases, the judgments referred to in the argument were admissible in evidence against the plaintiff, respondent.

"Now the provisions of the Indian Evidence Act expressly relating to judgments are sections 40 to 44. The judgments which are said to have been improperly rejected in this case not being evidence of any of the descriptions referred to in sections 40, 41 and 42, and they not having been excluded on **[526]** any of the grounds mentioned in section 44, it is not necessary to dwell upon the provisions of those sections. The question we have to consider is, whether the judgments, which have been held to be inadmissible by the Courts below, are really admissible under section 43 of the Evidence Act, which enacts that 'judgments, orders or decrees other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.'

"I am inclined to think that this question ought to be answered in the affirmative, and that the existence of the judgments under consideration, or at any rate the existence of one of them, is relevant under sections 11 and 13 of the Evidence Act.

"The judgments that were tendered in evidence and rejected as inadmissible by the Courts below are three in number, being (as I gather from the judgment of the Lower Appellate Court and from paragraph 10 of the written statement of defendants No. 1—3, (1) the judgment in suit No. 742 of 1887 brought by the present defendant No. 4, Protab Chunder Das, co-sharer of the plaintiff, against the present defendants for possession of two-thirds share of the land now in dispute ; (2) the judgment in suit No. 165 of 1892 brought by the said Protab Chunder Das against the said defendants ; (3) the judgment in suit No. 1219 of 1886 brought by one Emdad Ali against the present defendants. Though the relevancy of the last two may not be quite clear, the existence of the first-mentioned judgment seems to be a relevant fact, as well under section 11 of

the Evidence Act, as under section 13. This may be seen from the following considerations.

"First as to the relevancy of the judgment in suit No. 742 of 1887 under section 11. The existence of the judgment, that is, the circumstance that that particular judgment was passed, is clearly a fact within the meaning assigned to the term in section 3. Now the existence of the judgment (which will be established by the judgment being filed) shows that a suit had been brought by plaintiff's co-sharer Protab Chunder [527] so far back as 1887 against the principal defendants for possession of his two-thirds share of the disputed land, and that suit was dismissed. The plaintiff's case now is that the said Protab Chunder was in possession of the two-thirds share in dispute, while he and his vendor were in possession of the remaining one-third share down to a period within twelve years before the institution of the present suit. And the existence of the above-mentioned adverse judgment taken in connection with the other facts of the case might, if the judgment had been admitted in evidence by the Court below, have been found to make the non-existence of the plaintiff's possession and the existence of the defendants' possession highly probable within the meaning of section 11 of the Evidence Act. I cannot say it would have that effect, because, sitting here in second appeal, it is not open to us to enter into questions of fact. But I do say that it might have that effect, and if it might, a substantial error in the procedure consisting in the improper rejection of evidence is made out which may possibly have produced error in the decision of the case upon the merits within the meaning of section 584, clause (*c*) of the Code of Civil Procedure.

"Next as to the relevancy of the judgment in suit No. 742 of 1887 under section 13. If the existence of the judgment is not a transaction within the meaning of clause (*a*) of section 13, it proves that a litigation terminating in the judgment took place; and the litigation comes well within the meaning of the clause as being a transaction by which the right now claimed by the defendants was asserted. So again the litigation which is evidenced by the existence of the judgment was a particular instance within the meaning of clause (*b*) of section 13, in which the right of possession now claimed by the defendants was claimed. It has been said that the right spoken of in this section is an incorporeal right. I do not think that there is any sufficient reason for putting this limitation on the meaning of the term as used in the section. The judgment, therefore, is in my opinion relevant under section 13.

"If such judgments were not relevant under either of the two sections 11 and 13, they could not be admissible in evidence, [528] as the Privy Council have held them to be in the two cases referred to above.

"The strongest argument against the admissibility of such judgments in evidence is, to use the language of a well-known writer on the Law of Evidence (*see* Taylor on Evidence, 9th edition, section 1682) 'That no man ought to be bound by proceedings to which he was a stranger and over the conduct of which he could, therefore, have exercised no control.' But in the first place, the judgments in question are sought to be used, not as binding and conclusive evidence, but only as evidence for what they are worth, the weight to be attached to the evidence being left to the Court to determine. And in the second place, the reason stated above, though it is a good reason for excluding from consideration as against a stranger, the evidence afforded by a judgment, so far as it is the opinion of a Court upon materials in the placing of which before the Court the stranger could have had no control, does not appear to hold equally good where what is sought to be taken into consideration is the evidence afforded by the existence of the judgment as to a litigation relating

to the right in question and the way in which that litigation terminated. For such collateral purposes, judgments are admissible in evidence against strangers under the English Law. See *Davies* v. *Lowndes*, (1843) 6 M. & G., 471 (520). It is true that their Lordships of the Privy Council in the two cases referred to above while overruling in effect the decision of this Court in *Gujju Lal* v. *Fatteh Lal*, (1880) I. L. R., 6 Cal., 171, and *Surendro Nath* v. *Brojo Nath*, (1886) I. L. R., 13 Cal., 352, do not refer to any section of the Evidence Act. But I may add that the view I take is supported to some extent by the cases of *Hira Lal Pal* v. *A. Hills*, (1882) 11 C. L. R., 528; *Venkata Sami* v. *Venkatreddi*, (1891) I. L. R., 15 Mad., 12; and the *Collector of Goruckhpur* v. *Palakdhari Singh*, (1889) I. L. R., 12 All., 1. It has sometimes been said (see *Ranchhod Dass* v. *Bapu* **[529]** *Narhar*, (1888) I. L. R., 10 Bom., 439) that if the Legislature in this country had intended to make judgments admissible in evidence against strangers, as it was an important departure from the English Law, the intention would have been expressed, not indirectly by the provisions embodied in sections 11 and 13, but directly by some express povision in that part of the Evidence Act which relates to judgments. I think the answer to this remark is furnished by section 43, which is one of the group of sections relating to judgments, and which contains the provision applicable to cases like the one before us, relating to the relevancy of judgments as evidence against strangers.

"For these reasons I think the judgment in Suit No. 742 of 1887 ought to have been admitted in evidence. But as the point raised is not altogether free from doubt and difficulty, and is one of frequent occurrence and of great importance, I agree with the learned Chief Justice in thinking that the case should be referred to a Full Bench, the main question for determination being whether the judgments referred to above to which the plaintiff-respondent was no party are admissible in evidence against him under sections 11 and 13 of the Evidence Act, or under any other provision of law.

"MACLEAN, C.J.—I concur in thinking, as the point often arises and is of great importance, that this case should be referred to a Full Bench, but I reserve my opinion upon the point submitted for decision."

Babu *Hari Mohun Chuckerbutty* for the Appellants.

Babu *Lal Mohan Dass* for the Respondents.

The following **opinions** were delivered by the Full Bench (MACLEAN, C.J., and MACPHERSON, TREVELYAN, BANERJEE and JENKINS, JJ.): -

Maclean, C. J. - Although I was a party to this reference, I am not quite satisfied, after the discussion which we have heard to-day, that the question submitted in its broader aspect really arises. In my opinion, the judgments in question are not admissible in evidence in this suit, because now that the matter **[530]** has been fully laid before us, it appears that the subject-matter of the present suit is not identical with the subject-matter in the previous suits, in which those judgments were delivered. In the previous suit the subject matter was to recover a two-thirds share of the property in question, but in the present case it is a suit by a different plaintiff to recover the remaining one-third share. The subject-matter, therefore, of the two suits is not identical; the title to the one-third share may be, and apparently is. different from that of the other shares. In this view the judgments which were sought to be admitted as evidence in this case were irrelevant, and, therefore, not admissible as evidence. This point, so far as I recollect, I am speaking only from memory, was not very clearly brought to the attention of Mr. Justice BANERJEE and myself on the previous occasion, and if it had been, we might possibly have thought that this

reference was not necessary. But as the two cases decided by the Full Bench in this Court, the case of *Gujju Lall v. Fatteh Lall*, (1880) I.L.R., 6 Cal., 171, and a later case of *Surender Nath Pal Chowdhry v. Brojo Nath Pal Chowdhry*, (1886) I. L. R., 13 Cal., 352, have been referred to, I feel bound to express my opinion that, having regard to the recent observations of the Privy Council in the case of *Ram Ranjan Chakerbati* v. *Ram Narain Singh*, (1894) I. L. R., 22 Cal., 533: L. R., 22 I. A., 60, and in the more recent case of *Bitto Kunwar v. Kesho Pershad*, (1897) L.R., 24 I. A., 10, the Full Bench decisions referred to must be regarded as materially qualified, because it is clear from the decisions in the Privy Council that under certain circumstances, and in certain cases, the judgment in a previous suit, to which one of the parties in the subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit.

The decree in the present suit in favour of the plaintiff must be limited to a one-third share of 8 bighas and odd cottahs only; subject to the decree being varied to that extent the appeal fails, and must be dismissed with costs, including the costs of this reference.

[531] Macpherson, J.—I agree in the view expressed by the learned Chief Justice.

Trevelyan, J.—I also agree.

Banerjee, J.—I agree with the learned Chief Justice in holding that the rule laid down in the cases of *Gujju Lall* v. *Fatteh Lall*, (1880) I. L. R., 6 Cal., 171, and *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry*, (1886) I. L. R., 13 Cal., 352, must be taken to have been materially qualified by the decisions in the Privy Council in the cases of *Ram Ranjan Chakerbati* v. *Ram Narain Singh*, (1894) I. L. R., 22 Cal., 533, and *Bitto Kunwar* v. *Kesho Pershad*, (1897) L. R., 24 I. A., 10. Upon the question whether the judgment mentioned in the referring order is admissible or not, I feel bound to say that I am not quite satisfied that the mere fact of the subject-matter of the present suit being a one-third share in the property in dispute, whereas the subject-matter of the previous suit was the remaining two-thirds of the same property, would make any real difference in the case, having regard to the nature of the case made by the parties to the suit. For the reasons given by me in the referring order, I still have my doubts as to whether the Lower Appellate Court was right in excluding that judgment altogether. But I must add that my doubts on the point are not so strong as to justify my expressing myself in the language of positive dissent.

Jenkins, J.—I agree with the learned Chief Justice.

S. C. G. *Decree varied.*

NOTES.

[As regards the admission of judgments in previous rent suits, see also (1912) 17 C. W. N., 1016; (1906) 10 C.W.N., 1084; (1899) 1 Bom. L. R., 186; (1908) 9 C. L. J., 16.

As regards the admissibility of judgments, see also (1904) 9 C. W. N., 402; (1906) 5 C. L. J., 55; (1907) 7 C. L. J., 384, (1908) 12 C. W. N., 739; (1904) 31 Cal., 667; (1908) 13 C. W. N., 217.]

[25 Cal. 531]

The 25th January, 1898.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE,
MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN,
MR. JUSTICE BANERJEE, AND
MR. JUSTICE JENKINS.

Pyari Mohun Mukhopadhya............Plaintiff

versus

Gopal Paik, minor, represented by his next friend, guardian and mother Srimoti Nidra Dasi............Defendant.*

Landlord and Tenant—Suit for rent—Sub-division of Tenancy—Rent receipt signed by the agent—Bengal Tenancy Act (VIII of 1885), section 88.

[532] A receipt for rent granted by a landlord or his agent containing a recital that a tenant's name is registered in the landlord's *sherishta* as a tenant of a portion of the original holding at a rent which is a portion of the original rent, does amount to a consent in writing by the landlord to a sub-division of the holding and a distribution of the rent payable in respect thereof, within the meaning of section 88 of the Bengal Tenancy Act.

THIS case was referred to a Full Bench by BANERJEE and RAMPINI, JJ., on the 23rd April 1897, with the following OPINION:—

"This appeal arises out of a suit for arrears of rent. The plaintiff, in the plaint as originally filed, alleged that the defendant held 41 bighas 11 cottahs and 4 chittaks of land, bearing a rent of Rs. 31-1 anna 1¼ koras, and that arrears were due for the period from Bysak 1298 to Choitro 1300.

"The defence was, that the holding did not contain the area alleged by the plaintiff, nor did it bear the rent mentioned in the plaint, but that the defendant was really in possession of 37 bighas 12 cottahs and 4 chittaks of land, bearing a rent of Rs. 28-15 annas and 2¼ gundas, and that this reduced holding at the lower rent resulted from a sub-division of the former holding, an area of 3 bighas 19 cottahs, bearing a rent of Rs. 2-14 annas 15¾ gundas, having been sold to one Sridhur Haldar. Subsequently, the plaint was amended with the permission of the Court; and the plaintiff stated in the amended plaint that the area of the holding was 45 bighas 6 cottahs, and the annual rent Rs. 33-14 annas 10¼ gundas. Upon the plaint being amended, a fresh written statement was put in, in which the defendant alleged that, in addition to the transfer to Sridhur Haldar, there had been transfers to three other persons; and that the quantity of land that was in the possession of the defendant, and the rent that was payable by him, were as alleged in the first written statement. There was also a plea of payment raised."

Upon these pleadings, the parties went to trial upon three issues: "First, whether the *jama* payable by the defendant is Rs. 33-14 annas, or Rs. 28-1 anna, after *kharij*." "Second, whether the plaintiff's suit is not maintainable as the plaintiff has not filed the road-cess returns, and whether the defendant is not [533] entitled to raise that plea now." "Thirdly, whether the defendant's allegation of payment is true."

The Court of First Instance found against the defendant upon all these issues, and it decreed the claim in full. On appeal by the defendant, the Lower Appellate Court gave effect to the plea of sub-division of the holding, and it

* Reference to a Full Bench in appeal from Appellate Decree No. 1453 of 1895.

accordingly modified the decree of the first Court, holding that the annual rent payable by the defendant was Rs. 28-1 anna.

Against that decision of the Lower Appellate Court, the plaintiff has preferred this second appeal, and it is contended on his behalf, *first*, that the Lower Appellate Court was wrong in giving effect to the plea of sub-division of the holding, and the consequent reduction of the rent, sofar as that plea related to the deduction unsuccessfully pleaded in a previous suit, by reason of the transfer of a part of the holding to Sridhur Haldar; and, *secondly*, that the Lower Appellate Court was wrong in giving effect to the defendant's plea of sub-division of the tenure when it was not shown that such sub-division was made with the consent in writing of the plaintiff, as required by section 88 of the Bengal Tenancy Act. As it is necessary for the disposal of this case to determine the point raised in the second contention of the appellant, and as upon the question raised in that contention there is a conflict of authority in this Court between the case of *Aubhoy Churn Maji* v. *Shoshi Bhusan Bose*, (1888) I. L. R., 16 Cal., 155, and the unreported decision in second appeal No. 1537* of 1891, *Jagadishwar*

* *The 9th August, 1892.*

PRESENT:

MR. JUSTICE NORRIS AND MR. JUSTICE BEVERLEY.

Jagadishur Bhuttacharji............Defendant

versus

Joymoni Devi............Plaintiff.†

Landlord and Tenant -Suit for rent—Receipt granted by the gomastha of the landlord, containing recital that the tenant's name was registered in the landlord's sherishta in respect of a holding which is a portion of the original holding—Effect of such receipt—Sub-division of tenancy —Bengal Tenancy Act (VIII of 1885), section 88.

A rent receipt signed by the landlord's *gomastha*, and containing a recital that the defendant's name is registered in the landlord's *sherishta*, as a tenant in respect of a holding which is a portion of the original holding, is evidence of the fact that the landlord consented to the sub-division of the tenure.

The facts of the case, for the purposes of this report, are sufficiently stated in the judgment of the High Court.

Babu *Ashutosh Mookerjee* for the Appellant.

No one appeared for the Respondent.

The **judgment** of the High Court (**Norris** and **Beverley, JJ.**) was as follows :—

This is an appeal from the decision of the District Judge of 24-Pergunnahs, who has confirmed the decision of the Munsif of Alipur in a rent suit.

The suit was for arrears of rent, and the defendant No. 2 who is the appellant before us contended that the original rental of Rs. 28-13 annas had been sub-divided, and that he, at the time the suit was brought, held a portion only of the land in respect of which the rent was sued for and which had been consolidated with other lands of which he was in possession, which together formed a new holding.

The suit was decreed. The defence was held to fail on the ground that under the provisions of section 88 of the Bengal Tenancy Act there was no evidence to show that the landlord had consented to the sub-division of the holding.

The case came before us on the 1st of this month, and it was adjourned in order that the learned Vakil for the appellant might have the *dakhila* upon which he relied translated. It has now been translated and copies of the translations are before us. It appears that this

†Appeal from Appellate Decree No. 1537 of 1891 against the decree of R. F. Rampini, Esq., District Judge of 24-Pergunnahs, dated the 11th of June 1891, affirming the decree of Babu Kartic Chunder Pal, First Munsif of Alipur, dated the 8th of October 1890.

[534] *Bhattacharji* v. *Joymoni Debi*, dated the 9th August 1892, it becomes necessary under Rule I of Chapter V of the rules of this Court on the Appellate Side to refer this case for decision by a Full Bench. Though the receipts expressly referred to by the Lower Appellate Court are receipts not for rent but for bonus paid by the transferee, they do not cover all the transfers pleaded. To give effect to the plea as the lower Court has done, it is conceded that receipts for rent filed in the case have to be referred to; and thus there arises the question upon which the conflict of authority referred to above exists, namely, whether a receipt for rent [535] granted by the landlord or his agent containing a recital that a tenant's name is registered in the landlord's *sherishta* as a tenant of a portion of the original holding, at a rent which is a portion of the original rent, amounts to a consent in writing by the landlord to a division of the holding, and a distribution of the rent payable in respect thereof, within the meaning of section 88 of the Bengal Tenancy Act. As the question arises in a second appeal, the whole case must be referred to a Full Bench for decision.

Babu *Girish Chunder Chowdhry* for the Appellant contended that a receipt signed by a *gomastha* does not amount to a consent in writing within the meaning of section 88 of the Bengal Tenancy Act. The receipt may be binding upon the landlord, but it cannot be called a consent in writing of the landlord, so as to make a sub-division of a tenure.

Section 56 of the Bengal Tenancy Act speaks only of granting of receipts for the amount paid by the tenant, but such receipt cannot have the effect of a consent in writing of the landlord. Then again section 187, clause 3, of the Bengal Tenancy Act clearly indicates that in order to make a sub-division there must be a consent in writing to that effect by the landlord; the mere granting of a receipt by a *gomastha* would not make a sub-division.

Dr. *Ashutosh Mookerjee* for the Respondent was not called upon.

The following **opinions** were delivered by the Full Bench (MACLEAN, C.J., and MACPHERSON, TREVELYAN, BANERJEE, and JENKINS, JJ.)

Maclean, C.J. —The question for our decision on this reference is whether a receipt for rent granted by the landlord or his agent containing a recital that a tenant's name is registered in [536] the landlord's *sherishta* as the tenant of a portion of the original holding at a rent which is a portion of the original rent amounts to a consent in writing by the landlord to a division of the holding and a distribution of the rent payable in respect thereof within the meaning of section 88 of the Bengal Tenancy Act.

The matter was referred to a Full Bench by reason of a difference of opinion which was regarded as existing between the case of *Aubhoy Churn Maji* v. *Shoshi Bhusan Bose*, (1888) I. L. R., 16 Cal., 155, and an unreported decision of NORRIS and BEVERLEY, JJ. in S. A. No. 1537 of 1891, dated 9th August 1892, which is set out in the Paper Book. I am not myself quite satisfied that, as between these two cases, there is any real difference of opinion, for it is not very clear what the actual form of the receipt was in the case of *Aubhoy Churn Maji* v. *Shoshi Bhusan Bose*, (1888) I. L. R., 16 Cal., 155. In

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dakhila, which is signed by the landlord's *gomastha*, states that in the landlord's *serishta* the appealing defendant is registered as a tenant in respect of a holding of 37 bighas 13 cottahs at a rent of Rs. 18-1-8 pie, plus 9 annas for road-cess and public work-cess.

We think that this document containing the recital that the defendant is thus registered in the landlord's *serishta* and being signed by the *gomastha* of the plaintiff is evidence that the landlord consented to the sub-division of the tenure.

We are therefore of opinion that the appeal must be allowed, the decrees of the lower Courts set aside, and the plaintiff's suit dismissed with costs in all the Courts.

Appeal allowed.

the present case, the receipt is in the form given in the schedule to the Bengal Tenancy Act. I assume for the purpose of our decision, and I think the question submitted to us presupposes, that the agent is duly authorised by the landlord to give such a receipt. If that be so, I entertain no doubt whatever that a receipt given by the landlord or by his duly authorized agent in the form of the receipt given in this case, amounts to a consent in writing by the landlord to a division of the holding and a distribution of the rent payable in respect thereof within the meaning of section 88 of the Bengal Tenancy Act.

As regards the other point, which was rather hinted at than argued, viz., that the matter was *res judicata*, having regard to the findings of fact by the Lower Appellate Court, the point is not arguable.

The appeal therefore fails and must be dismissed with costs including the costs of this reference.

Macpherson, J.—I agree.

Trevelyan, J.—I also agree.

Banerjee, J.—I agree with the learned Chief Justice in thinking that the receipt produced in this case is sufficient to **[537]** answer the requirements of section 88 of the Bengal Tenancy Act. I only wish to add one word with reference to the reason for this reference to a Full Bench. Although the form of the receipt in the case of *Aubhoy Churn Maji* v. *Shoshi Bhusan Bose*, (1888) I. L. R., 16 Cal., 155, is not set out, it appears from the statement of facts in the report that the receipt was one for the smaller rent payable in respect of the smaller area contended for by the defendant. That receipt was considered insufficient to meet the requirements of section 88 by the Lower Appellate Court; and in the judgment of this Court, the learned Judges observe, after referring to the view taken of section 88 by the Lower Appellate Court: "In this view of section 88 we agree." It was this observation that influenced me in referring the case to a Full Bench.

Jenkins, J.—I concur in the judgment of the Chief Justice.

S. C. G. *Appeal dismissed.*

NOTES.

[See also (1904) 31 Cal., 1026; (1905) 10 C. W. N., 216; (1911) 13 I. C., 449; (1913) 18 C. L. J., 174, where this decision was followed.]

[25 Cal. 537]

PRIVY COUNCIL.

The 17th November and 8th December, 1897.

PRESENT :

LORDS WATSON, HOBHOUSE, AND DAVEY, AND SIR R. COUCH.

Robert Skinner (*alias* Sardar Mirza)...........Defendant

versus

Charlotte Skinner (*alias* Badshah Begum)......... ..Plaintiff.

[On appeal from the Chief Court of the Punjab.]

Marriage— Personal Status -Christian marriage followed by Mahomedan marriage Rights of widow under Mahomedan law Divorce.

In a suit to obtain a widow's share under Mahomedan law in the estate of the deceased, it was proved that the plaintiff and deceased had been married in 1865 as professed Christians in a church at Meerut, that subsequently, having reverted to Mahomedanism, they were married a second time according to Mahomedan law in *nikah* form, which second marriage had not been dissolved by a Mahomedan divorce. In 1886 the husband died, leaving a will excluding the wife from all participation in his estate.

Held, that the personal status of the deceased being at the time of his death that of a Mahomedan, and the plaintiff's personal status being that of his wife under the same law, she was entitled to a share in his estate, notwithstanding his will, which purported, but under Mahomedan law was inoperative, to exclude her

[538] Quaere,—whether in the case of spouses remaining domiciled in India where religious creed affects the rights incidental to marriage, such as that of divorce, a change of religion made honestly after marriage with the assent of both spouses, without any intent to commit a fraud on the law, affects any change in those rights.

APPEAL from a decree (12th July 1893) of the Chief Court, affirming a decree (25th June 1889) of the District Judge of Delhi The appellant, first defendant in the suit, was a sharer, and represented minor defendants, also sharers, in the estate of the late Stuart Skinner, otherwise Sardar [Nawab ?] Mirza, who died a Mahomedan in 1886. The plaintiff, respondent, (and cross-appellant in the Chief Court), was also a Mahomedan, and *claimed to* share in his estate according to that law, as his widow.

The facts are stated in their Lordships' judgment.

The main question as to the plaintiff's title, which was founded on her marriage to the deceased in the English form in a Church at Meerut, they having both been then Christians, was this Whether the plaintiff, who afterwards with her husband had reverted to the Mahomedan religion, was precluded from claiming her widow's share in the distribution of her husband's estate on his decease, according to the latter law, by reason of her having been divorced from him in manner sanctioned thereby.

Both the Courts below decided that the widow's claim was established; but they differed as to whether, in fact, such a divorce, according to Mahomedan law, had taken place. The District Judge found that it had. But he decided that it had no effect to dissolve the Christian marriage. The Chief Court, on an appeal, found no sufficient evidence of the divorce: so that the result was identical in the judgment of both Courts in favour of the claim.

The decree made by the District Judge, and affirmed, with the above distinction as to the grounds, by the Chief Court, directed a partition of the estate of the deceased, and the delivery of her share to the plaintiff as one of the two widows of the deceased Mahomedan proprietor.

The District Judge did not consider it necessary before giving his judgment, of the 25th June 1889, in favour of the plaintiff, to call on the defendants to produce all their evidence of the divorce [539] having taken place. The Christian marriage could not, in his opinion, have been dissolved by the divorce (*talak*), even if proved; and in support of this, he referred to the recognition, by the Mahomedan law itself, of a valid Christian marriage.

The first defendant appealed, and the plaintiff cross-appealed, to the Chief Court, who, on the 1st April 1891, remanded the suit to the first Court to take all the evidence for the defence. The District Judge, in his return of the 22nd June 1892, found that the plaintiff [plaintiff's husband?] had pronounced what amounted to a divorce against his wife, according to Mahomedan law, before 1865; but that this had not effected a dissolution of the Christian marriage of 1855.

The final judgment of the Chief Court of the 12th July 1893 distinguished between the evidence as to the actual occurrences which constituted the divorce, and the evidence as to the supposed effect of those occurrences. It was clear, said the Court, as indeed it was admitted by the defendants, that it was for that Court to decide whether or not there was an effectual divorce; and it had been correctly argued that it was of no consequence whether the parties were afterwards reconciled; for that would not renew, or revive, the marriage tie. Proceeding to the facts on which they were to decide the legal question—Was there a divorce?—the Court summed up that they did not consider the evidence to have given a true or trustworthy account of the occurrence, concerning which a dispute afterwards arose as to whether the words used constituted a conditional divorce.

The Court said: "It must be remembered that the whole issue depends upon the precise words said by Nawab Mirza to his wife thirty-five years before suit. All that can be safely deduced from the evidence is that about the year 1859 something was said by the husband to the wife, which the wife chose to regard as amounting to a divorce, probably a conditional divorce, and which the husband did not so regard; that the difference of opinion between husband and wife was referred before 1865 to a council of experts (or possibly two councils) which differed as to the legal effect of whatever had been submitted to them; and that the parties to the marriage [540] adhered to their respective views for a considerable period afterwards, and probably up to the time of Nawab Mirza's death. What was actually said by the husband to the wife it is impossible to determine positively, and with reasonable certainty upon the evidence before us, and it is therefore impossible to say whether or not there was a divorce which under the Mahomedan law dissolved the marriage tie of the *nikah* at Delhi.

"As to the rest of the evidence, it is agreed on all hands that the parties separated in 1859, and we do not consider that any fact is proved which is inconsistent with the continuance of the marriage tie from that date onwards, though we are by no means satisfied that there was any renewal of conjugal co-habitation. The results of the evidence are merely negative, and no positive conclusions can be, or need be, arrived at upon the minor disputed points.

"We find accordingly that it is not proved that the plaintiff was divorced by her husband at any time after the marriage, and consequently she was still his wife at the time of his death."

The Judges concurred with the lower Court in finding that the loss of a *kabin nama*, alleged by the plaintiff to have been executed, had not been proved; nor that any portion of dower was due thereunder.

They thus stated their conclusion: "The result of these findings of fact is that the decree of the District Judge stands affirmed; but on somewhat different grounds from those on which it was made. We must accordingly dismiss both appeals; and we think that the proper order is that each party should bear its own costs in both appeals."

On an appeal preferred by the first defendant,

Mr. *C. W. Arathoon*, for the appellant, argued that the Chief Court were wrong in their view of the facts as to the divorce, as to which they should have maintained the finding of the District Court. But, as to the legal effect of that divorce, he argued that the District Court had been wrong in holding that it had not operated to dissolve the Christian marriage of 1855. That **[541]** divorce had operated to disqualify the widow from claiming to share in her late husband's estate according to the Mahomedan law. Examination of the evidence showed that her conduct and assertions after her separation from her husband were sufficient to prove that she herself considered that she had been divorced and that she was free to marry again. The facts disentitled her to claim, on the principles of justice, equity, and good conscience, against the estate of the deceased, —principles which had been applied to members of the Skinner family in *Barlow* v. *Orde*, (1870) 13 Moo. I. A., 277.

Reference was made to *Moonshee Buzul-ul-Raheem* v. *Luteefut-oon-Nissa* (1861) 8 Moo. I. A., 395, *Abraham* v. *Abraham*, (1863) 9 Moo. I. A., 195, *Skinner* v. *Orde*, (1871) 14 Moo. I. A., 309, *Syud Mozuffer Ali* v. *Kumuru-nissa Bibi*, (1864) W. R., 32. The Indian Marriage Act, V of 1852, reciting 14 and 15 Vic. C. 40; Baillie's Mahomedan Law, Book III, of divorce, p. 205; Ameer Ali's Personal Law of the Mahomedans, Chapter XII, dissolution of the marriage contract; Macnaghten's Mahomedan Law, Chapter VII; Hedaya, Vol. I, Book 4, C. 2; Wilson's Gloss, 550; *In re Millard*, (1887) I. L. R., 10 Mad., 218; *Anon*, (1866) 3 Mad., H. C. R., Ap., 7, *In the matter of Ram Kumari*, (1890) I. L. R., 18 Cal, 264

The Respondent did not appear.

The **judgment** of their Lordships was delivered on 8th December 1897 by

Lord Watson. Stuart Skinner, otherwise known as Nawab Mirza, was, on the 3rd May 1855, married to the respondent, who was the daughter of one Martin Blake, of the Bengal Civil Service, by a Mahomedan woman, Choti Begum. The ceremony was performed in the Protestant Church at Meerut, by the Rev. J. E. Wharton Rotton, the resident chaplain. It appears that the spouses were originally adherents of the Mahomedan faith; and that, in order to validate the marriage which they contemplated, they had previously become professing Christians, the respondent having **[542]** been baptized at Delhi on the 18th April 1855, and Stuart Skinner, at Meerut on his marriage day. Some time after the marriage, but not later than the commencement of the Mutiny in 1857, both spouses reverted to their original creed; and, although they did not cohabit after the year 1859, they both continued in the practice and profession of the Mahomedan faith until the death of Stuart Skinner, which took place at Delhi, on the 29th of January 1886.

After their Christian marriage, the spouses went through the form of marriage a second time, according to Mahomedan law. The precise date of the ceremony is not satisfactorily fixed by the evidence; but it must have been shortly after the time when they reverted to Mahomedanism. In the year

1859, in consequence of domestic unpleasantness, occasioned by the circumstance that Stuart Skinner suspected his wife of having illicit intercourse with one Abdul Wahid, it is a fact proved beyond dispute that the respondent left his house and never returned to it. She stayed at first with her mother, and subsequently went to live with her alleged paramour, Abdul Wahid, to whom she bore several children. Before their separation, two children, a son and a daughter, whose legitimacy is not impeached, had been born of the marriage between her and Stuart Skinner, both of whom survived their father.

In the month of May 1871, Stuart Skinner began to cohabit with Sophia Skinner, daughter of one Thomas Skinner, whom he treated as his wife, and with whom he continued to live on that footing, until his decease in January 1886. He was survived by six children, born of that intercourse, by whom the present appeal has been brought.

This suit was commenced in May 1888, 16 months after the death of Stuart Skinner, by Charlotte Blake, *alias* Badshah Begum. In her plaint, Badshah Begum set forth their Christian marriage, and also alleged that "shortly after the said marriage, the plaintiff and Nawab Mirza were again married at Delhi according to Mahomedan law, as Sunnis, and "the plaintiff's dower was fixed at Rs. 50,000." She further averred that she and the deceased "lived together as husband and wife **[543]** according to the Mahomedan creed." Her claim was alternative, being for one-third of the deceased's estate according to the English law of inheritance, or otherwise, for Rs. 50,000 as dower, and one-eighth of the remaining estate according to Mahomedan law. The parties called by her as defendants were the two children born by her to the deceased during their cohabitation, and the six appellants, whom she described as being "looked upon as the heirs of Nawab Mirza, and entitled to succeed to the estate left by him." The plaintiff at the beginning of the litigation disputed that there had been any marriage between the deceased and Sophia Skinner, and the legitimacy of their offspring; but that contention was ultimately abandoned. By order of the District Judge of Delhi, before whom the action depended, Sophia Skinner was added as a defendant.

None of the defendants lodged written pleading; but they appeared by their Vakils before the District Judge, who made a note of the pleas orally stated in defence to the action, with a view to the adjustment of issues. The main pleas stated for the present appellants were to the effect (1) that the plaintiff was not, at the time of his decease, the wife of their father Stuart Skinner, she having been divorced by him, according to Mahomedan law, about the year 1859; and (2) that the deceased had left a last will, by the terms of which she was, in any event, excluded from his succession. The plaintiff, in replication, denied the execution of the will, and also contended that, assuming the will to have been executed with due formality, it was in law inoperative.

The learned Judge having adjusted 13 issues, which it is unnecessary to notice in detail, intimated to the parties, at the close of the plaintiff's evidence, that he would only take evidence from the defendants as to the *factum* of the will set up in answer to the plaintiff's claim, and then hear arguments upon the law points, when, if necessary, he would call upon the defendants to produce their remaining evidence. The effect of that order was to limit the evidence of the defendants to the 9th issue:—"Did Stuart Skinner execute a will excluding the plaintiff?"

When the evidence of the defendants bearing upon the **[544]** *factum* of the will was concluded, the District Judge heard parties, and gave judgment upon the 25th June 1889. He found that the Christian marriage of 1855 was valid and binding upon the parties; and he also held that the subsequent

return of the spouses to Mahomedanism did not give the husband any right to dissolve that marriage by a divorce according to Mahomedan law. He found in fact that the will put forward by the defendants had been duly executed by Stuart Skinner; but he held that it was in law inoperative, because it was admitted on both sides that Stuart Skinner, after the *nikah* or second marriage ceremony with Badshah Begum, " continued to live as a Mahomedan, and died professing this faith." The learned Judge adds that, in the matter of his will, "Stuart Skinner was bound by the provisions of the Mahomedan law, and according to that law it was clearly invalid." Upon the assumption on which it proceeds, the Mahomedan law laid down by the learned Judge appears to their Lordships to be correct, and no attempt was made by the appellant's counsel to impugn it. Upon these findings, a decree of partition was given to Badshah Begum, which assigned to her, as one of the two legal wives of the deceased, one-half of the eighth share allotted to the widow, or widows as the case may be, under the Mahomedan law of intestacy.

Against that judgment cross appeals were taken to the Chief Court of the Punjab; and, on the 1st April 1891, Sir Meredyth Plowden and C. A. Roe, Esq., remanded the case to the District Judge, under section 566 of the Civil Procedure Code, directing him to proceed with the trial of the 6th, 7th and 8th issues which he had framed, and to report the evidence and his findings thereon. The issues thus sent back were : 6 Did he (*i.e.*, Stuart Skinner) in fact divorce her, (*i.e.*, Badsha Begum), and when ? 7. Subsequently did plaintiff re-marry, and when ? 8. What was plaintiff's dower on *nikah* with Stuart Skinner? In obedience to the remand, the District Judge took evidence bearing upon these issues, which he returned to the Court, along with his findings, upon the 22nd June 1892. Upon the 6th issue, his finding was, that Badshah Begum had been divorced, according to the form prescribed by Mahomedan law, sometime [545] before 1865; upon the 7th issue, that Badshah Begum lived with Abdul Wahid as his wife, but that there was no evidence to show that they had contracted a Mahomedan or *nikah* marriage, and, upon the 8th issue, that, on the plaintiff's *nikah* marriage with Stuart Skinner, her dower was fixed at Rs. 50,000, such finding being subject to those qualifications, (1) that it was questionable whether the spouses, in going through the ceremony of a *nikah* marriage, and fixing the dower at Rs. 50,000, considered it more than an empty form, and (2) that it was " subject to the plaintiff's right to give secondary evidence of the contents of the deed of dower, which up to this date has not been produced."

The case was finally disposed of in the Chief Court of the Punjab, on the 12th July 1893, by the same learned Judges who had made the remand. Their decree simply affirmed the original decree of the District Judge, and ordered the parties to bear their own costs of appeal. In arriving at that result, the learned Judges expressed no opinion in regard to the finding of law by the District Judge in his original judgment of the 25th June 1889, to the effect that the fact of the spouses having returned to their Mahomedan faith after the Christian marriage of 1855 did not give Stuart Skinner any right to dissolve that marriage by a Mahomedan divorce ; but they reversed the later finding of the District Judge to the effect that there had been such a divorce. They agreed with him in holding, first, that, in the absence of secondary evidence of the contents of the deed of dower alleged by her, the plaintiff's claim for dower must fail: and, secondly, that the defendants had failed to prove their allegation that Badshah Begum had married Abdul Wahid during the life-time of Stuart Skinner.

The decree made by the District Judge, and ultimately approved of by the Chief Court, is framed upon the footing that the personal status of Stuart Skinner, at the time of his death in 1886, was that of a Mahomedan, and that the rights of succession to his estate, including the right of his first wife, who had become and was then a Mahomedan, were governed by the rules of Mahomedan law. But the grounds upon which the two Courts [546] came to the conclusion that Badshah Begum continued to possess the status of a wife of the deceased were essentially different. Whilst the District Judge held, as a matter of law, that the regular Christian marriage, celebrated between two persons domiciled in India, could not, upon the spouses subsequently embracing and professing Mahomedanism, be dissolved by a Mahomedan divorce, the learned Judges of the Chief Court were of opinion that, as a matter of fact, there had been no Mahomedan divorce, as alleged by the defendants.

One of the many peculiar features of this suit arises from the circumstance that in the case of spouses resident in India, their personal status, and what is frequently termed the status of the marriage, is not solely dependent upon domicile, but involves the element of religious creed. Whether a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of divorce, is a question of importance, and it may be of nicety. In the present case that question does not arise for decision, unless it is shown that Stuart Skinner did, in fact, divorce Badshah Begum according to Mahomedan form.

On the hearing of this appeal, which was *ex parte*, the appellants' counsel did not challenge any finding of the Court below with the exception of that of the Chief Court which negatives the fact of divorce. Upon that part of the case, their Lordships, after careful consideration of the evidence, which is not only contradictory, but is marked by peculiarities which are more perplexing than mere contradiction, have come to substantially the same conclusion with the learned Judges of the Chief Court. In these circumstances, and having regard to the fact that the case has come before them in such a shape as to make an exhaustive argument from the bar on both sides of the question impossible, they do not think it expedient to express any opinion as to the effect of a change of religion by the spouses, their domicile remaining the same, upon the rights of one or other of them which are incidental to marriage.

The bulk, and that not the least important part of the evidence [547] adduced in this case bearing upon the fact of divorce, consists of legal proceedings between the respondent Badshah Begum and the deceased Stuart Skinner, including depositions of witnesses taken in those proceedings. The difficulty, to say the least of it, of estimating the value of that evidence for the purposes of the present case, is occasioned by the fact that, in all these litigations, the respondent alleged and endeavoured to prove that she had been divorced about the year 1859, whereas the deceased alleged and endeavoured to prove that she had not. Accordingly, in the present suit, the appellants relied upon the statements made and proof furnished by the respondent, whilst she herself relies upon the statements made and proof furnished by Stuart Skinner, which she had controverted. It appears to their Lordships that these proceedings would have been insufficient to raise an estoppel, either against the respondent or against Stuart Skinner, in any question between them as to their status; and, in the argument upon this appeal, it was in their Lordships' opinion rightly conceded by the appellants' counsel, that the respondent was not estopped from maintaining that she never ceased to be the wife of Stuart Skinner,

and that the question must now be decided upon the weight of the evidence before the Court.

The first of these proceedings, Suit No. 257 of 1865, was instituted by the respondent against Stuart Skinner and the Official Trustee, who held certain funds in which the respondent and her children were interested. The immediate cause of action was the refusal of Stuart Skinner to sign papers to enable the respondent to obtain payment of interest on those funds to which she was entitled. The case was settled by a judgment adjusted with consent of the parties, in which, notwithstanding the respondent's contention that she had been divorced, Stuart Skinner is described as "her husband."

The second (Suit No. 33 of 1868) was brought against the respondent and also against Stuart Skinner, by Sophia Skinner, an infant, the legitimate daughter of their Christian marriage, and one John Van Cortland, as her next friend, for the appointment of a guardian to the infant. Stuart Skinner, who, by the consent decree in the previous suit, had become bound to give [548] the custody of the infant to the respondent, was the real instigator of the action, in which he repeated the allegation that the respondent was his wife, whilst she denied it. The suit was dismissed, with costs against both parents.

The third of these proceedings was an action brought by Stuart Skinner, in the year 1881, against Mrs. W. Orde and others, for the purpose of establishing his own legitimacy, and so proving his title to the share of an estate. The respondent was not a party to the suit, but she was examined as a witness on behaif of Stuart Skinner, when she again took the opportunity of stating that she had ceased to be his wife, by reason of his divorce.

There is, in their Lordships' opinion, an entire absence of facts established by reliable evidence, available for the purpose of testing the accuracy of the counter-statements made in the course of these proceedings by the respondent and by Stuart Skinner respectively. The only facts which appear to them to be proved are these: That, about 1869, there were dissensions between the spouses, in consequence of which the respondent left her husband's house, and never returned to it; that after, if not before she left, the respondent did not lead a chaste life, and gave her husband good cause for divorcing her, if he had chosen to dissolve the marriage tie; but it by no means follows that Stuart Skinner, either thought that it would be conducive to his interest, or that he intended to avail himself of that remedy. On the contrary, his repeated judicial assertions that, notwithstanding their actual separation, he still continued to be the husband of the respondent, strongly point to the inference that his design was to retain the hold over his wife which that relation gave him, in order that he might use it for his own advantage. If he had really been desirous to divorce the lady, he could have done so whenever he chose, according to Mahomedan law. It would, in their Lordships' opinion, be somewhat rash to assume that the counter-statements of these two parties were not affected by motives of self-interest, but they see no cause to prefer, as the District Judge did, the statements of the respondent, who had a clear object in stating that she [549] was divorced in the first and second of these suits, and, so far as they can see, she may have been actuated by the same motive when giving evidence in the year 1881.

The appellants relied strongly upon evidence which was furnished by them after the remand, as establishing that, subsequently to their disputes in

Court, Stuart Skinner had a meeting with Badshah Begum, in her mother's house at Delhi, at which their controversy as to the fact of the divorce had been settled by Stuart Skinner admitting it. The date of the meeting is not precisely fixed, but it appears to have been about the year 1860 or 1861. Four maulvis, or sages learned in the law, are said to have been present, and to have had submitted to them, for their opinion, a paper containing the precise words which were addressed by Stuart Skinner to his wife in 1859, at the time when they separated. From the account given by Amanullah, a leading witness for the defendants, he had suggested to Badshah Begum " a reference to learned men (*ulama*) to whom the words used should be stated, and who should give their opinion whether they amounted to a divorce or not, she appointing some and Nawab Mirza some. To this she agreed. On behalf of Nawab Mirza, I called Maulvi Sayad Muhammad and Maulvi Karimullah, and she called Maulvi Said-ud-din and another, whose name I forget. I was present at their meeting. A friend of hers stated the words used by Nawab Mirza, Badshah Begum being behind the pardah. The deliberations of the learned conclave, and the result of the meeting, are thus stated by the same witness : After consultation, Maulvi Sayad Muhammad said that the divorce was not clear, while the other learned men said it amounted to a divorce." " No written opinion was recorded ; before it could be done, dispute arose, and we dragged away Nawab Mirza from the house."

Assuming that such a meeting took place, terminating in a conflict which does not appear to have been confined to logic, and from which it was necessary to remove Stuart Skinner *alias* Nawab Mirza, by force, their Lordships are unable to derive from it any inference that Stuart Skinner then admitted that Badshah Begum had ceased to be his lawful wife. There is, in their opinion, no satisfactory evidence to show that the words, **[550]** which on that occasion are said to have been represented to the maulvis as having been the precise words used by the husband in 1859, were so in fact, or were admitted by both parties to be so. Nor does it appear that either of the spouses intended or consented to be bound by the opinion of the maulvis. There is really no trustworthy evidence to prove the language used by the husband in 1859. The version which is said, by witnesses examined in this case, to have been used at the meeting of 1860 or 1861, depends upon the memory of people not altogether neutral, who are speaking after a lapse of thirty years. The District Judge, in his report, relies to some extent upon the depositions of certain witnesses, taken in Badshah Begum's suit of 1865, which have been put in evidence in this case, but the Judges of the High Court make no reference to them. That testimony does not appear to their Lordships to be calculated to dispel the obscurity in which the matter is involved. Ahmed Jan, one of Badshah Begum's witnesses, says that he and three others were present in her mother's house, when Stuart Skinner said to her three times " I have divorced you " and then went away. Another witness, servant of a female relative of Badshah Begum, tells a similar story, but says that, besides himself, there were only two persons present, including Ahmed Jan. Both those witnesses state that there were no relations of either spouse present. The evidence of Maulvi Said-ud-din refers, not to what took place in 1859, but at the meeting of 1860 or 1861, which has been already noticed. In these circumstances, their Lordships have come to the conclusion that the defendants have failed either to establish that Stuart Skinner admitted that he had divorced his wife according to Mahomedan law, or to prove the words which he actually used in 1859, so as to enable a Court of law to determine whether they did or did not amount to a Mahomedan divorce.

Their Lordships will, accordingly, humbly advise Her Majesty to affirm the judgment appealed from and to dismiss the appeal. There will be no order as to costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

C. B.

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[551] APPELLATE CIVIL.

The 1st March, 1898.

PRESENT:

MR. JUSTICE O'KINEALY AND MR. JUSTICE RAMPINI.

Peari Lal Roy............Plaintiff

versus

Moheswari Debi and others............Defendants.*

Bengal Tenancy Act (Act VIII of 1885), section 167—Effect of service of notice—Annulling of incumbrance—Property in possession of a person other than the purchaser.

Service of notice under section 167 of the Bengal Tenancy Act has the effect of annulling an incumbrance. It is not necessary for the purchaser to bring a declaratory suit to have it declared that the incumbrance is annulled

The incumbrance would be annulled even if the property be not at the time of the service of the notice under section 167 in the possession of the purchaser, but of somebody else.

THIS suit was brought on a mortgage bond against the heirs of the mortgagor as well as against the purchaser of the mortgaged property at a sale in execution of a decree for rent due thereon. After the sale, notice was served by the purchaser through the Collector in the terms of section 167 of the Bengal Tenancy Act (Act VIII of 1885) annulling the plaintiff's incumbrance. The lower Courts dismissed the plaintiff's suit holding that his incumbrance was annulled by operation of law. The plaintiff preferred a second appeal to the High Court.

Babu *Gobind Chunder Das* for the Appellant.

Dr. *Ashutosh Mookerjee* for the Respondent.

The **judgment** of the High Court (**O'Kinealy** and **Rampini, JJ.**) is as follows:—

The learned pleader for the appellant in the case raises two contentions: *first*, that the service of notice under section 167 of the Bengal Tenancy Act has

* Appeal from Appellate Decree No. 687 of 1896, against the decree of B. G. Geidt, Esq., District Judge of Bankura, dated the 25th of January 1896, modifying the decree of Babu Tara Chand Sen, Munsif of Bankura, dated the 14th of September 1893.

not the effect *ipso facto* of annulling [552] an incumbrance; and, *secondly*, that the purchaser was not in possession at the time of annulling the incumbrance, the property having then been made over to the grandson of the original mortgagor.

We think there is no force in either of these contentions. We quite agree with the learned Judge in the Court below that service of a notice under section 167 does have the effect of annulling an incumbrance without it being necessary for the purchaser to bring a declaratory suit to have it declared that the incumbrance is annulled. This is quite clear from the second clause of section 164 read with section 167.

The learned pleader has also contended that the notice was bad, inasmuch as it was not served within one year from the date of the sale, or of the purchaser having become aware of the incumbrance. But this point was not raised in either of the lower Courts, and there are no facts before us upon which we could form any opinion upon it.

Then his second ground of appeal also seems to us to fail. There is no reason why an incumbrance should not be annulled simply because the property at the time of the service under section 167 was in the possession, not of the purchaser, but of somebody else. The learned pleader urges that the notice under section 167 was not served until after the transfer of the property in question by the purchaser at the sale under the mortgage decree, and that therefore it can have no effect. But we do not think it necessary to say anything further about this plea than that such does not appear from the proceedings of the Court below to be the case. There are no facts stated either in the pleadings or in the proceedings in the lower Courts upon which we could give effect to this contention, if we thought it necessary to do so.

For these reasons we dismiss the appeal with costs.

S. C. B.

NOTES.

[This was followed in (1907) 11 C. W. N., 248; see also (1905) 9 C. W. N., 551; (1906) 10 C. W. N., 976]

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[553] TESTAMENTARY JURISDICTION.

The 15th, 16th & 17th February, 1898.

PRESENT:

MR. JUSTICE SALE.

In the Goods of Taramoni Dasi (deceased). *

Probate—Grant of Probate—Subsequent inconsistent will of which probate is also granted- Costs of Executor.

The executor of a will had obtained probate thereof, when the executor of a subsequent (and inconsistent) will applied for and obtained probate of the second will.

* Original Civil Suit No. 3 of 1897.

Held, that having regard to the circumstances of the case, and to the fact that the litigation was produced by the conduct of the testatrix herself, the executors of both wills were entitled to their costs to be paid out of the estate; but that in so far as the costs would not be covered by the estate, each party must bear his own costs.

THE testatrix died on the 26th November 1896, after having made two wills, one in September 1896 and the other dated the 23rd day of November 1896. By the first will she appointed the defendant her executor, and the will was made in favour of his infant son. After the death of the testatrix, the defendant obtained probate of the will in common form.

Subsequently, the plaintiffs produced the second will, and applied for probate thereof. The executor of the prior will opposed the application; and the matter was set down as a contentious cause. At the hearing the Court pronounced in favour of the subsequent will; and thereupon the question arose as to what order should be made with regard to costs.

Mr. *Braunfeld* and Mr. *U. P. Roy*, on behalf of the Defendant.—The costs should come out of the estate, or, failing that, the parties should pay their own costs. For the executor of the prior will, having obtained probate, and the estate having come into his hands, could charge the estate with his costs; and as such executor he was bound to call upon any person propounding a latter will to prove it in solemn form. The costs should come out of the estate, because the conduct of the testatrix gave rise to [554] this litigation. An executor is called upon to pay costs personally only when he has been guilty of misconduct or has not acted properly, but that is not the case here.

Mr. *Avetoom* and Mr *M. L. Dutta* for the Plaintiffs.—The costs should follow the result. The Court having pronounced in favour of the subsequent will, the executor of the prior will should personally bear the costs.

The following is the **judgment** of SALE, J., so far as it relates to the question of costs:—

Sale, J.—I have considered the question of costs, and it appears to me the rule is this: The executor of the will of the testator is entitled, in the same way as the next of kin would be, to call upon the executor of a prior will to prove in solemn form and to cross-examine the witnesses in support of the will, supposing there are any suspicious circumstances in connection with the execution of that will.

In the present case I think the executor of the former will has done nothing more than discharge the duty cast on him. There were circumstances undoubtedly of suspicion in connection with the execution of the subsequent will. The testatrix very shortly after executing the former will left her place of residence, and, while living under the care and protection of her nephews, executed a will in their favour, which was certainly inconsistent with the terms of the provisions of the previous will. It is quite true the learned counsel for the executor of the first will did not confine himself to cross-examining the witnesses to the subsequent will, but also called evidence; but this was to allow the executor of the former will to give his version of an interview which took place after the death of the testatrix between him and the nephew of the deceased. Taking all the circumstances together, I prefer the account given by the nephews, but I think this circumstance should not disentitle the executor of the former will to his costs. The evidence given on his behalf was very short, and I think the litigation was produced by the conduct of the testatrix herself; and under the circumstances I think the order I should [555] make is that the costs of both parties shall be paid in the first instance out of the estate, and, as the estate is a very small

one, so far as the costs would not be covered by the estate, each party must bear his own costs.

The costs of the plaintiff and defendant will be paid rateably out of the estate, if the estate should be insufficient to pay the costs of both parties in full. So far as the estate may not be sufficient to pay these costs, each party will pay his own costs.

Attorney for the Plaintiffs: Babu *J. C. Dutta.*

Attorney for the Defendant: Babu *Sita Nauth Dass.*

H. W.

[25 Cal. 555]

APPELLATE CRIMINAL.

The 10th January, 1898.

PRESENT:

MR. JUSTICE HILL AND MR. JUSTICE STEVENS.

Surja Kurmi

versus

Queen-Empress.*

Jury, Irregularity in trial of case by—Trial by Jury of an offence triable with assessors—Criminal Procedure Code (Act X of 1882), ss. 306, 307, 536—Penal Code (Act XLV of 1860), ss. 240, 241—Government Notification of 1862.

The accused was tried by a jury for an offence triable with the aid of assessors, and the jury by a majority found him "not guilty." The Sessions Judge, who disagreed with the verdict, convicted the accused, treating the verdict of the jury as the opinion of assessors:

Held, that the conviction was bad, inasmuch as the case was validly "tried by a jury" within the meaning of s. 536 of the Criminal Procedure Code (Act X of 1882), and the trial was complete when the jury had returned their verdict; and that the Judge was bound, under the circumstances, either to give judgment in accordance with the verdict or, if he disagreed with it, to submit the case for orders of the High Court, as provided by sections 306 and 307 of the Code.

In the matter of Bhootnath Dey, (1879) 4 C. L. R., 405, followed.

A reference under section 307 of the Criminal Procedure Code should be made when the Judge is "clearly of opinion" that he should do so for the ends of justice.

[556] THE facts of the case are shortly these: The appellant was tried by a jury at the Sessions Court of Burdwan for having "delivered" a counterfeit coin knowing it to be counterfeit, an offence punishable under section 240 of

* Criminal Appeal No. 946 of 1897, against the order passed by A. C. Sen, Esq., Officiating Sessions Judge of Burdwan, dated the 24th November 1897.

the Penal Code. The jury by a majority of 4 to 1 returned a verdict of "not guilty." The Sessions Judge disagreeing with the verdict was about to refer the case to the High Court under section 307 of the Criminal Procedure Code (Act X of 1882), when it was brought to his notice by the Public Prosecutor that the trial ought to have been conducted with the aid of assessors, and not jurors, as offences under sections 240 and 241 of the Penal Code were not declared triable by jury, by the Government Notification of 1862. Thereupon the Sessions Judge, treating the verdict of the jury as the opinions of assessors, convicted the accused and sentenced him to two years' rigorous imprisonment.

Against this conviction and sentence the prisoner appealed to the High Court.

No one appeared for the appellant.

The **judgment** of the High Court (**Hill** and **Stevens, JJ.**) was as follows:—

The appellant was committed to the Court of Session for trial on the charge of having committed an offence punishable under section 240 of the Indian Penal Code. At the sessions the case was tried by a jury, which by a majority of four to one found the appellant not guilty and returned a verdict accordingly.

The learned Sessions Judge records that he was about to refer the case to this Court under the provisions of section 307 of the Code of Criminal Procedure when it was brought to his notice that the case was triable, not by a jury, but with the aid of assessors.

The course which the Sessions Judge then adopted was to treat the verdict of the jury as the opinions of assessors and to record a judgment convicting the appellant under section 241 of the Indian Penal Code and sentencing him to be rigorously imprisoned for two years.

The appellant has now appealed against the conviction so had.

[557] We are of opinion that the conviction, as it stands, cannot be supported. The case was "tried by a jury" within the meaning of section 536 of the Code of Criminal Procedure, and under the provisions of that section the trial was not invalid on the ground only that the case had been so tried, although the offence in question was triable with the aid of assessors. The trial by the jury was complete when they had returned their verdict, and the Judge was bound to act either under section 306 or under section 307 of the Code of Criminal Procedure, that is, he was bound either to give judgment in accordance with the verdict, or to submit the case for orders of this Court, if he disagreed with the verdict, and was clearly of opinion that reference to this Court was necessary for the ends of justice.

We are supported in this view by the decision in the case of *In the matter of Bhootnath Dey*, (1879) 4 C. L. R., 405.

We set aside the conviction and remand the case to the Sessions Judge in order that he may deal with it according to law by passing an order under either section 306 or section 307 of the Code of Criminal Procedure.

B. D. B. *Conviction set aside and case remanded.*

NOTES.

[This was followed in (1899) 23 Bom., 696; see also 25 Bom., 680; 33 Bom., 423; 26 Mad., 243.]

[25 Cal. 557]

The 6th December, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE HILL.

Daitari Das

versus

Queen-Empress.*

Criminal Procedure Code (Act X of 1882), section 35—Sentence—Concurrent sentences of imprisonment—Penal Code (Act XLV of 1860), section 409.

Sentences of imprisonment passed for distinct offences to run concurrently are not warranted by law.

Queen-Empress v. *Wazir Jan*, (1887) I. L. R., 10 All., 58, referred to.

THE appellant was charged with having committed criminal breach of trust as a public servant in respect of three different sums of money, and was tried by the Court of Sessions on three [558] distinct charges under section 409 of the Penal Code. The Sessions Judge found him guilty on all the three charges and passed sentence in the following terms:—

"The Court agreeing with both assessors finds accused Daitari Das guilty of the three offences of criminal breach of trust as a public servant charged against him, and sentences him under section 409 of the Indian Penal Code to seven years' rigorous imprisonment on each charge: the sentences to run concurrently."

Against this conviction and sentnce the prisoner appealed to the High Court.

No one appeared for the Appellant.

The *Deputy Legal Remembrancer* (Mr. *Gordon Leith*) for the Crown.

The **judgment** of the High Court (**Banerjee** and **Hill, JJ.**) was as follows:—

The appellant in this case was tried before the Sessions Court of Cuttack on three charges under section 409 of the Indian Penal Code for having committed criminal breach of trust as a public servant in respect of three different sums of money.

The learned Sessions Judge, agreeing with the assessors, has found the accused guilty on all the three charges, and has sentenced him under section 409 of the Indian Penal Code to seven years' rigorous imprisonment on each charge, with this qualification that the sentences are to run concurrently. We see no reason to interfere with the conviction; but in regard to the sentence, we are of opinion that it is not warranted by law. There is no provision in the Code of Criminal Procedure, or in any other law that we are aware of, authorizing a Court to pass sentences which are to run concurrently. On the contrary, section 35 of the Code of Criminal Procedure enacts that "when a person is convicted at one trial of two or more distinct offences, the Court may

* Criminal Appeal No. 820 of 1897, against the order passed by W. B. Brown, Esq., Officiating Sessions Judge of Cuttack, dated the 17th September 1897.

sentence him, for such offences, to the several punishments prescribed therefor, which such Court is competent to inflict, such punishments, when consisting of imprisonment or transportation, to commence the one after the expiration of the other in such order as the Court may direct."

[559] We may also refer to the case of *Queen-Empress* v. *Wazir Jan*, (1887) I. L. R., 10 All., 58, which goes to support the same view. That being so, the concurrent sentences passed in this case must be set aside.

The question then arises what should be the proper sentence in the case? We see no reason to dissent from the learned Sessions Judge's view that an aggregate sentence of seven years' rigorous imprisonment is required for the ends of justice; and our order, therefore, will be this—that the appellant be sentenced to five years' rigorous imprisonment in respect of the first count, one year's rigorous imprisonment in respect of the second charge, and one year's rigorous imprisonment in respect of the third, for the offences of criminal breach of trust as a public servant punishable under section 409 of the Indian Penal Code. Such sentences to run the one after the other in the order in which they have been mentioned above.

B. D. B. *Sentence altered.*

NOTES.

[In sec. 35 (1) of the Criminal Procedure Code, 1898, the words, "*unless the Court directs that such punishments shall run concurrently*," were inserted whereby these cases have lost their value:—10 Bom., 254; 25 Cal., 557; 20 All., 1.]

[25 Cal. 559]

CRIMINAL REVISION.

The 14th December, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE HILL.

Dolegobind Chowdhry and others............Petitioners

versus

Dhanu Khan............Opposite Party.*

Criminal Procedure Code (Act X of 1882), sections 107, 145—Disputes concerning land—Procedure—Recognizance.

Where a dispute likely to cause a breach of the peace exists concerning possession of land, proceedings under section 145, and not under section 107, of the Criminal Procedure Code, should be instituted.

THE facts of the case are shortly these: One Dhanu Khan (opposite party) purchased the interests of two tenants in a village in the District of Bankura, at a sale in execution of a decree against them and was put in possession by the Civil Court; and while he was proceeding to cultivate the land in question he was prevented from doing so by the petitioners, who claimed the land [560] under a permanent lease granted to their ancestors in 1867, and objected to be disturbed in their possession thereof. Thereupon Dhanu Khan lodged a

* Criminal Revision No. 780 of 1897, against the order of G. C. Manisty, Esq., District Magistrate of Bankura, dated the 13th of October 1897.

complaint before the Police, who, after an investigation, submitted a report to the Deputy Magistrate. The Deputy Magistrate having satisfied himself from the Police report that a breach of the peace was imminent in respect of possession of the land, instituted proceedings against the petitioners under section 107 of the Criminal Procedure Code, and bound them down to keep the peace for one year. The petitioners applied to the District Magistrate under section 125 to cancel the bonds, but he declined to interfere. Against this order of the District Magistrate the petitioners moved the High Court and obtained this Rule.

Mr. *Donogh* (Babu *Sarat Chunder Dutt* with him) for the Petitioners.—The Deputy Magistrate's order shows that he was satisfied from the Police report that there was a dispute about a piece of land likely to end in a breach of the peace. Under such circumstances the Magistrate was bound to proceed under section 145 of the Criminal Procedure Code, and to decide which party was in possession of the land, and having decided it to maintain such party in possession until evicted therefrom in due course of law. The language of section 145 being imperative the Magistrate has no option in the matter. Section 107 of the Code is not intended to apply to disputes regarding land, but to cases of personal liability to preserve the peace.

Babu *Degumber Chatterjee* for the Opposite Party.

(The Magistrate not having shown cause against the Rule their Lordships declined to hear the opposite party.)

The **judgment** of the High Court (**Banerjee** and **Hill, JJ.**) was as follows:—

This is a rule calling upon the Magistrate of the District to show cause why the orders complained of, purporting to have been made under section 107 of the Code of Criminal Procedure, should not be set aside.

The ground upon which our interference is asked is, that the proceedings recorded show that the case is properly one for the **[561]** institution of proceedings under section 145 of the Code of Criminal Procedure, and not under section 107. The order complained of is one that has the evident effect of binding down only one of the parties to the dispute, leaving the other party free, without any adjudication upon the question as to which of the two parties is in possession. We think the contention urged on behalf of the petitioners is right and ought to prevail.

We, therefore, set aside the order under section 107.

B. D. B *Order set aside.*

NOTES.

[The same view as in this case was taken in 25 Cal, 798; 3 C. W. N., 463; 6 C. W. N., 883; 7 C. W N., 29; 7 C. W. N, 142; 35 Cal., 117, 6 C. L. J., 697. See however 30 Cal., 112; 9 C. W. N., 551; 26 Mad., 471; 32 Cal., 966. The *contrary view* has been taken in **39 Cal., 160 F. B**; 39 Cal., 469, **34 All., 449.]**

[25 Cal. 561]

APPELLATE CRIMINAL.

The 6th December, 1897.*

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE HILL.

Biru Mandal and others
versus
Queen-Empress

Jury, Verdict of—Charge to Jury—Misdirection—Criminal Procedure Code (Act X of 1882), ss. 297, 423 (d)—Effect of omissions to explain the law to Jury—Penal Code (Act XLV of 1860), ss 143, 147, 380, 395—Practice.

In a trial by jury, the accused were charged with offences under the Penal Code. The Judge while charging the jury omitted to explain the law by which they were to be guided. The jury returned a verdict of *guilty* on all counts except one and the Judge agreeing with the verdict convicted the accused.

Held, that the omission to explain the law to the jury amounted to a misdirection vitiating the verdict within the meaning of s. 423 (*d*), Criminal Procedure Code.

Wafadar Khan v. *Queen-Empress*, (1894) I. L. R, 21 Cal., 955, relied upon.

Some statement should appear in the record of a trial by jury to show that the law bearing upon the charges has been explained to the jury.

THE appellants in this case were charged with (1) dacoity, (2) theft in a dwelling house, (3) rioting, and (4) being members of an unlawful assembly, under sections 395, 380, 147, and 143 of the Penal Code, respectively, and were tried by a jury. The Sessions Judge, in his charge to the jury, summed up the evidence, but omitted to lay down or explain the law by which they were to be [562] guided, according to section 297 of the Criminal Procedure Code. The jury retired for consideration of their verdict, and on being asked what their verdict was on the first charge replied, through their foreman, that they could give their opinion upon the whole case, but they had not considered their verdict on each charge. Thereupon the charges were once more read over to them, and they again retired to consider their verdict on each charge separately; and on their return pronounced a verdict of *guilty* on the first, third, and fourth charges, and that of *not guilty* on the second. The Judge agreeing with the verdict convicted the accused under sections 143, 147 and 395 of the Penal Code, and sentenced each of them to five years, rigorous imprisonment on the *first* charge only, observing that

"There will be no sentence on the other charges The verdict of the jury on the second charge being contradictory to their verdict on the first charge, there will be no order by the Court as to this second charge."

Against this conviction and sentence the accused appealed to the High Court

Babu *Dasarathi Sanyal* for the Appellants.

The *Deputy Legal Remembrancer* (Mr. *Gordon Leith*) for the Crown.

The **judgment** of the High Court (**Banerjee** and **Hill, JJ.**) was as follows:—

The appellants in this case were tried by a jury before the Sessions Court at Rajshahye on four charges: (1) dacoity punishable under section 395 of the

* Criminal Appeal No. 800 of 1897, against the order passed by H. E. Ransom, Esq., Sessions Judge of Rajshahye, dated the 28th of August 1897.

Indian Penal Code; (2) theft in a dwelling house, actual and constructive, punishable under section 380 read with section 149; (3) rioting punishable under section 147; and (4) being members of an unlawful assembly, punishable under section 143 of the Indian Penal Code.

The learned Sessions Judge charged the jury by summing up the evidence, but without laying down the law by which the jury were to be guided, as laid down in section 297 of the Code of Criminal Procedure. The jury, on being asked what their verdict was on the first charge, through their foreman replied that they could give their opinion upon the whole case, but they had not considered their verdict on each charge. Thereupon, as the record shows, the charges were once more read over to the jury, who [563] retired for some time to consider their verdict on each charge separately; and on their return they pronounced a verdict of guilty on the first charge, not guilty on the second charge, and guilty on the third and fourth charges. The learned Sessions Judge, agreeing with the verdict of the jury on the first, third and fourth charges, has convicted the accused under sections 395, 147 and 143, and has sentenced each of them under section 395 to rigorous imprisonment for five years.

In appeal it is contended by the learned Vakil for the accused that the learned Judge's omission to explain the law to the jury in this case constitutes a material misdirection, for which the verdict ought to be set aside, and a new trial ordered.

The learned Deputy Legal Remembrancer very properly calls our attention to the fact that here the charge to the jury that has been recorded contains, not merely the heads of the charges, but is actually the charge that was read out to the jury and interpreted in Bengali; so that there is no room for any contention that the law might have been explained without the explanation being embodied in the charge to the jury as recorded. But even if there had been any room for a contention of that sort, we should observe that as a rule we expect some statement in the record to show that the law has been explained to the jury. In the present case there can be no manner of doubt, as far as we can judge from the record, that the law has not been explained; and, if that is so, the question is, whether that amounts to a misdirection within the meaning of section 423, clause (*d*) of the Code of Criminal Procedure. Perhaps, strictly speaking, the error here is rather of non-direction than misdirection, but we think that the term misdirection in section 423 includes an omission of this description.

It is next necessary to consider whether this absence of direction, that is, this error, is not cured by section 527, and whether the language of clause (*d*) of section 423 stands in the way of our interfering with the verdict. We are of opinion that the effect of the two provisions of the Code of Criminal Procedure which we have just referred to, is to require us, before we interfere with the verdict of a jury, to see whether the misdirection [564] complained of was one of a material character, that is one which has made the verdict erroneous and led to a failure of justice. In the present case we feel no hesitation in answering the question in the affirmative, because the accused were charged with having committed a number of offences which are of a complex character, and it was very necessary therefore that the Judge should have explained to the jury what the elements are which go to constitute each of those offences, and should have clearly placed before them the distinction between them. That the absence of such direction had an effect upon the verdict is clear from the fact that the jury, when they were first asked what their verdict was on the first charge, were unable to say what their verdict was upon each separate charge. Thereupon the only additional direction given to them by the Judge

consisted in the reading of the charges, unaccompanied by any explanation of the law. Then the verdict they returned is somewhat inconsistent and not quite intelligible; because while they find the accused guilty on the first charge, that is guilty of the offence of dacoity, they find them not guilty of the offence mentioned in the second charge, namely, theft in a dwelling house. It is difficult to say upon what view of the evidence they returned a verdict of guilty on the first charge convicting the accused of the offence of dacoity, and yet did not convict them of the offence of theft in a dwelling house under the second charge.

Having regard to these circumstances we are of opinion that the misdirection in the charge has vitiated the verdict, and has thereby occasioned a failure of justice.

We may add that the view we take in this case is in accordance with that expressed in the case of *Wafadar Khan* v. *Queen-Empress*, (1894) I. L. R., 21 Cal., 955.

The result is, that the convictions and sentence must be set aside, and the case sent back for re-trial.

B. D. B. *Conviction set aside and re-trial ordered.*

NOTES.

[See also 27 Bom., 626 ; 25 Cal., 736 , 34 Cal., 698.]

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[565] APPELLATE CIVIL.

The 2nd February, 1898.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

Upendra Lal Mukerjee and others............Appellants

versus

Girindra Nath Mukerjee and others (Plaintiffs) and

Nilratan Mukerjee and others (Defendants)......... .. Respondents.*

Contribution, Suit for —Contract Act (IX of 1872), section 70—Money deposited by the plaintiffs to save the property, of which they were co-sharers, from being sold for arrears of revenue—Personal liability—Appeal -Power of the Appellate Court to add parties as respondents —Code of Civil Procedure (Act XIV of 1882), section 559.

In a suit for contribution by the plaintiffs against the defendants, the Court of First Instance gave the plaintiffs a decree against one defendant, and exonerated the others. On an

* Appeal from Appellate Decree No. 1463 of 1896, against the decree of Babu Syam Chand Roy, Officiating Subordinate Judge of Rungpore, dated the 30th of May 1896, reversing the decree of Babu Rajendro Lal Ghose, Munsif of that district, dated the 23rd of December 1895.

appeal by the defendant against whom the decree was passed, the Appellate Court directed the defendants exonerated by the first Court to be added as respondents, set aside the decree against the appealing defendant, and passed a decree against the defendants who were added as respondents, as representatives of one Shayamamoyi, and ordered the amount so decreed to be recovered from the estate of her, Shayamamoyi's husband. On appeal to the High Court by the defendants, who were thus made liable, on the grounds that they were wrongly made parties and no decrees could be passed against them, and that the liability to contribution being the personal liability of Shayamamoyi, they not being heirs to her *stridhan*, they were not liable for the plaintiff's claim :—

Held, that there was nothing wrong in the course adopted by the Lower Appellate Court, and by s. 559 of the Code of Civil Procedure the defendants were rightly made parties.

Atma Ram v. *Balkishen*, (1883) I. L. R., 5 All., 266, dissented from.

Held, also, that inasmuch as a claim for contribution creates only a personal liability against the co-sharers on account of whose share the payment has been made, and does not create a charge on the estate, the persons liable would not be the reversionary heirs to Shayamamoyi's husband's estates but those who would inherit her *stridhan*.

THE facts of the case, so far as they are necessary for the purposes of this report and the arguments, appear sufficiently from the judgment of the High Court

[566] Babu *Saroda Churn Mitter* for the Appellants.

Babu *Horendra Nath Mookerjee*, with him Babu *Joy Govind Shome*, for the Respondents.

The **judgment** of the High Court (**Banerjee** and **Wilkins, JJ.**) was as follows : -

This appeal arises out of a suit for contribution brought by the plaintiffs, respondents, against certain persons described as principal defendants and certain other persons described as *pro formâ* defendants, on the allegation that a four-annas share of a certain *mehal* bearing No. 76 on the Collector's rent roll belonged to one Shayamamoyi Debia, the plaintiffs, and the *pro formâ* defendants being co-sharers in that *mehal*; that defendants Nos. 1 to 8 were the heirs of Shayamamoyi ; that the amount of Government revenue payable in respect of Shayamamoyi's share was Rs. 650 on account of the September instalment of 1891 ; that out of this the amount of Rs. 325 having remained unpaid, the said amount was paid by the plaintiffs to save the estate from sale ; and that the plaintiffs are entitled to recover the said amount from the principal defendants. It was further stated in the plaint that the share of Shayamamoyi had been let out in *ijara* to Annada Prosad Mukerjee, the predecessor in title to defendants Nos. 1 to 5 and to Saroda Prosad Mukerjee, predecessor in title to defendants Nos. 10 to 12 in equal shares and that the share leased out in the name of Saroda Prosad which was held by him and his (Saroda's) brother Nilratan, defendant No. 6, was sold in execution, and the *ijara* interest in respect of this two annas share was purchased by the husband of defendant No. 9. It is not clearly stated in the plaint on what ground the plaintiffs seek to make all the principal defendants liable, but it would appear from the tenor of the plaint that they sought to make the defendants liable, not merely as representatives of Shayamamoyi, in respect of whose share they had paid the Government revenue, but also as her *ijardars*, it being stated in the plaint that one of the terms of the *ijara* lease was that the *ijardars* were to pay the Government revenue payable by Shayamamoyi.

The suit was originally contested only by defendants Nos. 1 to 5. They were exonerated from liability and an *ex parte* decree **[567]** was passed against defendant No. 9. Subsequently the *ex parte* decree was set aside and the suit was reheard.

The defence of defendants Nos. 1 to 5 was that they had paid their share of the revenue due, and that the only share that was in default was that held in *ijara* by defendant No. 9.

The defence of defendant No. 9 was that neither she nor her predecessor in interest was a co-sharer of the plaintiffs; that no suit for contribution was, therefore, maintainable against her; that she had no possession of the property at the time when the default in payment of the revenue was committed; and that money was due to her from the plaintiffs who were *darijardars* under the *ijara* and so she was not liable for the plaintiff's claim.

The first Court held that defendant No. 9 was the only person liable, and it accordingly upon the rehearing of the case made the same decree that had been originally made *ex parte*.

On appeal by defendant No. 9, the Lower Appellate Court ordered the remaining defendants who apparently had not been made parties to the appeal, viz., defendants Nos. 1 to 8, to be brought before the Court under section 559 of the Code of Civil Procedure, and it has set aside the decree against defendant No. 9 and given the plaintiffs a decree against defendants Nos. 1 to 8 as representatives of Shayamamoyi, and has ordered that the plaintiffs shall recover the amount decreed from the estate of the husband of Shayamamoyi.

In second appeal it is contended on behalf of defendants Nos. 1 to 5 that the decree of the Lower Appellate Court is wrong, *first*, because no decree could be passed against defendants Nos. 1 to 5, the suit having been dismissed against them by the first Court and the plaintiffs having preferred no appeal against that part of the decree; *secondly*, because the suit having been based by the plaintiffs mainly, if not solely, upon the terms of the *ijara* lease, and the defendants Nos. 1 to 5 having paid the share of the Government revenue that was due on account of the two-annas share held by them under the *ijara*, they were not liable for any part of the plaintiff's claim; and, *thirdly* because the liability to contribution was a personal liability of Shayamamoyi, and defendants Nos. 1 to 5 were no heirs to her *stridhan*, but were the [568] reversionary heirs to the estate of her husband, and, as such, were not liable for the plaintiff's claim.

Upon the first point, the case of *Atma Ram* v. *Balkishen*, (1883) I. L. R., 5 All., 266, is no doubt in favour of the appellant's contention; but having regard to the language of section 559, we think it authorizes the course that the Lower Appellate Court has taken in this case. The plaintiffs in their plaint stated all the necessary facts, and they asked for a decree against the defendants. The first Court upon the view that it took of the liabilities of the parties as a matter of law, exonerated defendants Nos. 1 to 8 from liability and passed a decree against defendant No. 9 alone. The plaintiffs were content with that decree, because it did not matter to them whether the decree went against defendants Nos. 1 to 8, or against defendant No. 9, the parties being all equally solvent. The defendant No. 9 being dissatisfied with the decree passed against her, preferred an appeal; and the Lower Appellate Court having, at the hearing of the appeal, found that the defendants Nos. 1 to 8 who were parties to the suit in the first Court, but who had not been made parties to the decree and were interested in the result of the appeal (in this sense that, whereas they sought to fasten the liability for contribution on defendant No.9, the appeal was intended to exonerate defendant No. 9 altogether) ought to be made parties, directed that they should be made parties; and they entered appearance in accordance with the order made. The plaintiffs, having obtained a decree against defendant No. 9, and being satisfied with that decree, were

not under any necessity for preferring any appeal to make the other defendants liable. But if at the hearing of the appeal, the Court found that the defendant No. 9 was not liable, but the other defendants were liable, we do not think that there was anything wrong in the Lower Appellate Court's making them respondents and passing a decree against them. We may observe that the exercise of the power is not limited by the provisions of the Limitation Act, see *Manickya Moyee* v. *Boroda Prosad*, (1882) I. L. R., 9 Cal., 355.

The view we take is, to some extent, supported by the decision of the Bombay High Court in the case of *Sowu Padmanabh* **[569]** *Rangappa* v. *Narayanrao* bin *Vithalrao*, (1893) I. L. R., 18 Bom., 520. The first contention of the appellants must, therefore, fail.

Upon the second point, we are of opinion that, although the plaintiffs in their plaint referred to the *ijara* lease and based their claim in part upon the terms of that lease, still that circumstance cannot go to exonerate the defendants Nos. 1 to 8 altogether from liability, if they are otherwise liable under the law. They were made parties as the heirs of Shayamamoyi, and a decree was asked for against all the defendants. It cannot, therefore, be said that, upon the case as made, the defendants Nos. 1 to 8 ought to be exonerated from liability altogether. The liability for contribution attaches to the co-sharer by whom the revenue was payable and for whom it was paid, that is, Shayamamoyi, and after her death to her legal representatives; and the defendants Nos 1 to 8 are alleged to fill that character.

Upon the third point, we find that although, in the plaint, the defendants Nos. 1 to 8 are represented as the heirs of Shayamamoyi, the defendants Nos. 1 to 5 in their written statement denied that they were her heirs, and alleged that they were the heirs of Chandra Bhusan Mukerjee, Shayamamoyi's husband; and there has been no adjudication in either of the Courts below as to whether defendants Nos. 1 to 5 are the heirs to Shayamamoyi's *stridhan*. The question then arises whether, if the defendants Nos. 1 to 5 are not heirs to Shayamamoyi's *stridhan*, they can still be made liable for the plaintiff's claim. The claim is for contribution for the payment of Government revenue, which was payable by Shayamamoyi during her lifetime. Now, a claim for contribution, as has been held by a majority of the Judges of a Full Bench of this Court in the case of *Kinu Ram Das* v. *Mozaffer Hossein Shaha*, (1887) I. L. R., 14 Cal., 809, creates only a personal liability against the co-sharer on account of whose share the payment has been made, and does not create a charge on the estate. That being so, the claim must be held to be one for which Shayamamoyi was personally liable, but which the reversionary heirs are not bound to satisfy. It may appear somewhat anomalous that although, if Shayamamoyi had borrowed money for the purpose of paying her share of the Government revenue, mortgaging her husband's estate or even **[570]** alienating any portion of it by sale, the mortgage or sale would have been binding on the reversioners, yet if she has made default in the payment of revenue and another co-sharer has paid the amount for her, such co-sharer can have no claim against the reversioners.

But one explanation of the anomaly is, we think, to be found in the fact that the widow's alienation for the purpose of paying the revenue becomes binding on the reversioners only when there is necessity made out for the alienation. But where the widow merely neglects to pay the revenue and somebody else pays it for her, it cannot be said that the default on the part of the widow was due to the necessities of the estate. It may be that she had funds in her hands out of which to make payment, and yet she did not make the payment. In such a case the persons who ought to be held properly

liable would be, not the reversionary heirs to her husband's estate, but the persons who would inherit her *stridhan*. That being so, it becomes necessary to determine whether the appellants or any of them are the heirs of Shayamamoyi's *stridhan*. As that question has not been determined, the case must go back to the first Court for its determination, and, as the ground upon which we remand the case is common to all the defendants, who have been made liable, the result is that the decree of the Lower Appellate Court must be set aside, and the case remanded for determination of the question, whether the defendants Nos. 1 to 8 or any of them are heirs to Shayamamoyi's *stridhan*. If the question is answered in the affirmative, the plaintiffs would be entitled to a decree against such persons as are found to be heirs to Shayamamoyi's *stridhan*. If the question is answered in the negative, as against all the defendants, the plaintiff's suit must fail. The costs of this appeal will abide the result. It will be open to the parties to adduce evidence on the issue for the determination of which the case is sent down.

The decree exonerating the defendant No. 9 from liability will stand, and the defendant No. 9 will recover her costs of this appeal from the appellants; but the costs so recovered will be costs in the cause and will be recoverable by defendants Nos. 1 to 5 from the plaintiffs or not according to the final result of the suit.

S. C. G. *Appeal allowed, case remanded.*

NOTES.

[I. There is a difference of opinion between the Calcutta, Bombay and Allahabad High Courts and the Madras High Court on the subject of the contributions forming a charge. The former hold that they do not—(1898) 25 Cal., 565; (1905) 9 C.W.N., 865; (1902) 26 Bom., 437; (1907) 32 Bom., 35; (1904) 26 All., 407; (1906) 28 All., 743; (1911) 33 All., 708 F.B.—while the latter holds the affirmative (1903) 26 Mad., 686 F.B.

II. As regards the power of the appellate Court to make defendants liable when there has been no appeal by the plaintiff, see also (1904) 31 Cal, 643 F.B. 8 C.W.N., 496, where this decision was upheld; see also (1898) 26 Cal., 109; (1898) 26 Cal., 114; (1908) 35 Cal., 538; (1901) 3 Bom., L.R., 172; (1901) P.R., 23; (1903) 30 Cal., 655; (1910) 12 C.L.J., 137; (1908) 31 Mad, 442; (1908) 35 Cal., 538.]

[571] *The 12th January, 1898.*

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, AND Mr. JUSTICE BANERJEE.

Rai Charan Ghose and others........ ....Principal Defendants

versus

Kumud Mohun Dutt Chowdhry and another, Plaintiffs and another ("Proforma" Defendant)...........Respondents.*

Res judicata—*Code of Civil Procedure (Act XIV of 1882), section 13—Issue decided in a previous suit not subject to second appeal—Same issue raised in a subsequent suit subject to appeal—Landlord and tenant—Suit for rent—Instalment—Bengal Tenancy Act (VIII of 1885), sections 53 and 153—Second appeal.*

The question relating to instalments, though it affects the question of interest on the ent, is not a question of "the amount of rent annually payable" within the meaning of

* Appeal from Appellate Decree No. 695 of 1895 on review and in Rule No. 1604 of 1897, against the decree of Babu Brojo Behari Shome, Subordinate Judge of Jessore, dated the 12th of January 1896, modifying the decree of Babu Ambica Charan Mozoomdar, Munsif of Jessore, dated the 8th of August 1894.

section 153 of the Bengal Tenancy Act. Therefore no second appeal would lie in a case, where the value of the suit is less than Rs. 100, even if there is a question as to the instalment of rent.

Koylash Chandra v. *Tarak Nath**, referred to.

[573] In a previous suit for rent valued at less than Rs. 100 by the plaintiff against the defendants, one of the questions raised was, in how many instalments the rent was payable, and it was held that it was not payable in instalments. In a subsequent suit for rent valued at more than Rs. 100 between the same parties, the question of instalment was again raised, as the plaintiffs claimed the rent to be payable in four instalments. The defendants *inter alia* pleaded that the question as to instalment was barred as *res judicata.* The Munsif held that it was so barred. On appeal the Subordinate Judge reversed the decision of the Munsif.

On a second appeal to the High Court:—

Held, that the judgment in the previous suit operated as *res judicata*, notwithstanding that no second appeal was allowed by law in that suit.

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* *The 28th January, 1897.*

PRESENT:

MR. JUSTICE O'KINEALY AND MR. JUSTICE HILL.

Koylash Chandra De ....Plaintiff

versus

Tarak Nath Mandal...........Defendant.†

Landlord and tenant—Suit for rent—Whether interest on rent is rent within the meaning of section 3, Clause (5) of the Bengal Tenancy Act (VIII of 1885) —Second appeal—Bengal Tenancy Act (VIII of 1885), section 153.

Interest on rent is not rent within the meaning of section 3, clause (5), of the Bengal Tenancy Act. Therefore no second appeal would lie in a case where the question is only relating to rate of interest, and the value of the subject-matter of the suit is less than Rs. 100.

The plaintiff brought a suit for recovery of arrears of rent for the years 1297 to 1300 B. S., in the Court of the Munsif of Diamond Harbour. The defendant objected as to the rate of interest, and also pleaded that the rent for the first six months of the year 1297 B. S. was barred by section 13 of the Code of Civil Procedure. The Munsif gave a modified decree, and allowed interest on the rent, at the rate of 25 per cent. per annum. On appeal to the District Judge by the defendant as to the rate of interest, he held that under the law the plaintiff was entitled to interest only at the rate of 12 per cent. per annum. Against this decision the plaintiff appealed to the High Court.

Dr. *Ashutosh Mookerjee*, for the Respondent, took a preliminary objection to the hearing of the appeal, on the ground that as the value of the subject- matter of the suit was below Rs. 100, and the question was only relating to interest, no second appeal would lie under section 153 of the Bengal Tenancy Act.

Babu *Gyanendra Nath Bose*, for the appellant, argued that a second appeal would lie as interest on rent is rent within the meaning of section 3 (clause 5) of the Bengal Tenancy Act. He referred to the following cases: *Watson & Co* v. *Sreekristo Bhumick*, (1893) I. L. R., 21 Cal., 132, *Nobin Chand Naskar* v. *Bansenath Paramanick*, (1894) I. L. R., 21 Cal., 722, and *Assanulla Khan Bahadur* v. *Tirthabashini*, (1895) I. L. R., 22 Cal., 680.

The **judgment** of the High Court (**O'Kinealy** and **Hill, JJ.**) was as follows:—

At the hearing of this appeal it was objected that there was no second appeal, as the question was merely a question of the rate of interest and not of rent. The pleader for the appellant argued that interest is rent We are of opinion that it is not.

The appeal is dismissed with costs.

S. C. G. *Appeal dismissed.*

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† Appeal from Appellate Decree No. 2128 of 1894, against the decree of D. Cameron, Esq., Officiating District Judge of 24-Pergunnahs, dated the 30th of August 1894, modifying the decree of Babu Preo Lall Pyne, Munsif of Diamond Harbour, dated the 8th of January 1894.

Vithilinga Padayachi v. *Vithilinga Mudali*, (1891) I. L. R., 15 Mad., 111), and *Bhola Bhai* v. *Adesang*, (1884) I. L. R., 9. Bom., 78, dissented from.

[573] *Misir Raghobardial* v. *Sheo Baksh Singh*, (1882) L. R., 9 I. A., 197; *Edun* v. *Bechun*, (1867) 8 W. R., 175, distinguished.

David v. *Grish Chunder Guha*, (1882) I. L. R., 9 Cal., 183, referred to.

THE facts of the case, so far as they are necessary for the purposes of this report and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Taruk Nath Sen* for the Appellants.

Dr. *Ashutosh Mookerjee* for the Respondents.

The **judgment** of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows:—

Banerjee, J.—This case was heard along with an appeal from Appellate Decree No. 759 of 1895. One of the grounds upon which the learned Vakil for the respondent sought to support the decision of the Lower Appellate Court that the judgment in a previous rent suit did not operate as *res judicata* was that the matter in dispute in the former suit could not, by reason of its value being below Rs. 100, be taken up to the High Court in second appeal, whereas the matter now in dispute, being in value above that limit, a second appeal was *allowed* in this suit. We considered this ground untenable, holding that, even if the proposition of law, upon the assumed correctness of which it was based, was correct, it did not affect this case, as a second appeal in fact lay in the former suit. This is quite true as regards one of the two cases, namely, the appeal from Appellate Decree No. 759 of 1895; but it is, as has been shown to us now, not true with reference to the appeal from Appellate Decree No. 695 of 1895, the decision upon which the plea of *res judicata* is based in this case having been passed in a case in which no second appeal lay.

An application for review of judgment was made in this case on the ground of there being the abovementioned error in our [574] decision; the application was granted, and the case was reheard under section 630 of the Code of Civil Procedure.

The ground upon which the Lower Appellate Court's judgment is based is untenable, and this is conceded by the learned Vakil for the respondent. The only question now raised before us is, whether the decision in the former case upon the matter of instalments can operate as *res judicata* in this, when a second appeal in that case was barred by section 153 of the Bengal Tenancy Act, whereas in the present case a second appeal is not barred. If this question is answered in the affirmative, the appeal succeeds. If it is answered in the negative, the appeal must fail.

The learned Vakil for the appellants contended in the first place that the question did not arise, and that a second appeal was not barred in the previous case by section 153 of the Bengal Tenancy Act, as the judgment of the first Appellate Court, by deciding the question of instalments, determined the interest payable on the arrears of rent, and thus decided a question relating to rent; and in the second place he contended that, even if the question did arise, it ought to be answered in the affirmative, as the issue relating to instalments now raised was directly and substantially in issue in the former suit between the same parties in a Court of jurisdiction competent to try the present suit, and has been heard and finally decided by such Court; and it was none the less a Court of competent jurisdiction because a second appeal was barred in the case. On the other hand, the learned Vakil for the respondents urged in the first place that the question did arise, as a second appeal was

barred in the former case, a question relating to interest being different from one relating to "the amount of rent annually payable" within the meaning of section 153, and in support of this contention, he relied upon the case of *Koylash Chandra De* v. *Tarak Nath Mandal* (*ante p.* 571), ; and in the second place he contended that the question should be answered in the negative, as section 13 of the Code of Civil Procedure required that the former suit, the decision in which was pleaded as *res judicata*, should be triable, not only in the first instance, but also in successive appeals by the same Court by which the second suit is triable: and in support of this contention he cited the cases **[575]** of *Bhola Bhai* v. *Adesang*, (1881) I. L. R., 9 Bom., 75; *Vithilinga Padayachi* v. *Vithilinga Mudali*, (1891) I. L. R., 15 Mad., 111; *Misir Raghobardial* v. *Sheo Baksh Singh*, (1882) L. R., 9 I. A., 197, and *Edun* v. *Bechun*, (1867) 8 W. R., 175.

I am of opinion that in the former case no second appeal lay, as the question relating to instalments, though it affected the question of interest on the rent, was not a question of "the amount of rent annually payable" within the meaning of section 153 of the Bengal Tenancy Act, and I fully agree in the view taken in the case of *Koylash Chandra De* v. *Tarak Nath Mandal* (*ante p.* 571) cited for the respondents.

That being so, the question stated above does arise in this case. The question is one of considerable importance and of no small difficulty. The answer to the question must be sought for in the first instance in section 13 of the Code of Civil Procedure, and if that section leaves the matter in doubt, then in the general principles relating to the doctrine of *res judicata*.

Section 13 enacts (I quote only so much of the section as bears upon the question before us) that "no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue on a former suit between the same parties in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court."

Now the matter in issue in this suit, namely, whether the rent of the defendant's holding is payable quarterly or annually, was also directly and substantially in issue in the former suit brought in the Munsif's Court which was competent to try the present suit: the issue was decided against the defendants by the Munsif, but on appeal the Appellate Court, that is the Court of the Subordinate Judge which was competent to try the first appeal in the present suit, finally decided the issue in favour of **[576]** the defendants. As has been said above, a second appeal was barred in the former suit by reason of its value, but a second appeal is not barred in the present suit. Does this case then come within the rule of *res judicata* enunciated in section 13 of the Code of Civil Procedure? I think it does. The section applies to two classes of cases, in one of which a subsequent suit is wholly barred by the decision in a former suit by reason of the subject-matter of the two suits being the same, and in the other the trial of an issue in a subsequent suit is barred by the adjudication upon the same issue in a former suit, though the subject-matters of the two suits are different. The present case comes under the latter class, but it is not a simple type of that class. The simplest type is that in which the trial of an issue in a subsequent suit is barred by the adjudication upon it in a former suit by the first Court in which it was brought and which was competent to try the subsequent suit. Here the adjudication relied upon was in the Court of Appeal in the former case. But that alone cannot affect the application of the section. It would be most

unreasonable to hold that a decision does not operate as *res judicata* merely because it is the decision of the Appellate Court in the former suit. It is true that the section speaks of the matter being "heard and finally decided by *such* Court," that is the "Court of jurisdiction competent to try" the subsequent suit; and it is true also that if the Court spoken of in the section can mean the Court of Appeal in the previous suit, it may lead to the decision of an Appellate Court in a previous suit cognizable in the first instance by the Munsif operating as *res judicata* in a subsequent suit of value exceeding the limit of the Munsif's jurisdiction by reason of such suit being cognizable by the Appellate Court -a result evidently not contemplated by the section, as has been held in several cases: see *Baharasi Lal Chowdhry* v. *Sarat Chunder Dass*, (1895) I.L.R., 23 Cal., 415; *Pathuma* v. *Salimamma*, (1884) I.L.R., 8 Mad., 83; *Run Bahadur* v. *Lucho Koer*, (1884) I. L R., 11 Cal., 301 : L. R., 12 I. A., 23. But the difficulty is completely removed if we read the words "heard and finally decided by such Court" to mean heard and finally decided by such Court, either [577] if no appeal is preferred from its judgment, or if an appeal being preferred has been disposed of and the judgment of the Appellate Court which takes the place of its judgment has decided the point. This view is in accordance with Explanation IV of the section, and with section 581, which requires the Appellate judgment to be entered in the register of suits in the first Court. Thus understood, the section clearly applies to a case like the present.

It remains now to consider whether the fact of a second appeal being barred in the former suit and not being barred in the present can make any difference. There is nothing in section 13 to indicate that the judgments in two suits must be open to appeal in the same way in order that the decision upon any issue in the earlier suit can bar the trial of the same issue in the later one.

It was urged by Dr. *Ashutosh Mookerjee*, who in his concise but clear argument has placed before us all that could be said in favour of the respondents, that section 13 is not very clearly worded, that a literal construction of it would lead to many anomalous results and that a reasonable construction of the section requires that not only should the Court which tried the former suit be of jurisdiction competent to try the subsequent suit, but its judgment in the former suit should be open to appeal in the same way as the judgment in the latter suit is. No doubt it must be conceded that the wording of the section is in some respects faulty, and that a literal construction of the section will lead to many anomalies. This has already been observed with reference to the words "finally decided by such Court." Another and a still greater anomaly was noticed with reference to the words "competent to try such subsequent suit" in the case of *Gopi Nath Chobey* v. *Bhugwat Pershad*, (1884) I. L. R, 10 Cal., 697, and *Raghunath Panjah* v. *Issur Chunder Chowdhry*, (1884) I. L. R., 11 Cal., 153, in which it was held that those words must be taken to mean competent to try the subsequent suit, if it had been brought at the same time that the former suit was brought. It may also be conceded that as an estoppel, to use the language of Sir BARNES PEACOCK in *Edun* v. *Bechun*, (1867) 8. W. R., 175, "shuts out [578] enquiry into the truth," it is necessary to see that the principle of *res judicata* is not unduly enlarged, and that it would be a wholesome restriction to the rule of *res judicata* if it is held that in order that a judgment in a former suit may be conclusive upon any issue arising in a subsequent one, it must have been open to appeal in the same way as a judgment in the subsequent suit is. Indeed one might go further and say that the proper application of the doctrine of *res judicata*

should be confined to a subsequent suit relating to the same subject-matter, and that the extension of the doctrine to exclude the trial of an issue in a subsequent suit relating to a different subject-matter, merely because that same issue was tried in a previous suit in a Court of jurisdiction competent to try the subsequent suit, is of doubtful propriety, for this, amongst other reasons, that a suit for a comparatively small amount, say Rs. 100, though triable only in a Subordinate Judge's or a District Judge's Court which is of jurisdiction competent to try a suit for a lakh of rupees or more, is not likely to be conducted by the parties with the same interest and the same care in the production of evidence as a suit of the latter description. But these are matters for the Legislature and not for the Court to consider. The duty of the Court is to construe the law as it stands, and not to make a new, though it may be a better, law. It is quite true that in interpreting a statute, to meet the obvious intention of the Legislature, "a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence" (see Maxwell on the Interpretation of Statutes, Chapter IX), but that is allowed only where the Court is coerced to do so to avoid some serious injustice or to prevent a statute from being reduced to a nullity; or for any other similar reason [see *Ex parte Rashleigh*, (1875) L.R. 2 Ch. Div., 9 (13); *Salmon* v. *Duncombe*, (1886) L. R. 11 App. Cas., 627]. In the present case it cannot be said that any such reason forces us to adopt the strained construction contended for on behalf of the respondents, for which the words used in the section afford no warrant. Moreover, the construction contended **[579]** for will, in cases like the present, be attended with some anomaly, if not also hardship and injustice. For if that construction be accepted, then to undo the effect of a judgment in a previous suit for rent in which a second appeal was barred, either party may wilfully raise a false and unfounded dispute as to the amount of rent in the subsequent suit, to make a second appeal allowable under section 153 of the Bengal Tenancy Act.

Of the cases cited *Bhola Bhai* v. *Adesang*, (1884) I.L.R., 9 Bom., 75, and *Vithilinga Padayachi* v. *Vithilinga Mudali*, (1891) I.L.R., 15 Mad., 111, are no doubt in point; but for the reasons given above, I must respectfully dissent from them. As for the cases of *Misir Raghobardial* v. *Sheo Baksh Singh*, (1882) L.R., 9 I.A., 197, and *Edun* v. *Bechun*, (1867) 8 W.R. 175, they are clearly distinguishable from the present. The question raised in those cases was whether a judgment passed by a Court in a previous suit was conclusive upon any matter raised in a subsequent suit when the Court which tried the former suit was incompetent to try the latter; and that question was answered in the negative. There are no doubt certain observations in the judgments in those two cases which may seem to favour the respondent's contention; but they must be taken in connection with the point which the Court had to determine, and so considered they do not warrant the view which the learned Vakil for the respondents asks us to take. I should add that the view I take is supported by the case of *David* v. *Grish Chunder Guha*, (1882) I. L. R., 9 Cal., 183.

For the foregoing reasons I must hold that the judgment in the previous suit operates as *res judicata* upon the question of instalments. This appeal must consequently be allowed, the decree of the Lower Appellate Court reversed, and that of the first Court restored with costs in this Court and in the Court below.

Maclean, C.J.—I have had the advantage of reading Mr. Justice BANERJEE'S judgment, and I concur.

S. C. G. *Appeal allowed.*

NOTES.

[I. The C.P.C., 1908, sec. 11, Exp. II, which is new, enacts that "for the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court."

This is in accordance with the previous decisions in 25 Cal., 571; (1900) 28 Cal., 78; (1901) 24 Mad., 444 which, however, was overruled in (1905) 29 Mad., 195. See also (1905) 10 C.W.N., 529: (1908) 35 Cal., 353; (1907) P.R. 57; (1904) 9 C.W.N., 656; (1913) 19 C.L.J., 34. The decision in (1909) 13 C.W.N., 1197: 10 C.L.J., 120, discusses the question of *res judicata* with reference to review proceedings in the *same* suit.

II. Rent does not include interest, (1906) 11 C.W.N., 110: 5 C.L.J., 69.

III. As regards appeal in rent suits, see also (1905) 5 C.L.J., 78 (n); (1901) 25 Bom., 625.]

[580] *The 1st December, 1897.*

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Fazil Howladar............Judgment-debtor

versus

Krishna Bundhoo Roy...........Decree-holder.*

Civil Procedure Code (Act XIV of 1882), section 230— Decree for payment of money—Decree for sale of hypothecated property, which also made the defendant personally liable in case of insufficiency—Mortgage decree.

A decree, which directs the realization of the decretal amount from the hypothecated property, and, if insufficient, makes the defendant remain personally liable, is a mortgage decree, and not a "decree for payment of money" within the meaning of s. 230 of the Code of Civil Procedure.

Ram Charn Bhagat v. *Sheobarat Rai*, (1891) I. L. R, 16 All, 418, followed.

Hart v. *Tara Prasanna Mukherji*, (1885) I. L. R., 11 Cal, 718, distinguished.

Jogemaya Dassi v. *Thackomoni Dassi*, (1895) I. L. R, 24 Cal, 473, referred to.

THE facts of the case, so far as they are necessary for the purposes of this report and the arguments, appear sufficiently from the judgment of the High Court.

Moulvi *Shamsul Huda* for the Appellant.

Babu *Bassant Kumar Bose* for the Respondent.

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.):—

Maclean, C J.—The first question we have to decide is whether the decree in this case is a mortgage decree. That point has not been very seriously argued by the learned Vakil for the appellant, because he virtually admits that he cannot distinguish a recent decision of this Court in the case of *Jogemaya Dassi* v. *Thackomoni Dassi*, (1896) I. L. R., 24 Cal., 473, from the present case upon that point. In my opinion the decree in this case was a mortgage decree.

That being so, the further question arises, whether the plaintiff is now entitled to take any further execution proceedings [581] to obtain the benefit of this decree, the appellant urging that he is debarred from doing so by reason of the third paragraph of section 230 of the Code of Civil Procedure which says that "No subsequent application to execute the same decree shall be granted after the expiration of twelve years from any of the following dates."

* Appeal from Order No 332 of 1897, against the order of Babu Debendra Lal Shome, Subordinate Judge of Backergunge, dated the 20th of July 1897, affirming the order of Babu Rajoni Kanto Chatterjee, Munsif of Barisal, dated the 1st of May 1897.

The decree referred to in that paragraph of the section is admitted to be a "decree for the payment of money," and we therefore have to decide whether the decree, in this case, is a decree "for payment of money" within the meaning of that paragraph of section 230. The decree was dated 16th May 1884, and the last execution proceedings were on the 14th May 1896, and the present application for execution is dated 30th November 1896, so admittedly a period of twelve years has expired from the date of the decree. The translation of the decree as handed up to me is in these terms: "It is ordered that the suit be decreed *ex parte* and the sum of Rs. 323 claimed (in the suit)and the costs of this suit Rs. 34-8 as., with interest at 6 per cent. per annum from this day till the date of realization, plaintiff do get from the hypothecated property. If insufficient, defendant to remain personally liable."

This question has been before the Allahabad High Court, and it was there decided in the case of *Ram Charan Bhagat* v. *Sheobarat Rai* (1894) I. L. R. 16 All, 418, "that a decree for sale of hypothecated property made in a suit for sale upon a mortgage bond is not a decree for the payment of money within the meaning of section 230 of the Code."

Looking to the reasoning upon which that decision is based, and having regard to the various sections of the Code of Civil Procedure to which attention is drawn in that judgment, with the object of showing that under certain sections of the Code the term "decree for payment of money" is used in contradistinction to other decrees, I concur in that decision and in the reasoning by which it is supported. This being so, I scarcely think that it is necessary to go through the various sections which have been referred to in the course of the argument, though I may briefly say that sections 210 and 322 and 254 of the Code indicate to my **[582]** mind the distinction to which I have referred, that is to say, the distinction drawn in the Code between a decree for the mere payment of money and a decree with other objects, and giving other relief. Reliance is placed by the appellant upon the case of *Hart* v. *Tara Prasanna Mukherji* (1885) I. L. R., 11 Cal., 718, decided by this Court, but there, as has been pointed out in the course of the discussion, was a distinct order upon the defendant personally to pay the money. In the present case there is no such order; there is merely that which is tantamount to a declaration that if the property be insufficient, the personal liability is to remain, and I may here remark that in this case as regards any personal liability of the defendants to pay the money, both the Courts below have held that the application is too late, and the execution proceedings decreed are confined to a realisation of the property only.

Reliance was placed by the learned Vakil for the appellant upon certain passages in the judgments of MACPHERSON and TREVELYAN, JJ., in the case of *Jogemaya Dassi* v. *Thackomoni Dassi*, (1896) I. L. R., 24 Cal., 473, to which I have already referred, and for the purpose of showing that in that case those learned Judges held that a mortgage decree, such as the present, was a decree for the payment of money within the meaning of section 230 of the Code. I was a party to that decision, and the reliance I placed upon that section is indicated by my observations at p. 487 of the report. Personally I did not in that case express any opinion upon the point which is the subject of discussion before us now, though no doubt there are passages in the judgments of my learned brotherswhich do support the appellant's present contention. But speaking from recollection, and seeing that neither the case in the Allahabad High Court nor the case of *Hart* v. *Tara Prasanna Mukherji*, (1885) I. L. R., 11 Cal., 718, were cited, and looking to the head note of the case *Jogemaya Dassi* v *Thackomoni Dassi*, (1896) I.L.R, 24 Cal., 473, as to the application to that case of section 230, and to

the circumstance that the point was not necessary to the decision, I am not satisfied it was the intention of those learned Judges finally to decide the point. But even if [583] it were, the decision would not avail the appellant here as I notice that in that case there was a decree against the defendant personally for payment. For these reasons, and, adopting as I do, the reasoning and conclusion of the learned Judges who decided the case in the Allahabad Court, I think that a decree such as this is not a decree for payment of money within the meaning of paragraph 3 of section 230 of the Code, and consequently that the order of the Court below was right and must be affirmed.

Banerjee, J.—I am of the same opinion. Two questions have been raised before us by the learned Vakil for the appellants: *first*, [illegible] decree in this case is a mortgage decree, that is a decree ordering [illegible] the mortgaged property, or whether it is simply a money decree, that is, a decree ordering the payment of money by the defendant; and, *second*, whether, even if the decree be held to be a mortgage decree, the present application for execution is not barred by section 230 of the Code of Civil Procedure.

As to the first question, having regard to the terms of the decree, I am of opinion that it is a mortgage decree, that is, a decree ordering the sale of the mortgaged property coupled with a decree for the realization of the balance of the mortgage debt, if any, left after the sale of the mortgaged property, out of any other property belonging to the judgment-debtor. The terms of the decree in this case come very much nearer to the terms of the decree in the case of *Jogemaya Dassi* v. *Thackomoni Dassi*, (1896) I. L. R., 24 Cal., 473, than to the terms of the decree which was the subject of discussion in the case of *Chundra Nath Dey* v. *Burroda Shoondury Ghose*, (1895) I. L. R., 22 Cal., 813. The last mentioned case is therefore distinguishable from the present; and following the case of *Jogemaya Dassi* v. *Thakomoni Dassi*, (1896) I.L.R., 24 Cal., 473, I think we must hold that the decree in this case was a mortgage decree.

As to the second contention, the Courts below have already held that so much of the decree as authorizes the decree-holder to realise the judgment-debt out of any property of the judgment-debtor other [584] than the mortgaged property is barred under section 230 of the Code, and the only question now before us is whether that portion of the decree which directs the realization of the mortgaged debt by sale of the mortgaged property is also barred under section 230 That question ought, in my opinion, to be answered in the negative. Although the first paragraph of section 230 relates to a decree generally, the third paragraph which contains the rule of limitation now relied upon speaks of an application to execute "a decree for the payment of money or delivery of other property." Can it be said that the decree that is now sought to be executed is one "for the payment of money," or, more strictly speaking, is that portion of the decree made in the suit which is for the payment of money? No doubt, every mortgage decree directs the mortgagor within a certain time fixed by the Court to pay the mortgage debt; and if such payment is not made, the decree directs the sale of the mortgaged property. The decree in this case did not specify any time within which payment was to be made. But we need not consider the question whether that defect vitiates the decree, because it is too late now to raise that question What the decree-holder is now seeking to execute is only so much of the decree as directs the sale of the mortgaged property; and an application to execute such a decree is not, in my opinion, within the scope of the third paragraph of section 230 of the Code. That the Code of Civil Procedure clearly observes a distinction between a simple decree for the payment of money and a decree directing the realization of money by the sale of mortgaged property, will be

clear from section 322 of the Code, and will also be borne out by a reference to sections 254 and 295. The view I take is fully supported by the case of *Ram Charan Bhagat* v. *Sheobarat Rai*, (1884) I. L. R., 16 All., 418.

As for the case of *Hart* v. *Tara Prasanna Mukherji*, (1885) I.L.R., 11 Cal., 718, that is clearly distinguishable from the present, because the question that arose there was with reference to the applicability of section 295 to the decree in that case, and it was held that section 295 applied, one of the reasons evidently being that the decree in that case not only directed sale of the mortgaged property, **[585]** but also authorized the realization of the money decreed by sale of property other than the mortgaged property.

As for certain observations of two of the learned Judges in the case of *Jogemaya* v. *Thackomoni*, (1896) I.L.R., 24 Cal., 173, referred to, they have been considered in the judgment just delivered by the learned Chief Justice, and I need say nothing more than this, that those observations, though they may be construed as favouring to some extent the construction contended for by the learned Vakil for the appellant, are observations that were not necessary for the decision of the case.

S. C. G. *Appeal dismissed.*

NOTES.

[This was followed in (1898) 26 Cal., 166; (1899) 27 Cal., 285; (1913) 17 C.W.N., 1039; see the cases in note (2) on p 67 Dr. Rash Behari Ghosh's Mortgages, IV Edn , (1911) Vol. I. See also (1904) 31 Cal., 792; (1907) 31 Bom , 308; (1908) P.L.R., 121.]

[25 Cal. 585]

The 9th February, 1898.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT , CHIEF JUSTICE, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN, MR. JUSTICE BANERJEE, AND MR. JUSTICE STEVENS.

Kanti Chunder Goswami............Plaintiff

versus

Bisheswar Goswami and others............Defendants.*

Lunatic—Act XXXV of 1858—Uncertificated guardian, Powers of—Manager of Joint Hindu Family, Powers of - Guardian --Sale by de facto *Guardian of Lunatic's share.*

Act XXXV of 1858 does not affect the general provisions of Hindu law as to guardians who do not avail themselves of the Act, and the managing member of a joint Hindu family, one of the members of which is a lunatic may, in case of necessity, sell joint family property including the lunatic's share although he does not hold a certificate under the said Act.

Ram Chunder Chuckerbutty v. *Projonath Mozoomdar*, (1879) I. L. R., 4 Cal. 929, followed in principle; the *Court of Wards* v. *Kupulmun Singh*, (1873) 10 B. L. R., 364; 19 W. R., 163, disapproved.

* Appeal from Appellate Decree No. 287 of 1897, against the decree of Babu Kadar Nath Mozumdar, Subordinate Judge of Burdwan, dated 23rd December 1896, affirming the decree of Babu Aughore Nath Biswas, Munsif of Burdwan, dated 24th February 1896.

THIS case was referred to a Full Bench by STEVENS, J., sitting alone to hear appeals not exceeding Rs. 50 in value. A Full [586] Bench consisting of five Judges, MACLEAN, C.J., and MACPHERSON, TREVELYAN, BANERJEE and STEVENS, JJ., heard the case on the 1st February, and the appeal was dismissed with costs. The judgments of the Full Bench were subsequently recalled, it appearing in the trial of another appeal referred to the Bench that there could not be a valid reference from a single Judge to a Full Bench. The order was as follows :—

" MACLEAN, C.J.—We directed this case to be put on the Board to-day under these circumstances. In the case heard by the Full Bench yesterday S. A. No. 1517 of 1896, objection was taken that there could not be a valid reference from a single Judge to a Full Bench. That case has been considered by us, and we have arrived at the unanimous conclusion that such a reference cannot be made. In the present case that objection was not taken, but the decision I have referred to applies equally to the present case, which was also a reference by a single Judge. Therefore the reference to the Full Bench was bad, and our judgment which has not been signed, passed and entered, must be recalled. Strictly then our course is to send the case back to Mr. Justice STEVENS, but, in order to save the parties expense, and as they consent, the proper steps shall be taken to have the case heard by a specially constituted Court of the same five Judges who heard it on the previous occasion. This will, we consider, get rid of any difficulties, and save the parties expense."

The plaintiff in this case sued for declaration of his title and recovery of possession of 1/12 share of a tank after cancellation of a deed of sale, dated the 31st Assar 1291, alleged to have been executed by his brother Hari Madhab. It was stated in the plaint that the plaintiff became of unsound mind while living jointly with Hari Madhab, and that he became of sound mind five or six years before the suit. It was further stated that Hari Madhab and the plaintiff had together an 1/6 share in the tank, that Hari Madhab wrongfully sold the plaintiff's share to the defendant during the plaintiff's insanity, and that the plaintiff not having been benefited by the sale the sale was not binding upon him.

The defence *inter alia* was that a joint debt of the plaintiff and his brother was paid off by selling the share in question, and that the plaintiff's brother sold it as manager of the family comprising [587] himself and the plaintiff, and that the plaintiff was benefited by the sale.

The lower Court dismissed the plaintiff's claim.

The plaintiff appealed to the High Court

The question raised in the High Court was thus stated by STEVENS, J., in his order of reference to a Full Bench :—

" The point which arises in this case is, whether a sale by the managing member of a joint Hindu family, which included a lunatic, of a portion of a joint family property, including the interest of the lunatic, is bad so far as the share of the latter is concerned, on the sole ground that the manager, who was the lunatic's brother, did not hold a certificate under Act XXXV of 1858.

It has been found on the facts that the transaction was a prudent one entered into for the benefit of the lunatic, and that the lunatic actually derived benefit from it.

According to the ruling in the case of *Court of Wards* v. *Kupulmun Singh*, (1873) 10 B. L. R., 364 : 19 W. R., 163, the sale of the lunatic's interest would appear to be invalid. The principle on which that case seems mainly to have been decided was that in all cases of disqualification the appointment of a guardian to the disqualified person lay according to the Hindu law with

the State, and inasmuch as by Act XXXV of 1858 a particular course was marked out for the Court as representing the State, to pursue, in regard to appointing a guardian or manager of a lunatic's estate, no appointment of such guardian or manager could be properly effected after the passing of that Act otherwise than in the special manner prescribed thereby. It was held that any equitable principle that might apply to dealings *bona fide* for valuable consideration with a *de facto* manager who had not obtained a certificate under the Act could not extend to transactions which in the case of a certificated manager would have required the previous sanction of the Court under section 14 of the Act.

Those principles were applied on the authority of that decision [588] among others in the case of *Abhassi Begum* v. *Rajrup Koonwar*, (1878) I. L. R., 4 Cal., 33, which was an analogous case under Act XL of 1858, section 18 of which corresponds closely to section 14 of Act XXXV.

The latter case was overruled by a Full Bench of the Court in the case of *Ram Chunder Chuckerbutty* v. *Brojo Nath Mozumdar*, (1879) I. L. R., 4 Cal., 929. The case in 19 Weekly Reporter, 163, was referred to in the argument, but was not mentioned in the judgment of the Full Bench, which moreover proceeded on the construction of Act XL of 1858 itself and on the history of previous legislation on the subject. Although, therefore, the principles, on which the case in 19 Weekly Reporter, 163, was decided, were not followed by the Full Bench, and so far the decision may be said to have been dissented from by implication, it was not expressly overruled.

I think that, though all the considerations noticed in the judgment of the Full Bench are not applicable to Act XXXV of 1858, there does not appear to be any substantial difference of principle between that Act and Act XL of 1858, so as to render correct the application of section 14 of the former Act in circumstances analogous to those in which the application of section 18 of Act XL of 1858 has been held by the Full Bench to be incorrect. I, therefore, venture to differ from the decision in the case of *Court of Wards* v. *Kupulmun Singh*, (1873) B. L. R., 364 . 19 W. R., 167, and I accordingly refer the matter for the decision of a Full Bench."

Babu *Digambar Chatterjee* appeared for the Appellant, and contended that on a proper construction of the deed of sale, the interest of the lunatic did not pass thereby, but only an 1/12 share, and that of the brother who executed this deed was meant to be sold. He further contended that the brother had no authority to sell the interest of the lunatic without a certificate under Act XXXV of 1858, and cited *Court of Wards* v. *Kupulmun Singh*, (1873) B. L. R, 364 : 19 W. R., 167, and *Goureenath* v. *Collector of Monghyr*, (1867) 7 W. R., 5.

Babu *Nilmadhab Bose* (Babu *Shib Chandra Palit* with him) [589] on behalf of the Respondent argued that the principle of *Hanuman Prasad's* case should be applied; it appeared from the pleadings that it was understood that the plaintiff's share was sold, and the facts found were that full value was paid for the entire ⅙ share, and that the plaintiff benefited by the sale. The case cited from 7 W. R., 5, supported the defendant, and that from 19 W. R, only proceeds on the view that the unauthorized guardian should not possess more power than the authorized. That case is considerably weakened by the subsequent case in I. L. R., 4, Calcutta Series. The two Acts XXXV and XL of 1858 were passed at the same time and are similar in their scheme, and should be construed to be on the same principles. See section 14 of the Lunatics' Act and section 18 of the Minor's Act. The principle of the Full Bench ruling in I. L. R., 4, Calcutta Series, should be extended to the case of a lunatic.

Babu *Digambar Chatterjee* in reply.

The **Judgments** of the High Court (MACLEAN, C.J., MACPHERSON, TREVELYAN, BANERJEE, and STEVENS, JJ.) were as follows:—

Maclean, C. J.—The question we have to decide is whether a sale by the managing member of a joint Hindu family, which includes a lunatic, of a portion of a joint family property, including the interest of the lunatic, is bad so far as the share of the latter is concerned, on the ground that the manager, who was the lunatic's brother, did not hold a certificate under Act XXXV of 1858. It must be taken that the sale in this case was effected by Hari Madhab, brother of the lunatic, to pay off a debt of the joint family, and that there was necessity for the sale. I entertained during the course of the argument some doubt as to how this question should be answered; but on the whole I have come to the conclusion that it must be answered in the negative, in other words, I think the sale is good and binding.

Two points have been urged before us on behalf of the plaintiff, appellant, and the first point is upon the construction of *kobala* in question. It is contended for the appellant that on the construction of the deed Hari Madhub only sold his own interest [590] in it and not the interest of his then lunatic brother, the present plaintiff.

If the document stood alone and the question were one merely of the construction of the document as it stands, there might be some difficulty in saying that it passed anything more than the interest of Hari Madhub. But the authorities cited appear to me to establish that in a case of this class, the Court may take into consideration not only the language of the deed itself, but may look into all the surrounding circumstances in order to ascertain what the true intention of the parties was. This being so, it is not an unfair inference from the findings of the Court below that the purchaser intended to buy, and that Hari Madhub intended to sell, not only the share of Hari Madhub in the tank in question, but also the share of his lunatic brother. Taking then the deed in connection with the surrounding circumstances, the right conclusion is, I think, that the sale included, and was intended to include, both the shares.

Upon the second point, the decision of this Court in the case of *Court of Wards* v. *Kupulmun Singh*, (1873) 10 B. L. R., 364 : 19 W. R., 163, where it was held—I am now reading from the head note—"That all dealings with a lunatic's property must be made by the hands of a guardian or manager to be appointed by the supreme civil power; the legality of the guardianship depending on such appointment," is an authority in the plaintiff's favour. But in a later case decided by a Full Bench of this Court—*Ram Chunder Chuckerbutty* v. *Brojo Nath Mozumdar*, (1879) I. L. R., 4 Cal, 929, it was held that it was not the intention of Act XL of 1858, which was no doubt an Act applicable to infants and not to lunatics—"to alter or affect any provision of Hindu or Mahomedan law as to guardians who do not avail themselves of the Act. The scope of the enactment is merely to remove legislative prohibitions to confer expressly a certain jurisdiction, and to define exactly the position of those who avail themselves of, or are brought under, the Act, leaving persons to whom any existing rules of law apply unaffected."

[591] That case no doubt applies to the case of an infant and not to that of a lunatic, but the statute relating to lunatics (Act XXXV of 1858) was passed in the same year as that relating to infants, and the provisions of the two Acts, *qua* the present point, are substantially, if not absolutely, analogous. Although, as I said before, I, in the first instance, entertained some doubt on the point—a doubt which was fostered by the circumstance that there is no

express provision in the Mitakshara for the case of a lunatic, though there is for the case of a minor—I think the reasoning upon which the judgment in the later Full Bench case is based applies with equal force to the case of a lunatic as to the case of an infant. It is difficult to see any real distinction in principle between the two cases having regard to the wide and somewhat general powers of the manager of Hindu joint family property, and which prevail according to Hindu law. The necessity for the sale must of course be shown.

Upon these short grounds I am of opinion that the sale in question is good, and that it binds the share of the lunatic.

The appeal therefore fails, and must be dismissed with costs, but there will be no costs of the reference by Mr. Justice STEVENS, which proved to be abortive.

Macpherson, J. —I think that on the facts found, the plaintiff's brother had power to dispose of the plaintiff's interest in the tank in question, the plaintiff being a lunatic at the time of the sale. The tank was the joint property of the two brothers, and the plaintiff's brother was in the position of the manager. Act XXXV of 1858 does not make the appointment of a guardian or manager compulsory in the case of every lunatic, nor does it deprive the managing member of a Hindu family, one of the members of which is a lunatic, of the powers of dealing with the family property in case of necessity. The authority of the case of *Court of Wards* v. *Kupulmun Singh*, (1873) 10 B. L. R., 364. 19 W. R, 163, has, I think, been greatly shaken by the case of *Ram Chunder Chuckerbutty* v. *Brojo Nath Mazumdar*, (1879) I. L. R, 4 Cal., 929, decided by a Full Bench of this Court. Reasons which led the Full Bench to hold **[592]** that a *de facto* guardian of a minor has authority in case of necessity to deal with the infant's property, apply, in my opinion, equally to the case of a Hindu family, one member of which is a lunatic.

On the other point as to whether the sale did actually pass the interest of the plaintiff, I agree in the view expressed by the learned Chief Justice.

Trevelyan, J.—I also agree in the view taken by the learned Chief Justice on both the questions. As regards the first question, I think that it is always to be determined in these cases, from the terms of the deed and surrounding circumstances, what the parties intended should pass, whether they intended that the share of the minor, or the lunatic, as the case may be, should pass, or whether they only intended that the person who was acting for such a minor or a lunatic, should be considered as dealing with his own property. In this case one-twelfth share of the property did actually belong to the manager himself and one-twelfth belonged to the lunatic. Looking at the deed itself, and having regard specially to the decision of the late Sir BARNES PEACOCK, Chief Justice, and Mr. Justice DWARKA NATH MITTER in *Judoonath Chuckerbutty* v. *James Tweedie*, (1869) 11 W. R., 20, I am bound to say that the property of the lunatic passed by the sale in question. In that case, as in the present case, the manager had, apparently, a share of his own besides the share with which he was dealing. The learned Chief Justice there said: "In this case it appears to be clear that the vendors intended to pass the whole property and not merely the share which they passed in their own right, *first*—because they professed to sell the whole, and, *secondly*, because in the deed they recite a necessity which it would have been wholly unnecessary for them to have done if they were selling in their own right." In the present case, also, the manager professed to sell the whole one-sixth. In this case, also, he professed to sell such property in order to pay off a debt which is admitted to be a joint family debt. It is described in the plaint as a joint family debt, and throughout it has been treated as such. It seems to me, therefore, that there is

[593] absolutely no distinction whatever between the case of *Judoonath Chuckerbutty* v. *James Tweedie*, (1869) 11 W.R., 20, and the present case. I, therefore, hold that the parties must have intended that the whole one-sixth should pass.

I also agree in the view that the decision in *Ram Chunder Chuckerbutty* v. *Brojo Nath Mozumdar*, (1879) I. L. R., 4 Cal., 929, practically concludes this case on the point referred to us.

Banerjee, J.—I am of the same opinion. Upon the first of the two points raised, namely, that relating to the construction of the conveyance, I do not think it necessary to add anything to what has been said in the judgments of the learned Chief Justice and Mr. Justice TREVELYAN.

Upon the second point, which is the one that has given rise to this reference, I wish only to add a few words in answer to the contention raised by the learned Vakil for the appellant, that the case of a lunatic is distinguishable from that of a minor. The distinction which is sought to be drawn is this: Whereas the case of a minor is expressly provided for by Hindu law, and it was this express provision of Hindu law that was made the basis of the decision of the Full Bench in the case of *Ram Chunder Chuckerbutty* v. *Brojo Nath Mozumdar*, (1879) I. L. R., 4 Cal., 929, there is no such provision relating to the case of a lunatic. And there being no such provision relating to the case of a lunatic, it is argued that the only authority dealing with his property must be that derived from Act XXXV of 1858.

The answer to this argument, in my opinion, is this: Though the passage of the Mitakshara which is referred to, namely, Mitakshara, Chapter I, Section I, para. 29, relates only to the case of minors, the text of Brihaspati upon which that passage is a comment, and which is quoted in the preceding paragraph, is quite general in its terms, and would include the case of a lunatic, or other disqualified person, just as much as that of a minor; and if that is so, it cannot be said that the case of a lunatic is absolutely unprovided for in Hindu law. The view I take is [594] supported by a decision of this Court in the case of *Gouree Nath* v. *Collector of Monghyr*, (1867) 7 W. R., 5. That being so, I do not think that there can be any reason for distinguishing the case of a lunatic from that of a minor, in regard to whom it has already been settled by the decision of this Court in the case of *Ram Chunder Chuckerbutty* v. *Brojo Nath Mozumdar*, (1879) I.L.R., 4 Cal., 929, that a *de facto* guardian or manager has the power of dealing with his property in case of necessity. I think the rule of law which requires a purchaser in such a case to prove necessity in order to sustain the alienation in his favour, is a sufficient safeguard against the interest of the lunatic being sacrificed.

Stevens, J.—I agree.

S. C. C. *Appeal dismissed.*

[25 Cal. 594]

FULL BENCH REFERENCE.

The 25th January, 1898.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN, MR. JUSTICE BANERJEE AND MR. JUSTICE JENKINS.

Gopal Chunder Manna and others............Judgment-debtors

versus

Gosain Das Kalay............Decree-holder.*

Limitation Act (XV of 1877), Schedule II, Art 179, cls. (4) and (2)—Execution of decree, not materially defective, Application for —Application returned for amendment —Code of Civil Procedure (Act XIV of 1882), sections 235 and 248—Decree against joint defendants—Appeal by one of several defendants against part of the decree.

The plaintiff obtained a joint decree against defendants for possession of immoveable property and damages on 21st May 1886. Against that decree all the defendants except defendant No. 1 appealed, and on 2nd July 1887 so much of the decree was reversed as made the appealing defendants liable for damages but was affirmed in all other respects. A second appeal by the plaintiff from the decree of the Appellate Court was dismissed by the High Court on 9th July 1888. An application for execution of the decree was made by the plaintiff on 7th July 1891 within three years from the date of the final decree, dated 9th July 1888

[595] The prayer was for issue of notice on the Judgment-debtor for delivery of possession, for attachment and sale of certain immoveable properties, for realization of costs and damages decreed. Notice under section 248 of the Code of Civil Procedure was issued on the judgment-debtors on 8th September 1891. The judgment-debtors, except defendant No. 1, objected that as the application did not contain the right number of suit and date of decree it was not in accordance with law, and as no other application had been made within three years from date of decree, the execution was barred by limitation. Defendant No. 1 objected that limitation as against him would run from 21st May 1886, there being no appeal by or against him from the decree of that date.

Held, that material defects only could vitiate an application, and as the defects in the present application for execution were not material, it was not barred by limitation. *Asgar Ali* v. *Troilokya Nath Ghose*, (1890) I. L. R., 17 Cal., 631, and *Gopal Sah* v. *Janki Koer*, (1895) I. L. R., 23 Cal., 217, distinguished.

Held, also, that even if such application was defective as an application for execution of decree it was still an application to take some step in aid of execution, namely, to issue a notice under section 248, which was necessary, the decree having been passed more than a year before, and such notice having been issued, it kept the decree alive.

Behari Lal v. *Solik Ram*, (1878) I. L. R., 1 All., 675, and *Dhonkal* v. *Phakkar*, (1893) I. L. R., 15 All., 84, referred to.

Held, further, that limitation against defendant No. 1 would run from date of the decree in appeal, therefore the application for execution was not barred by limitation. *Gunga Moyee* v. *Shib Sunker*, (1878) 3 C. L. R., 430, followed. *Moshiat-un-nissa* v. *Rani*, (1889) I. L. R., 13 All., 1, distinguished.

* Reference to the Full Bench in Appeal from Order No. 88 of 1896.

THIS case was referred to a Full Bench by MACLEAN, C.J., and BANERJEE, J., on the 9th August 1897. The order of reference was as follows:—

BANERJEE, J.—This appeal arises out of an application for execution of a decree for possession of certain immoveable property and for damages. The first Court, on the 21st May 1886, gave the plaintiff a decree for possession and for damages against all the defendants. Against that decree all the defendants, except No. 1, preferred an appeal, and the Appellate Court, on the 2nd July 1887, reversed so much of the decree as made the appealing defendants liable for damages, but it affirmed the [596] decree in every other respect. And a second appeal from the decree of the Appellate Court was dismissed by the High Court on the 9th of July 1888.

The first application for execution was made in the Court of the first Munsif of Howrah on the 7th of July 1891; it was returned by the first Munsif on the 21st of August following for want of jurisdiction; and it was presented on the same day to the proper Court. The application asked for issue of notice on the judgment-debtor for delivery of possession and for attachment and sale of certain immoveable properties for realization of the costs and damages decreed. Notice under section 248 of the Code was issued on the judgment-debtors on the 8th September 1891, and on their objection that the particulars required by section 235 were incorrectly stated, the application was, by an order of the Court, dated the 11th January 1892, allowed to be amended. This last-mentioned order was reversed by the Appellate Court, and the Munsif was directed to deal with the application for execution as originally made; and the execution case was dismissed by the Munsif, on the 13th July 1892, for want of prosecution. A second application for execution made on the 15th August 1893 was rejected on the 4th April 1894 for incorrectness in the statement of necessary particulars, and then the present application was made on the 19th of June 1894. The judgment-debtors urge that it was barred by limitation; the first Court gave effect to this objection, but the Lower Appellate Court has reversed the decision of the first Court, and ordered execution to proceed; and hence this appeal by the judgment-debtors.

Two contentions have been raised in this appeal:

First—That execution is barred against all the defendants, as the application of the 7th of July 1891 was not one according to law; and as there was no other application within three years even from the date of the decree of the High Court; and

Second—That even if the application of the 7th of July 1891 be held to be one according to law, still execution is barred against defendant No. 1, as time runs in his case, not from the [597] date of the decree of the High Court, but from the date of the decree of the first Court, that is, the 21st of May 1886, there having been no appeal by or against him from that decree.

In support of the first contention, it is argued by the learned Vakil for the appellants that many of the particulars required by section 235 of the Code were incorrectly stated in the application of the 7th of July 1891, and that it cannot therefore be regarded as an application made according to law within the meaing of Article 179, Clause 4 of Schedule II of the Limitation Act; and the cases of *Asgar Ali* v. *Troilokya Nath Ghose*, (1890) I.L.R., 17 Cal., 631, and *Gopal Sah* v. *Janki Koer*, (1895) I.L.R., 23 Cal., 217, are relied upon. It was conceded, however, and very properly conceded, that the decree-holder was entitled under section 14 of the Limitation Act to exclude from computation the time from the 7th July to the 21st August 1891.

That being so, and the decree-holder being admittedly entitled to reckon time as against at least some of the judgment-debtors from the date of the final decree in appeal, that is, the 9th of July 1888, execution is not barred against them, if the application of the 7th July 1891 is one within the meaning of Clause 4 of Article 179, that is, if it is an application according to law within the meaning of that clause.

Now the question whether an application for execution or for taking some step in aid of execution is one according to law within the meaning of Article 179, Clause (4), has to be determined with reference to the circumstances of each case; and while on the one hand an application must be in substantial compliance with the law in order that it may be regarded as one coming within the meaning of clause 4, on the other hand, it is not every informality that would vitiate an application and take it out of that clause. Were it otherwise, *bonâ fide* applications for execution would fail to save limitation owing to trivial defects of form, —a result which I do not think the Legislature could have intended. The view I take is amply supported by the authority of decided cases **[598]** of which I need only refer to *Bal Kishen* v. *Bedmati*, (1892) I.L.R., 20 Cal., 388, and *Rama* v. *Varada*, (1892) I.L.R., 16 Mad., 142.

The two cases cited by the learned Vakil for the appellants are clearly distinguishable from the present. In *Asgar Ali* v. *Troilokya Nath Ghose*, (1890) I.L.R., 17 Cal, 631, while the decree-holder, as I gather from the judgment of PRINSEP, J., asked for the sale of the immoveable property of the judgment-debtor "as per list," no list was attached to the application, so that the application did not comply with section 237 of the Code, and no execution could be taken out thereon owing to this material defect. So also in *Gopal Sah* v. *Janki Koer*, (1895) I.L.R., 23 Cal., 217, the application, which was considered to be one not according to law, was found to be materially defective in not complying with sections 235 to 238. Mr. Justice PRINSEP in his judgment in this last mentioned case observes: "One of the errors committed by the decree-holder was in misstating the amount of his decree in a lesser sum than he was given, and the Subordinate Judge has consequently limited the execution to that smaller sum. If that had been the only defect the decree would have been capable of being executed for the smaller sum. But in other respects, which it is unnecessary to mention, the application failed to comply with the requirements of sections 235, 236, 237 and 238 applicable to the case." These observations go to some extent to support the view I take, that it is only material defects that can vitiate an application. In the present case, the defects in the application of the 7th of July 1891, as the Lower Appellate Court has shown, were not of a material character. The application asked for delivery of possession of the property covered by the decree, and the decree could well have been executed so far as this part of the prayer was concerned. It is admitted again that the application contained a list of the immoveable property sought to be attached and sold for the realization of the money decreed, so that there was no want of compliance with the provisions of **[599]** section 237 of the Code here. Moreover, though the amendment allowed by the first Court was set aside on appeal, the Appellate Court did not treat the application as one not made according to law, but remanded the case to the first Court to deal with the application as originally made—a course which it could not have taken if the application had been considered as not made according to law. Lastly, granting that the application of the 7th of July 1891 was informal and defective as an application for execution of decree, it was at any rate, as pointed out by the learned Vakil for the respondent, an

application to take some step in aid of execution, that is to say, to issue a notice under section 248 of the Code which was here necessary, the decree having been passed more than one year before. A notice was issued according to the prayer made in this application, and the application and the notice were sufficient to keep the decree alive. See *Behari Lal* v. *Salik Ram*, (1878) I.L.R., 1 All., 675, and *Dhonkal* v. *Phakkar*, (1893) I.L.R., 15 All., 84.

The first contention of the appellants must therefore fail.

In support of the second contention that time runs as regards defendant No. 1 from the date of the decree of the first Court, the cases of *Hur Proshad* v. *Enayet Hossein*, (1878) 2 C.L.R., 471, and *Raghu Nath* v. *Abdul Hye*, (1886) I.L.R., 14 Cal., 26, are relied upon. These cases are in conflict with that of *Gunga Moyee* v. *Shib Sunker*, (1878) 3 C.L.R., 430, which I am inclined to follow, as the decision in this last mentioned case appears to be more in conformity with the language of the law, than that in the two cases cited for the appellants. Moreover, Explanation I to Article 179 of Schedule II of the Limitation Act makes a distinction between a joint decree against several defendants and a decree in which separate reliefs are granted against different defendants, with reference to Clause 4, while no such distinction is made with reference to Clause 2; and this to my mind is a clear indication that the **[600]** Legislature intended that time should run from the date of the final decree of the Appellate Court where there has been an appeal irrespective of the question whether the appeal related to the whole decree or not.

In this conflict of decisions in this Court, a reference to a Full Bench becomes necessary, and as this is an appeal from an Appellate order having the force of a decree, the whole case must be referred to a Full Bench.

MACLEAN, C.J.—I agree that this case should be referred to a Full Bench reserving my opinion upon the question raised.

Babu *Prosonno Gopal Roy*, for the Appellant.

Babu *Nil Madhub Bose* and Babu *Shib Chunder Palit*, for the Respondent.

Babu *Prosonno Gopal Roy*.--The application for execution is barred by limitation. It is a defective application, as it does not give the right number of the suit, the date, and the amount of the decree. That being so, the application is not one made in accordance with law. See section 235 of the Code of Civil Procedure, and the cases of *Gopal Sah* v. *Janki Koer*, (1895) I.L.R., 23 Cal, 217 (223), and *Chowdhry Paroosh Ram Das* v. *Kali Puddo Banerjee*, (1889) I.L.R., 17 Cal., 53 If it is an application not made in accordance with law, the issue of a notice under section 248 of the Code of Civil Procedure would not save limitation. Application in aid of execution must be made according to law, in furtherance of the execution proceedings under a decree. See *Sujan Singh* v. *Hira Singh*, (1889) I L.R., 12 All., 399 (402), and *Dalichand* v. *Bai Shivkor*, (1890) I.L.R., 15 Bom., 242). The execution as against defendant No. 1, at least, has been barred by limitation. Limitation as against him would run either from the date of the decree of the first Court, or of the Appellate Court, as there was no appeal by or against him. See the cases of *Hur Proshaud Roy* v. *Enayet* **[601]** *Hossein*, (1878) 2 C. L R., 471; *Harkant Sen* v. *Biraj Mohan Roy*, (1895) I.L. R, 23 Cal., 876; *Mashiat-un-nissa* v. *Rani*, (1889) I. L. R., 13 All., 1; *Muthu* v. *Chellappa*, (1889) I. L. R., 12 Mad., 479; *Rughu Nath Singh* v. *Pareshram Mahata*, (1882) I. L. R., 9 Cal., 635; *Mullick Ahmed Zumma* v. *Mahomed Syed*, (1880) I. L., R., 6 Cal., 194

Babu *Nil Madhub Bose*, for the Respondent, was not called upon.

The opinion of the FULL BENCH was delivered by MACLEAN, C.J. (MACPHERSON, TREVELYAN, BANERJEE, and JENKINS, JJ., *concurring*).

Maclean, C. J.—Although in the reference I have reserved my opinion on the point referred to the Full Bench, I had the advantage of hearing the arguments addressed to Mr. Justice BANERJEE and myself in the Court below, and of discussing the matter with him, and I am in entire agreement with the opinion he has expressed upon the question of whether the application for execution of the 7th July 1891 was or was not one according to law. I concur both in the reasoning and in the conclusion expressed by Mr. Justice BANERJEE; and as regards the point which has been referred to the Full Bench, namely, whether the time from which the period is to begin to run is, as regards the defendant No. 1, the date of the decree pronounced on the appeal or the date of the decree of the first Court, I am of opinion that it begins to run from the date of the decree on appeal. I only propose to add one or two brief remarks to what Mr. Justice BANERJEE has said. With respect to the case decided in the Allahabad High Court, the case of *Mashiat-un-nissa* v. *Rani*, (1889) I.L.R., 13 All., 1, the first comment I make is that in that case there was a marked difference of opinion amongst the Judges who heard and decided it, and, in the next place, the facts were clearly distinguishable from those of the present case, inasmuch as here the decree was a joint one, whilst in the Allahabad case the decrees were **[602]** separate, or any way tantamount to separate decrees against each of the defendants. There is no doubt a dictum of C. J. EDGE which supports the present appellant's view, but it was *obiter* and not necessary for the purposes of that particular decision. I allude to the passage as to the application of clause 2, article 179 * on page 13. For myself I prefer the reasoning and the conclusion of the two learned Judges who were in the minority in that case, and to read the language of sub-section 2 of Article 179 of the second schedule to the Limitation Act according to the ordinary signification of the words used. That article says that, where there has been an appeal, the date of the final decree or order of the Appellate Court shall be taken to be the time from which the period is to begin to run. There is no such qualification in the article as is suggested by the majority of the Judges in the Allahabad case, and which must be read into the article in order to support their view, nor is there anything to lead me to suppose that any such qualification or modification was intended by the Legislature. The language of the article is reasonably clear, and in my opinion the safer course is to construe it according to the ordinary meaning of the words used. Again, upon the question of convenience, the convenience seems to me to be all in favour of the view which I take. In my opinion, the answer to the question submitted to us should be, that the time runs, as against the defendant No. 1, from the date of the final order of the Appellate Court, which was that of the High Court, dated the 9th July 1888; and that being so, the application for execution of the 7th July 1891 was not out of time. The appeal fails and must be dismissed with costs, including the costs of this reference.

* [Art. 179, cl. 2.—

Description of application.	Period of limitation.	Time from which period begins to run.
For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, section 230.	Three years; or where a certified copy of the decree or order has been registered, six years.	2. (where there has been an appeal) the date of the final decree or order of the Appellate Court, or

Macpherson, J.—I agree with the Chief Justice on both points.

Trevelyan, J.—I also agree.

Banerjee, J.—I am of the same opinion.

Jenkins, J.—I am of the same opinion.

S. C. G. *Appeal dismissed.*

NOTES.

[I. As regards which decree is to be executed when there is an appellate decree, see also (1899) 23 Mad., 60; (1902) 26 Mad., 91; (1902) 5 O. C., 217; (1907) P. R., 32; (1907) 34 Cal., 874: 7 C. L. J., 305; (1914) 22 I. C., 685; 19 C. W. N., 287.

II. Mere irregularities of an informal character do not vitiate an application:—(1898) 25 Cal., 594; (1901) 23 All., 162; (1908) 1 I. C., 210 (Nagpur); (1907) P. R., 32; 116; (1905) 28 Mad., 557: 18 M. L. J., 14.]

[603] FULL BENCH REFERENCE.

The 1st February, 1898.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN, MR. JUSTICE BANERJEE, AND MR. JUSTICE JENKINS.

Preonath Shaha............Defendant No. 1

versus

Madhu Sudan Bhuiya............Plaintiff.*

Evidence Act (I of 1872), section 92—Mortgage, Sale—Conduct of parties—Oral Evidence when admissible to prove that an apparent sale is a mortgage—Admissibility of parol evidence to vary a written contract.

Oral evidence of the acts and conduct of parties, such as oral evidence that possession remained with the vendor notwithstanding the execution of a deed of out-and-out sale, is admissible to prove that the deed was intended to operate only as a mortgage.

THIS case was referred to a Full Bench by BANERJEE and WILKINS, JJ., on the 24th November 1897, with the following OPINION:—

"This appeal arises out of a suit brought by the plaintiff respondent, for declaration of his title to, and confirmation of his possession of, an 8 annas share in certain plots of land on the allegation that the said share belonged to two brothers, Panchcowri Maity and Bonomali Maity; that Panchcowri, without the knowledge and consent of his brother, mortgaged the entire 8 annas share to Bama Sundari Dassi, wife of Khetra Mohun Shaha, by a deed appearing on the face of it to be a deed of out-and-out sale, but both Panchcowri and Bonomali continued to be in possession of the land as before; that the shares of the two brothers having passed by inheritance to Mohendra Nath Maity, son of Panchcowri, he redeemed the mortgage to Bama Sundari; that on his death his mother Puti Dasi, having inherited the said property, sold it to the plaintiff in

* Reference to the Full Bench in appeal from Appellate Decree No. 205 of 1896.

1297, and the plaintiff has since been in possession of the same; that Hari Churn Maity, defendant No. 2, having fraudulently obtained possession of the *kobala* or mortgage deed **[604]** in favour of Bama Sundari, and having, in collusion with defendant No. 1, Preonath Shaha, who claims to be the heir of Khetra Mohun Shaha, suffered a fraudulent decree for arrears of rent to be obtained against himself by Preonath, induced Preonath to cause the property in dispute to be advertised for sale; and that hence the plaintiff is obliged to institute this suit.

"The defence, so far as it is necessary to be referred to for the purposes of this appeal, was that the alleged mortgage to Bama Sundari Dasi was really an out-and-out sale to her husband Khetra Mohun Shaha by Panchcowri and Bonomali under a registered deed of sale, dated the 8th Falgun 1269; that the plaintiff's vendors did not hold adverse possession of the property in dispute for twelve years; and that the decree obtained by defendant No. 1, who was the heir of Khetra Mohun Shaha, against defendant No. 2, and the proceedings taken in execution thereof, were not fraudulent and collusive, but were *boná fide* and valid.

"The first Court found for the defendant No. 1 and dismissed the suit. On appeal by the plaintiff the Lower Appellate Court has reversed the first Court's decision and given the plaintiff a decree, holding that the deed of the 8th of Falgun 1269, though executed by both Panchcowri and Bonomali, was one of mortgage and not of sale, and that the plaintiff and his predecessors in title had been in possession of the property in dispute for more than twelve years.

"Against that decree of the Lower Appellate Court defendant No. 1 has preferred this appeal, and it is contended on his behalf—

"*First.*—That the Lower Appellate Court is wrong in admitting parol evidence to contradict the terms of the deed of the 8th Falgun 1269; and

"*Second.*—That even if the deed be held to be a mortgage deed, the Lower Appellate Court is wrong in giving the plaintiff a decree without finding that the mortgage was either satisfied or extinguished.

"In support of the first contention, section 92 of the Evidence Act is relied upon for the appellant, while the learned **[605]** Vakil for the respondents in answer cites the cases of *Baksu Lakshman* v. *Govinda Kanji*, (1880) I. L. R., 4 Bom., 594, and *Hem Chunder Soor* v. *Kally Churn Dass*, (1883) I. L. R., 9 Cal., 528, as showing that section 92 of the Evidence Act is no bar to the admission of evidence of acts and conduct upon which the Lower Appellate Court has held the deed in question to be one of mortgage and not of sale.

"There is some conflict of authority upon the point and some little difficulty in reconciling those cases which favour the respondent's view with the provisions of section 92 of the Evidence Act.

"In the case of *Kashee Nath Chatterjee* v. *Chundy Churn Banerjee*, (1866) 5 W. R., 68, decided before the Evidence Act was passed, the majority of a Full Bench of this Court held that evidence of an oral agreement was not admissible to prove that a deed of sale was intended to operate only as a mortgage, but that evidence of the acts and conduct of parties, as for instance evidence of possession having been allowed to remain with the vendor, was admissible for that purpose.

"In *Daimoddee Paik* v. *Kaim Taridar*, (1879) I.L.R., 5 Cal., 300, which was decided by this Court after the Evidence Act had come into force, it was held that section 92 of that Act had altered the law and was a bar to the admission of evidence of the kind which was considered admissible in the Full Bench case just referred to, and it was pointed out that there was "some difficulty in comprehending the distinction between the admissibility of evidence of a verbal

contract to vary a written instrument and the admissibility of evidence showing the acts of the parties, which after all are only indications of such unexpressed, unwritten agreement between the parties." And somewhat to the same effect is the case of *Ram Doyal Bajpie* v. *Heera Lall Paray*, (1878) 3 C. L. R., 386.

" On the other hand it has been held by the Bombay High Court **[606]** in *Baksu Lakshman* v. *Govinda Kanji*, (1880) I. L. R., 4 Bom., 594, by the Madras High Court in *Venkatratnam* v. *Reddiah*, (1890) I. L. R., 13 Mad., 494, and by this Court in *Hem Chunder Soor* v. *Kally Churn Das*, (1883) I. L. R., 9 Cal., 528, and *Kasi Nath Dass* v. *Hurrihur Mookerjee*, (1883) I. L. R., 9 Cal., 898, that section 92 of the Evidence Act does not alter the rule laid down in *Kashee Nath Chatterjee* v. *Chundy Churn Banerjee*, (1866) 5 W R., 68, and that the ground upon which the evidence of acts and conduct is admitted, is that the Court, should not permit the perpetration of fraud. But as has been well pointed out in a work of which the learned Vakil for the respondent is the author (see R. B. Ghose's Mortgage, second edition, page 66), the fraud referred to in proviso (1) of section 92, which would warrant the admission of oral evidence to vary a written instrument, must be contemporaneous and not subsequent fraud, that is fraud which prevented the insertion of the alleged agreement in the deed and not fraud which consists in a false denial of the agreement; for, if fraud of this latter description were to be allowed to make oral evidence admissible to contradict a document, it would render the section nugatory, the object of the section evidently being to avoid falsehood and perjury in the great majority of cases, even at the risk of allowing fraud to go undetected in a few instances.

"The case of *Kader Moideen* v. *Nepean*, (1891) I. L. R., 21 Cal., 882, to which our attention was called by the learned Vakil for the respondents, does not in our opinion touch the point now raised, the ground upon which their Lordships of the Privy Council based their judgment in that case having reference more to the construction of the written instruments than to the effect of oral evidence to vary them.

" The ground upon which the admissibility of the evidence of acts and conduct of parties to contradict a written instrument, in cases in which there is no contemporaneous fraud, may be **[607]** based, notwithstanding the provision of section 92 of the Evidence Act, is we think this: that section 92 of the Evidence Act, with a view to prevent falsehood and perjury, excludes evidence of " any oral agreement or statement " as to which perjury is easy, for the purposes of varying a written instrument; but neither the letter nor the spirit of the section excludes oral evidence which seeks to vary a written instrument, not by proving *a mere verbal agreement or statement* as to which perjury may be easy, but by proving *acts and conduct* of the parties as to which perjury is not equally easy, and which would be inconsistent with the view that the instrument was intended to operate in the form in which it appears.

" Having regard to these considerations, and to the fact that the balance of authority is in favour of the admissibility of the evidence upon which the Lower Appellate Court has held the deed in this case to be one of mortgage, we are inclined to hold that the first contention of the appellant should be disallowed. But as there is a clear conflict between the decisions of this Court in the cases of *Daimoddee Paik* v. *Kaim Taridar*, (1879) I. L. R., 5 Cal., 300, and *Hem Chunder Soor* v. *Kally Churn Das*, (1883) I. L. R., 9 Cal., 528, which are both in point, the question whether oral evidence of the acts and conduct of parties is admissible to contradict the deed in this case must, under Rule I of Chapter V of the Rules of this Court, be referred for decision to a Full Bench. And as the question arises on an appeal from an Appellate decree,

the whole case must be so referred under Rule II, the point upon which we differ from the decision of this Court in *Daimoddee* v. *Kaim Taridar*, (1879) I. L. R., 5 Cal., 300, being whether oral evidence of the acts and conduct of parties, such as oral evidence that possession remained with the vendor notwithstanding the execution of a deed of out-and-out sale, is admissible to prove that the deed was intended to operate only as a mortgage.

"We may add that in our opinion the second contention of the learned Vakil for the appellant ought to succeed, and the case ought to go back to the Lower Appellate Court, as the learned **[608]** Subordinate Judge has not determined the question whether the mortgage had been extinguished or satisfied, nor has he even stated that as one of the questions requiring determination. The finding as to possession cannot help the plaintiff, because if the plaintiff's predecessors in title were mortgagors of the property, their possession could not bar the right of the mortgagee."

Babu *Umakali Mookerjee* for the Appellant.

Dr. *Rash Behary Ghosh* and Babu *Digambar Chatterjee* for the Respondent.

The **judgment** of the Full Bench (MACLEAN, C.J., and MACPHERSON, TREVELYAN, BANERJEE, and JENKINS, JJ.) was as follows: -

Maclean, C.J. In regard to the question of law, which was the main ground for this reference, namely, whether oral evidence as to the acts and conduct of the parties was admissible to prove that the deed in this case was intended to operate as a mortgage and not as an out-and-out sale, the learned Vakil who appeared for the appellant stated that, having regard to the authorities, he could not successfully contend that such evidence was not admissible. We think the authorities establish that in such a case, evidence directed to the acts and conduct of the parties would be admissible. Upon the main question submitted to us on this reference, the appellant consequently fails.

Upon the other point, whether the case ought to go back to the Lower Appellate Court, upon the ground that the Subordinate Judge has not determined the question whether the mortgage has been extinguished or satisfied, we see no reason to differ from the conclusion of the two learned Judges who heard the case in the Division Bench.

The case must go back for the determination of the question, but to be decided upon the evidence as it now stands.

With reference to the costs of the appeal, and of the reference as regards the appeal as there has been a partial success on each side, the costs of the appeal must abide the result of the remand, but as regards the costs of the reference the appellant must pay them.

S. C. G. *Appeal allowed, case remanded.*

NOTES.

[This was followed in (1898) 26 Cal., 160; (1900) 28 Cal., 256; (1901) 28 Cal., 289; (1901) P. R., 72. The decision of the Privy Council in *Balkishen* v. *Legge*, (1899) 22 All., 149, was subsequent to the decision in this case. In the following cases it has been held that the Privy Council decision has impaired the authority of this decision:—(1901) 25 Mad., 7; (1905) 30 Bom., 119; (1905) 3 L. B. R., 100; (1907) 3 N. L. R., 19; (1901) 12 C. L. J., 439. But it has been maintained in 28 Cal., 256; 28 Cal., 289 that this decision remains unaffected. See also *per* MOOKERJEE, J. in 11 C. L. J., 39 at 42; 38 Cal., 892; 33 All., 340; 33 Cal., 773; 9 C. W. N., 178; 6 C. W. N., 60.]

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[609] APPELLATE CIVIL.

The 5th January, 1898.
PRESENT:
MR. JUSTICE GHOSE AND MR. JUSTICE AMEER ALI.

Makbool Ahmed Chowdhry............Decree-holder.
versus
Bazle Sabhan Chowdhry............Judgment-debtor.*

Civil Procedure Code (Act XIV of 1882), section 310 A—Civil Procedure Code Amendment Act (V of 1891)—Amount payable incorrectly calculated by an officer of the Court.

The judgment debtor within thirty days from the date of sale deposited in Court, under s. 310A of the Code of Civil Procedure, the amount calculated in the office of the Munsif as payable under the section. The Munsif set aside the sale. On appeal to the High Court by the auction-purchaser on the ground that the amount deposited by the judgment-debtor was not in compliance with s. 310A, and that before the sale could be set aside it was necessary for the judgment-debtor to pay, in addition to what he deposited, a sum equal to five per cent. of the purchase money:

Held, that when the amount payable by the judgment debtor under s. 310A of the Code of Civil Procedure has been calculated by an officer of the Court, and has been deposited, an order setting aside the sale must be made by the Court as a matter of right; the Munsif therefore was justified in setting aside the sale. *Ugrah Lall* v. *Radha Pershad Singh*, (1891) I. L. R., 18 Cal., 255, referred to.

THE facts of the case, so far as they are necessary for the purposes of this report, are sufficiently stated in the judgment of the High Court.

Sir *Griffith Evans*, Babu *Sreenath Das* and Moulvi *Abdul Jawad*, for the Appellant.

The *Advocate-General* (Sir *Charles Paul*) and Moulvi *Serajul Islam*, for the Respondent.

The **judgment** of the High Court (GHOSE and AMEER ALI, JJ.) was as follows:--

Ghose, J.--This is an appeal by the decree-holder, who is also the purchaser at the sale held in execution of the decree, [610] against an order setting aside a sale under section 310A of the Code of Civil Procedure. It appears that after the sale had taken place, the judgment-debtor applied to the office of the Munsif for the purpose of ascertaining the exact sum that he had to pay in satisfaction of the decree in accordance with the provisions of section 310A; and an account was prepared by the execution mohurir shewing the amount payable by the judgment-debtor, and that account was signed by the Munsif. The judgment-debtor paid in the amount which was shewn in the account, and the Munsif subsequently set aside the sale in accordance with section 310A.

It has been contended, however, by the learned Counsel for the appellant that the amount that was deposited by the judgment-debtor was not in compliance with the requirements of section 310A, and he has argued that it was necesssary, before the sale could be set aside, that the judgment-debtor

* Appeal from order No. 195 of 1897, against the order of C. P. Caspersz, Esq., District Judge of Chittagong, dated the 8th of February 1897, affirming the order of Babu Romesh Chunder Bose, Munsif of Sitakund, dated the 30th of September 1896.

should pay, in addition to what he deposited, a sum equal to five per centum of the purchase-money to the purchaser. It is not necessary in this case to decide the question whether, in a case like this where the purchaser is decree-holder, and not a third party, a sum equal to five per centum on the purchase-money should be deposited by the judgment-debtor for the purpose of obtaining relief under section 310A. It is sufficient to say that the judgment-debtor in this case paid in the exact sum of money which, upon calculation by the Court, was found to be due, and payable by him in accordance with the requirements of section 310A.

In the case of *Ugrah Lall* v. *Radha Pershad Singh*, (1891) I. L. R., 18 Cal., 255, decided by this Court, and reported, and which has, as we understand, been recently followed in another case (unreported) decided by MACPHERSON and AMEER ALI, JJ., this Court, under circumstances somewhat similar to this, held that the sale should be set aside. Sir COMER PETHERAM, in delivering the judgment of the Court in the case of *Ugrah Lall* v. *Radha Pershad Singh*, (1891) I.L R., 18 Cal., 255, observed as follows: Section 174 provides no **[611]** machinery by which the amount payable under the section is to be ascertained, but apparently from what has taken place in the case, the amount is in practice calculated in the office after notice to the decree-holder, and when that has been done, we think the amount so calculated and settled by the officer of the Court, has been settled as the amount payable under the section, and that when the amount has been paid into Court, an order to set aside the sale must be made by the Court as a matter of right. That was a case under section 174 of the Bengal Tenancy Act, the wording of which is very similar to section 310A of the Civil Procedure Code with which we are concerned in the present case; and the principle which underlies that case is equally applicable here.

We think that in the circumstances of this case the Munsif was justified in setting aside the sale which had taken place. The appeal will accordingly be dismissed and the application No. 1467 refused with costs.

Ameer Ali, J —I concur.

S. C. G. *Appeal dismissed.*

NOTES.

[As regards the necessity for deposit, see (1898) 22 Mad., 286.

In (1899) 26 Cal., 449 it was held distinguishing this decision that the mistake of the officer was no excuse unless he was under a duty to furnish the information.]

[25 Cal. 611]

ORIGINAL CIVIL.

The 11th March, 1898.

PRESENT:

MR. JUSTICE SALE.

Girendro Coomar Dutt

versus

Kumud Kumari Dasi and others.*

Mortgage—Further Advances—Equitable mortgage on title deeds already deposited under previous mortgage.

The defendants had executed a mortgage in favour of the plaintiff, and handed him the title-deeds of the mortgaged property. Subsequently the plaintiff advanced a further sum to the defendants, who agreed that the plaintiff should retain the title-deeds already held by him as a security for the repayment of the further advances. There was no fresh deposit of the deeds.

Held, that the plaintiff was entitled to be declared an equitable mortgagee in respect of such further advance.

Ex parte Kensington, (1813) 2 V. & B., 79, applied. *In re Beethan*, (1887) 18 Q. B. D., 380, referred to.

[612] THE facts of this case are fully stated in the judgment of SALE, J., below.

Mr. *Sinha* and Mr. *J. G. Woodroffe* for the Plaintiff.

Mr. *Henderson* and Mr. *Swinhoe* for the Defendant Kumud Kumari Dasi.

Mr. *Avetoom* for the Defendant Johurry Lall Pal.

Mr. *Chuckerbutty* for the remaining Defendant.

Sale, J.—The main question which arises for determination in this case is whether the plaintiff is entitled to a further charge for Rs. 8,000 by way of equitable mortgage in respect of certain property which admittedly was mortgaged to him. The facts are of a very simple character, and are in my opinion very clear, though as regards one point a question arises as to what is the proper inference to be drawn from them. The defendant Johurry Lall Pal carried on a piece goods business in Calcutta, and for the purposes of his business from time to time borrowed certain sums of money from Rajender Dutt, the father of the plaintiff. The transactions between Rajender Dutt and Johurry Lall Pal commenced by a loan from Rajender Dutt to Johurry Lall Pal of a sum of Rs. 10,000 as security, for which Johurry Lall Pal deposited title-deeds of the property in suit with Rajender Dutt, intending thereby to create an equitable charge as security for the loan in favour of Rajender Dutt. Subsequently Johurry Lall Pal, purporting to act for himself and for his wife Sreemutty Kumud Kumari Dasi, negotiated with Rajender Dutt for a mortgage of Rs. 60,000 which included the original sum of Rs. 10,000 obtained from him, and on the 18th January 1890 a mortgage for Rs. 60,000 was executed in favour of Rajender Dutt by Sreemutty Kumud Kumari Dasi. It appears that the title-deeds which were deposited with Rajender Dutt previous to the execution of the mortgage stood in the name of Sreemutty Kumud Kumari Dasi, and that Johurry Lall Pal, after the title-deeds had been so deposited, purported to act under the terms of a *mukhtearnamah*

* Original Civil Suit No. 795 of 1896.

which he stated was executed in his' favour by Sreemutty Kumud Kumary Dasi. Subsequently to the execution of the mortgage of the 18th of Janury 1890, Johurry Lall was in want of further sums of money and he borrowed [613] sums amounting to Rs. 21,000 on three different occasions, and on each occasion executed a promissory note in favour of Rajender Dutt. It was agreed between Rajender Dutt and Johurry Lall Pal that the title-deeds already in the possession of Rajender Dutt should be regarded as a deposit to secure these further advances. At the same time Johurry Lall Pal, professing to act both fore himself and for his wife, agreed that a regular legal mortgage should be executed by himself and his wife to secure these further advances. On the 25th August 1890 that mortgage, which is the mortgage in suit, was executed. In the year 1893 Johurry Lall Pal required a further advance for the purpose of his business, and acting, as the evidence shows, in precisely the same way as when the former advances were obtained by him, he requested the plaintiff to lend him Rs. 16,000, agreeing that the title-deeds then in the possession of the plaintiff should be held by him as security for this further advance. The plaintiff, however, agreed to lend only a sum of Rs. 8,000. The question is whether under the circumstances there is evidence of authority on the part of Johurry Lall Pal to bind his wife, and, if so, whether the plaintiff is entitled to rank as an equitable mortgagee in respect of this further advance of Rs. 8,000. So far as the evidence of authority goes, it appears to me that there is abundant evidence to shew that Kumud Kumari was holding out to Rajender Dutt and to the plaintiff her husband as authorised on her behalf to borrow monies for her, and for that purpose to deal with the title-deeds so as to secure the monies borrowed. It is I think quite clear, both from the recitals which appear in the mortgage of the 25th August 1890, and also from the allegations contained in the written statement, both of Johurry Lall Pal and Kumud Kumari Dasi, that Kumud Kumari Dasi knew that her husband was acting as her agent for the purposes of his business, and that she authorized him so to do. That being so, the evidence is, it seems to me, sufficient to raise the implication of authority on the part of the husband to bind the wife in respect of the further sum of Rs. 8,000 which was borrowed by the husband under the circumstances I have already stated. The defendant Kumud Kumari Dasi in her written statement denies knowledge or authority in respect of this loan [614] of Rs. 8,000. Neither she nor her husband has been called for the purpose of supporting the defence which she sets up.

The next question is, whether upon the facts the plaintiff is entitled to be regarded as an equitable mortgagee in respect of this further sum of Rs. 8,000. It is said there was no further or fresh deposit of title-deeds to secure the advance, and further that the title-deeds were held, not under an agreement to deposit, but under an agreement and a conveyance. Authority has been referred to, from which it would appear that the Court of Chancery refused to extend the doctrine of the deposit of title-deeds creating an equitable mortgage to a case where the title-deeds were already held by the creditor under a mortgage in the nature of a conveyance. The authority referred to is an old case, and it would appear from the more recent case of *In re Beetham*, (1887) 18 Q. B. D., p. 380, that the Courts in England would recognize an agreement that the title-deeds already held under a mortgage should be held as a security for a further advance, if such agreement satisfied the conditions of the Statute of Frauds.

Moreover, it is to be remembered that in the present case the title-deeds in suit were originally held under an agreement to deposit, and that the defendants Johurry Lall Pal and Sreemutty Kumud Kumari Dasi from time to time

regarded these title-deeds as deposited so as to secure fresh advances. I, therefore, see no reason why the contention of the plaintiff in respect of the fresh advance of Rs. 8,000 should not be given effect to. It has been pointed out that title-deeds already deposited as security for a previous loan are not required to be redelivered or redeposited to secure a subsequent advance when the parties by a subsequent arrangement intended that they should be held as security for a subsequent advance. In the case of *Ex parte Kensington*, (1813) 2 V. & B., 83, Lord Chancellor ELDON says at page 83: "In the cases alluded to I went to the length of stating that, where the deposit originally was for a particular purpose, that purpose may be enlarged by a subsequent parol agreement; and this distinction appeared to me to be too thin, that you should not **[615]** have the benefit of such an agreement, unless you added to the terms of that agreement the fact that the deeds were put back into the hands of the owner and a redelivery of them required, on which fact there is no doubt that the deposit would amount to an equitable lien within the principle of these cases." That case is referred to as an existing authority in the 10th edition of Snell's Principles of Equity at page 404, where the learned author says: "In *Russel* v. *Russel*, 1 Wh. & Tud. L. C. 7th, edit. 76, it was decided that the deeds were a security for the sum advanced at the time of the deposit, and only for that sum. But it is now held that such deposit will cover future advances, if such was the agreement when the first advance was made, or if it can be proved that a subsequent advance was made on an agreement, express or implied, that the deeds were to be or to remain a security for it as well."

I think, therefore, that the plaintiff is entitled to the usual mortgage decree, both in respect of the mortgage of the 25th August 1890 and of the further advance of Rs. 8,000. No relief is claimed as against the defendant Johurry Lall Pal who has been adjudicated an insolvent. A question was raised as to who should pay the costs of the brothers of the plaintiff who were not made plaintiffs in this suit, but were afterwards added as defendants on the ground that they as well as the plaintiff are entitled to the benefit of the mortgage of 25th August 1890. The defendant Kumud Kumari Dasi raised the question as to the title of the plaintiff to institute the present suit by himself, and asked that his brothers should be added as defendants. I think that the proper order to make with reference to the costs of these defendants, who only appeared on the first day of the hearing, is that their costs should be provided for in the same way as the plaintiff's costs from the proceeds of the mortgaged property. It is not necessary to make any order with reference to the costs of Johurry Lall Pal, inasmuch as no relief is sought against him, and he need not have appeared. The decree as against Kumud Kumari Dasi will be in the form of an ordinary mortgage decree.

Attorney for the Plaintiff: Mr. *Rutter*.

[616] Attorneys for the Defendant Kumud Kumari Dasi: Messrs. *Swinhoe & Co.*

Attorney for the Defendant Johurry Lall Pal · Babu *Sarat Chunder Dutt*.

Attorneys for the remaining Defendant: Messrs. *Bonnerjee & Haldar*.

H. W.

NOTES.

[Dr. *Rash Behari Ghosh* in his Mortgages, IV Edn., Vol. I, (1911), p. 160, observed. "An equitable mortgagee therefore is in a much better position as regards future advances than an ordinary mortgagee; and he has been confirmed in this 'bad eminence' by the Indian Courts, (1895) 17 All., 252; (1898) 25 Cal., 611. But antecedent debts will not be included in the absence of any expression of a contrary intention."]

[25 Cal. 616]

The 7th February, 1898.

PRESENT :

MR. JUSTICE JENKINS.

Dhurmo Dass Ghose
versus
Brahmo Dutt.*

Minor—Mortgage by minor —Voidable mortgage—Estoppel—Evidence Act (I of 1872), section 115—Fraud—Contract Act (IX of 1872), section 64—Restoration of benefit by minor.

The general law of estoppel as enacted by section 115 † of the Evidence Act (I of 1877) will not apply to an infant unless he has practised fraud operating to deceive.

A Court administering equitable principles will deprive a fraudulent minor of the benefit of a plea of infancy ; but he who invokes the aid of the Court must come with clean hands and must establish, not only that a fraud was practised on him by the minor, but that he was deceived into action by the fraud. *Ganesh Lala* v. *Bapu*, (1895) I. L. R., 21 Bom., 198, dissented from. *Sarat Chunder* v. *Gopal Chunder Laha*, (1897) I. L. R., 20 Cal.. 296 ; *Mill* v. *Fox*, (1887) L. R., 37 Ch. D., 153 ; *Wright* v. *Snow*, (1848) 2 De Gex. & S., 321, and *Nelson* v. *Stocker*, (1859) 4 De Gex. & J., 458, discussed.

If money advanced to an infant on a mortgage declared void is spent by him, then there is no benefit which he is bound to restore under the provisions of section 64‡ of the Contract Act (IX of 1872).

THE facts of the case appear sufficiently from the judgment.

Mr. *Pugh*, Mr. *Chakravarti* and Mr. *S. C. Mookerji* for the Plaintiff.

Mr. *O'Kinealy* and Mr. *J. G. Woodroffe* for the Defendant.

Jenkins, J.—On the 20th of July 1895 the plaintiff executed in favour of the defendant a mortgage over premises in Calcutta known as No. 15, Bolaram Ghosh's Street and 133, Cornwallis Street, to secure Rs. 20,000, and the present suit is brought to have **[617]** the deed cancelled on the ground that at the time of its execution the plaintiff was an infant. On the evidence before me I have no hesitation in finding that the plaintiff was under the age of twenty-one on the 20th of July 1895, and as at that time his mother Jogendra Nandini Dasi was guardian of his person and property under an order of Court to that effect, it follows that at the date of the mortgage the plaintiff was under such incapacity as arises from infancy. By way of answer to this incapacity the defendant in the first place contends that the loan was induced by a fraudulent misrepresentation made by the plaintiff to the defendant's attorney Kedar Nath Mitter, to the effect that the plaintiff was of age, and that Kedar Nath

* Original Civil Suit No. 630 of 1895.

† [Sec. 115 :—When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.]

Estoppel.

‡ [Sec. 64 :—When a person, at whose option a contract is voidable, rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.]

Consequences of rescission of a voidable contract.

Mitter was deceived by the misrepresentation, so that it is necessary to examine the facts relevant to this contention.

The plaintiff, who seems to have been a young man of extravagant and profligate habits came to Kedar Nath Mitter, an attorney of this Court, some time in the month of May 1895, with a request for a loan of Rs. 20,000 on mortgage of the property to which I have already referred. The upshot of the matter was that Dedraj, the local manager in Calcutta of the defendant, an up-country money-lender, expressed his willingness to advance the money on being satisfied as to the security. In the course of investigation of the plaintiff's title there came into Kedar Nath Mitter's hands a decree in a partition suit and an order for possession in which the present plaintiff was described as a minor, and thereupon Kedar Nath Mitter, according to his account of what occurred, asked the plaintiff to produce satisfactory evidence of his majority, with the result that the latter produced copies of two petitions presented by his mother, one praying for a grant of letters of administration, and the other for her appointment as guardian of the person and property of the plaintiff. In the former of these the plaintiff was described as being under the age of seven years, from which Kedar Nath says that he drew an inference which would place the plaintiff's birthday in July. Kedar Nath Mitter claims to have based this inference on what he calls a calculation; but if the mental process he describes ever had an existence, then I can only say it had no justification in fact or in reason.

[618] Kedar Nath Mitter further has sworn that the plaintiff was constantly asserting that he was born on the 4th Assei (the 17th June), but his testimony on this point is uncorroborated by any of the defendant's witnesses, and is absolutely contradicted by the plaintiff.

The next thing, according to Kedar Nath Mitter, is that as he still wanted evidence of the precise date of the plaintiff's birth, the astrologer Kalidas Acharji and Nando Lal Ghosh were produced, and made the declarations which form part of the evidence in the case. In addition to this Kedar Nath Mitter got from the plaintiff, as he says, "for greater security in the interests of his client" the declaration affirmed by the plaintiff on the 20th of July, the day of the execution of the mortgage. These are the facts on which the defendant relies in support of his plea of fraudulent misrepresentations. The plaintiff, on the other hand, contends that Kedar Nath Mitter was not in fact deceived by the misrepresentations contained in the declarations, and to establish that he relies on his conduct in the matter and also on a letter of the 15th of July 1895. This letter was written by Babu Bhupendranath Bose, who at that time was the plaintiff's mother's attorney, and was in these terms:—

July 15th, 1895.

Babu KEDAR NATH MITTER.

Dear Sir,

I am instructed by Srimati Jogendra Nandini Dasi, the mother and guardian appointed by the High Court under its Letters Patent of the person and property of Babu Dharamdas Ghose, that a mortgage of the properties of the said Dharamdas Ghose is being prepared from your office. I am instructed to give you notice which I hereby do that the said Dharamdas Ghose is still an infant under the age of twenty-one and any one lending money to him will do so at his own risk and peril.

Yours faithfully,
BHUPENDRA NATH BOSE.

This letter was on the same day handed to the witness, Lal Mahomed, Pressman, to be taken by him to Kedar Nath Mitter's office. Lal Mahomed swears that he took the letter to Kedar Nath Mitter's office, and there went

into a room where Kedar Nath Mitter and another Babu were seated. He says that he handed the letter to this Babu who opened it, read it and then handed [619] it to Kedar Nath Mitter, who in turn read its contents. The Babu, it is said, then signed the peon book, which was brought back by the messenger. No reply was sent to this letter, and on the 24th of July Bhupendra Nath again wrote to Kedar Nath Mitter as follows:—

July 24th 1895.

Babu KEDAR NATH MITTER.

Dear Sir,

Re *Dharamdas Ghose*.

I warned you on the 15th of July instant that Dharamdas Ghose was and still is an infant, and that his mother my client Srimati Jogendra Nandini Dasi is his guardian. I understand that yesterday, notwithstanding the warning, one of your clients Jamnadas Brahmadutt through you got the said Dharamdas Ghose to execute a mortgage of his properties in Calcutta in favour of the said Babu Jamnadas Brahmadutt for Rs. 20,000 of which he did not pay Rs. 8,700, the remainder being distributed between the unhappy victim and the confederates of your client. I am instructed to call upon your client through you to cancel the said mortgage at once as otherwise my instructions are to take legal proceedings without further reference.

Yours faithfully,
BHUPENDRA NATH BOSE.

To this letter Kedar Nath Mitter replied denying the receipt of the letter of 15th July, and this led to a further letter from Babu Bhupendra Nath Bose.

July 26th, 1895.

Babu KEDAR NATH MITTER.

Dear Sir,

Re *Dharamdas Ghose*.

Your letter of the 25th, I am surprised on hearing from you that you did not get any writing from me on the 15th. I find from my peon book that my letter of the 15th was delivered to you, and the receipt is signed by one of your clerks whose name, as far as I can make out, is Nishi Kanto Ganguly.

As regards the rest of your letter it requires no reply.

Yours faithfully,
BHUPENDRA NATH BOSE.

On the 27th July 1895 Kedar Nath Mitter sent a reply in which he simply states that there was no clerk of the name of Nishi Kanta Ganguly. On that Babu Bhupendra Nath Bose sent to Kedar Nath Mitter the peon book in which there is the name which certainly appears to be Radica Nath Gooly [620] or Gangooli; and I am further satisfied that there was a clerk of that name at the time in Kedar Nath Mitter's office and (notwithstanding Kedar Nath Mitter's denial) that it was his practice to sit downstairs. It will here be convenient to refer to a letter written on the 20th July 1895 by Nanda Lal Ghose to Kedar Nath Mitter in which he says:—

"As requested I have been to Babu Wooma Nath Ghose, the uterine brother of Hurry Das Ghose, and enquired of him whether he recollected the precise date of the birth of Dharamdas Ghose."

It further appears that there is an entry in Kedar Nath Mitter's day book, dated Tuesday, the 23rd July 1895.

"Attending yesterday at No. 2, Badur Bagan's Lane, accompanied by Babu Nanda Lal Ghose, Behary Lal Mitter and Nitto Gopal Ghose, having an interview with Babu Wooma Nath Ghose, the uterine brother of Hurry Das Ghose, the deceased father of Dharama Ghose and enquiring of him about the age of Dharamdas Ghose."

Now Nando Lall Ghose's evidence was that their visits were in consequence of a letter received by Kedar Nath Mitter from Bhupendra Nath Bose, though no doubt on learning the dates he receded from this position. In the same way Kedar Nath Mitter gives the following evidence in reference to his visit : "I wanted further enquiry because of the letter of Bhupendra Nath Bose. That made me curious to know what the other members said. I am sure of that." Then when the date is shewn him he says: "There must be a mistake in the date in the dav book." The importance of all this is that prior to these visits the only letter Babu Bhupendra Nath Bose had written was that of July 15th, the receipt of which Kedar Nath Mitter had denied, so that the position is this. It is sworn by the pressman that he delivered the letter : the peon book contains a signature which is the name of one of Kedar Nath Mitter's clerks, and he is a clerk whose practice it was to sit in Kedar Nath Mitter's room and was one of the attesting witnesses of the mortgage, Kedar Nath Mitter himself being the other. Radika Nath Ganguly, though still a clerk in Kedar Nath Mitter's employ, is for some reason, which has not been explained before me, not called to testify on this point; and both Kedar Nath Mitter and Nanda Gopal Ghose explain their [621] conduct by reference to a letter which on the dates can only have been that of the 15th of July.

Against this positive testimony and weight of probability I simply have the evidence of Kedar Nath Mitter, a witness, whose evidence I am forced with regret to describe as unsatisfactory.

I here pass to a consideration of Kedar Nath Mitter's conduct in this matter.

The plaintiff is brought to him by Nitto Gopal Ghose who certainly does not answer the description Kedar Nath Mitter attributed to him of a "well-to-do broker," but does seem to have had close relations with Kedar Nath Mitter and actually to have resided with him for four or five years. It is further clear that Kedar Nath Mitter dealt with the plaintiff, arranged for the loan, and secured a promise for payment to himself of Rs. 800 for his services at a time, when even, according to Kedar Nath Mitter's own case, he knew the plaintiff was an infant and that his mother was his guardian.

Then, when a question arose as to the plaintiff's age, does Kedar Nath Mitter make any inquiry of the plaintiff's mother or of her attorney Bhupendra Nath Bose or any member of the family with whom the plaintiff was brought up? That, apparently, is the last thing he would do, and instead he says that he consulted the witness Nando Gopal Ghose, an uncle, it is true, of the plaintiff, but a man who had been in hostile litigation with the plaintiff and his mother, who had employed Kedar Nath Mitter as his attorney in that litigation, and as to whom Kedar Nath Mitter is forced to admit he inferred that there must be bad feeling still existing between him and the plaintiff's mother.

The other person that he consults is apparently Kali Das Acharji, the astrologer. This man did not attend on his subpœna, and I therefore have had no oppurtunity of forming an opinion as to what passed between him and Kedar Nath Mitter. Then, I come to the statutory declaration which Kedar Nath Mitter got this young man to affirm, a declaration which contained more than one allegation that Kedar Nath Mitter must have known was beyond the plaintiff's knowledge. I do not intend to criticize [622] this declaration in detail, suffice it for me to say that it was in my opinion a most improper one for Kedar Nath Mitter to have prepared, if the object was to obtain a clear statement from the plaintiff as to his age.

It must further be borne in mind that Kedar Nath Mitter actually conducted this matter in the way I have indicated, though he was acting as the defendant's attorney. Let me say here that I absolve the defendant from all personal responsibility for this, for it all was clearly done without his knowledge; still at the same time, as he seeks to rely on a fraud alleged to have been practised on Kedar Nath Mitter, his claim must necessarily be tested by reference to Kedar Nath Mitter's conduct. It is unquestionably within the power of the Court administering equitable principles to deprive a fraudulent minor of the benefits flowing from the plea of infancy, but one who invokes the aid of that power must come to the Court with clean hands, and must further establish to the satisfaction of the Court that a fraud was practised on him by the minor, and that he was deceived into action by that fraud. I can only say that in this case it has not been established to my satisfaction that these requirements exist.

Kedar Nath Mitter's conduct has not been such as to predispose me in favour of the defendant's case, and a consideration of the circumstances to which I have referred does not lead me to the conclusion that Kedar Nath Mitter was deceived, and I accordingly hold that the circumstances of the case are not such as to nullify the plea of infancy.

It is right that I should here notice the argument that fraud and deceit are not necessary to the success of the defendant's plea.

This contention is based on section 115 of the Evidence Act as interpreted by *Ganesh Lala* v. *Babu*, (1895) I. L. R., 21 Bom., 198, in which it is no doubt said that, having regard to that section, proof of fraud on the part of the infant is not essential. The learned Judge in that case relies on the fact that in *Sarat Chunder* v. *Gopal Chunder*, (1892) I. L. R., 20 Cal., 296, **[623]** and in *Mills* v. *Fox*, (1887) 37 Ch. D., 153, no suggestion is made of the exception of an infant from the doctrine of estoppel. Now in the first of these cases the individuals sought to be affected were not infants, and at the bottom of page 306 the following passage appears in the judgment of the Privy Council: "The District Judge has held it to be proved that they had both reached majority at the date of the mortgage * * * * Accordingly it must be taken that they were of age to consent to the mortgage being granted or by their acts or representations to bar themselves from challenging it." It seems to me with all respect that this passage shows that the case is no authority for the proposition it is supposed to justify, but inferentially negatives it.

The case of *Mills* v. *Fox*, on the other hand, turned on special circumstances which do not allow of its being an authority for the broad principle laid down by the Bombay Court. Then it is further said by the learned Judge that *Wright* v. *Snow*, (1848) 2 De G. & S., 321, establishes this proposition. The headnote to that case appears to me to go beyond what was actually decided, for the learned Judge, V. C. KNIGHT BRUCE, finds that it was not proved that plaintiff was a minor at the time of the transaction, while his remarks in the course of the argument point to the view that fraud is necesssary though what amounts to fraud must depend on the circumstances.

That V. C. KNIGHT BRUCE did not regard fraud as unessential is, I think, made further apparent by the case of *Nelson* v. *Stocker*, (1859) 4 De G. & J., 458, in which being then Lord Justice KNIGHT BRUCE, he says: "It appears to me, however, upon the whole of the evidence that the defendant's deceased wife is not shewn to have been defrauded or deceived by the defendant in any respect before their marriage. I believe that at the time of the marriage and previously to it before the instrument of settlement in question was signed by either of them and before it was prepared, she was aware of his minority, and the case stands

substantially on the same footing, so far as the parties to the present record are concerned, as [624] if the fact of his infancy had been stated on the face of the settlement." Nor does the matter rest there, for in the same case is to be found the clear statement of that most eminent Judge Lord Justice TURNER that fraud is an essential element. It is enough for me to refer to that portion of his judgment which is contained on pages 465 and 466 of the report.

It appears to me, therefore, that the cases do not justify the proposition that fraud on the part of an infant is not essential. I think fraud operating to deceive must be found as a fact, and whether in any particular case there is such fraud must depend on its own particular circumstances.

This brings me to the plea of ratification which is based on the allegations contained in the defendant's further written statement.

It is a matter of surprise and regret to me that an attorney of this Court should have seen fit to act as Kedar Nath Mitter did in connection with this matter.

The draft purports to have been approved by one *Nanda Gopal Roy*, an attorney of this Court, but how he came to act for the plaintiff does not appear, nor has he been called by the defendant to explain his connection with the matter. In fact the further charge never was carried through, and I cannot regard the draft as being itself a ratification. At most the matter does not seem to me to have been more than an engagement to ratify in case the further advance was made. I therefore hold that this plea too has failed. Next I have to notice the contention based on section 64 of the Contract Act which prescribes the consequences to arise from rescission of a voidable contract, it being common ground that I am bound by authority to regard the mortgage of an infant as voidable. The section provides that the party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit so far as may be to the person from whom it was received. Now it is contended by Mr. *Woodroffe* that this provision entitles him to repayment of the money advanced even though it is not ear-marked and cannot now be followed.

[625] It is obvious that if this were the result of the section then the protection of infancy would practically be at an end. The money advanced has been spent, probably in useless or even vicious extravagance, and there is no benefit which the plaintiff is able or is bound to restore. Nor do I think that this is a case in which justice requires that the plaintiff should make compensation in accordance with the provisions of the Specific Relief Act, section 38. The result is that there must be a declaration that the mortgage of the 20th July 1895 is void and inoperative, and it must be delivered up to be cancelled.

Though I should have been glad to relieve the defendant of the costs of the action I do not see how I can with propriety do so; they must, therefore, be paid by him on scale No. 2.

Attorney for the Plaintiff: Babu *Bhupendra Nath Bose*.

Attorney for the Defendant: Babu *Kedar Nath Mitter*.

S. C. B.

NOTES.

[The judgment of the High Court is contained in (1898) 26 Cal., 381 and that of the Privy Council in (1903) 30 Cal., 539, which hold that the Indian contract Act renders void contracts by minors and that the question of estoppel did not arise since the party dealing with the minor in this case was aware of his minority.]

[25 Cal. 625]

CRIMINAL REVISION.

The 10th February, 1898.
PRESENT:
MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Abhoy Charan Dass and another...... .....Petitioners
versus
Municipal Ward Inspector...........Opposite Party.*

Calcutta Municipal Consolidation Act (II of 1888, B. C.), ss. 307, 335, 336, Schedule II, Rule 6—Liability for keeping animals without license—Penalty, to whom attached—Owner—Lessee.

The petitioners, as owners, let out a stable on hire, where *ticca gharries* and horses were kept by the lessee without taking out a license from the Municipal Commissioners. The petitioners were convicted under ss. 307 and 336 of the Calcutta Municipal Act (II of 1888 B.C.) for having permitted offensive matters, &c., and animals to be kept on the premises in contravention of the provisions of s. 335 of the Act:

Held, that the convictions were bad, the lessee alone being answerable in such a case for disregarding the provisions of the Act.

The penalty, under s. 336 of the Calcutta Municipal Act of 1888, attaches to the owner of any land for permitting any animals to be kept thereon, when he has direct possession of the land, and not when he has leased it out to another.

[626] THE facts are shortly these: The petitioner Abhoy Charan Dass and his son, being the proprietors of a tiled hut, let it out on hire to one Chunder Coomer Roy, under a registered agreement, for a period of six months for keeping horses and carriages. Chunder Coomer took possession of the premises and kept some horses and carriages therein without taking out a license from the Municipal Commissioners. The Municipal authorities thereupon prosecuted the petitioners under s. 307 of the Calcutta Municipal Act (II of 1888 B.C.), for having kept or suffered to be kept offensive matters otherwise than in a proper receptacle, &c., and also under s. 336 of the same Act for having permitted animals to be kept for profit, &c., in contravention of the provisions of s. 335 of the Act. The lower Court convicted the petitioners under both the aforesaid sections, and sentenced them to pay a fine. Against this conviction and sentence the petitioners moved the High Court and obtained this Rule.

Mr. *A. P. Sen* with Babu *Joy Gopal Ghose* for the Petitioners.

No one appeared to show cause.

The **judgment** of the High Court (**Banerjee** and **Stevens**, *JJ.*) was as follows:—

This is a rule calling upon the Magistrate of the District to show cause why the convictions and sentences in this case should not be set aside on the ground that as regards the offence under s. 307 of Act II (B.C.) of 1888, it

* Criminal Revision No. 858 of 1897, against the order of N. K. Banerjee Esq., Deputy Magistrate of Alipur, dated the 14th of October 1897.

has not been found that the accused were occupiers of the premises in question, and that as regards the offence under s. 336, it has not been found that the accused permitted any animals to be kept in the said premises in contravention of the provisions of s. 335 within the meaning of the law.

No one appears to show cause, but a written explanation has been submitted by the Magistrate which goes to supplement the judgment. We do not think that effect can be given to the explanation as supplementing the judgment.

Turning now to the judgment, we find that there is nothing to show that the accused are the occupiers of the premises in **[627]** question, and so the conviction under s. 307 of Act II (B.C.) of 1888 must be set aside.

Then as regards the conviction under s. 336 of the above Act, this is how the finding is stated : "The Court believes the evidence of the Inspector and the peons that the accused Abhoy Moira and his son have let out a stable on hire where *ticca gharries* are kept."

If that is so, can it be said that the accused have permitted animals to be kept on the premises in contravention of the provisions of s. 335 as required by s. 336 to constitute the offence of which they have been convicted ?

Section 335 enacts that "no person shall keep any animal for profit within Calcutta except in a place licensed by the Commissioners." And on referring to Schedule 2, Rule 6, we find it laid down that "when the owner or lessee of any place is liable to take out a license, the license should be taken out by the lessee if there is any lessee; if not, by the owner." Now, the finding is that these premises are let out on hire: therefore, the provisions of s. 335 have been contravened by the lessee. Then can it be said that, notwithstanding that that was so, the accused who are the owners of the premises must, nevertheless, be held to have permitted the animals to be kept on the premises in contravention of s. 335, because the person bound to take out a license had failed to take out the same ? To hold that, would be to hold that the accused are liable for the acts of their lessee, over which they have no control.

If a person grants a lease of his land or house, he can have no direct possession of, or control over, the same; and if the lessee thereafter, without taking any license, keeps any animals on the premises for which he is required by law to take out a license, the penalty for doing so ought in reason and justice to attach to the lessee and the lessee alone The words of s. 336, though apparently general, must be read with this limitation, namely, that the penalty under the section attaches to the owner for permitting any animals to be kept thereon when he has direct possession of the land in question, but not when he has leased the same out to another.

[628] That being so, the conviction under s. 336 of Act II (B.C.) of 1888 must also be set aside, and the fines, if realized, refunded.

The order imposing a daily fine is also set aside.

B. D. B. *Conviction set aside.*

NOTES.

[See also 6 Bom., L. R., 246 ; 32 Cal., 1093 : 2 C. L. J., 280.]

[25 Cal. 628]

The 14th December, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE HILL.

Subal Chunder Dey............(Defendant) Petitioner

versus

Ram Kanai Sanyasi............(Complainant) Opposite Party.*

Recognizance to keep peace--Criminal Procedure Code (Act X of 1882), s. 106—Security to keep the peace on conviction--Breach of the peace Penal Code (Act XLV of 1860), s. 448—House-trespass.

An order under s. 106 of the Criminal Procedure Code (Act X of 1882) binding down the accused to keep the peace, upon conviction for "house trespass" under s. 448 of the Indian Penal Code, cannot stand where the intention of the accused for committing the trespass was to have illicit intercourse with the complainant's wife.

The *Queen* v. *Gendoo Khan*, (1867) 7 W. R., Cr., 11, and the *Queen* v. *Jhapoo*, (1873) 20 W., R. Cr., 37, distinguished.

It is necessary before an order under s. 106 of the Criminal Procedure Code can be made that the accused should have an opportunity of answering to an accusation for an offence of the kind, upon a conviction for which such an order can be made.

IT appears that the petitioner actually entered into the complainant's house with the object of having illicit intercourse with the wife of the complainant who seized him inside the house. Thereupon the petitioner threatened to beat the complainant. The lower Court, on these findings, convicted the petitioner for "house trespass" only and sentenced him to twelve days' rigorous imprisonment, and also ordered the petitioner, under s. 106 of the Criminal Procedure Code, to execute a bond to keep the peace towards the complainant for one year.

Against this conviction and sentence, and the order to keep the peace, the petitioner moved the High Court; but a rule to shew cause why the latter order only, viz., the order under [629] s. 106 of the Criminal Procedure Code should not be set aside was granted.

Mr. *P. L. Roy* for the Crown. An order under s. 106 of the Criminal Procedure Code may legally follow a conviction for "house trespass": see *The Queen* v. *Gendoo Khan*, (1867) 7 W.R, Cr., 14, and *The Queen* v. *Jhapoo*, (1873) 20 W.R., Cr., 37. And upon the finding of the lower Court the petitioner is likely to commit a breach of the peace, inasmuch as he threatened to beat the complainant: and, therefore, the order binding the petitioner down to keep the peace is in accordance with law.

Mr. *C. R. Das* for the Petitioner. -The cases cited by Mr. *Roy* are clearly distinguishable. In those cases the intention of the accused was to commit breach of the peace, and in carrying out that intention trespass was committed. Here the intention to commit adultery negatives any intention to commit breach of the peace; and the alleged breach of the peace was the result of the attempt by the accused to free himself from the clutches of the husband of the woman. That being so, the order under s. 106 of the Criminal Procedure Code is bad in law.

*Criminal Revision No. 768 of 1897, against the order of F. Karim, Esq., Deputy Magistrate of Munshigunge, dated the 2nd of November 1897.

The **judgment** of the High Court (**Banerjee** and **Hill, JJ.**) was as follows:—

This is a rule calling upon the Magistrate of the district to show cause why the order made in this case under s. 106 of the Code of Criminal Procedure should not be set aside upon the ground that there has been no conviction for any of the offences upon a conviction for which such an order could have been made.

The accused has been convicted of the offence of house trespass punishable under s. 448 of the Indian Penal Code, and the intention for committing the trespass, as found in the judgments of the Courts below, was to have illicit intercourse with the complainant's wife. That being so, can it be said that the accused was convicted of any of the offences contemplated by s. 106 of the Code of Criminal Procedure? We are of opinion that the question must be answered in the negative.

Mr. *P. L. Roy*, who appears for the Crown to show cause, **[630]** contends that a conviction for house trespass may sustain an order under s. 106 of the Code of Criminal Procedure; and in support of this contention he cites the cases of *Queen* v. *Gendoo Khan*, (1867) 7 W.R.Cr., 14, and *Queen* v. *Jhapoo*, (1873) 20 W.R.Cr., 37. Those two cases are, however, clearly distinguishable from the present. In both these cases this Court found that the intention of the accused for committing the trespass was to commit a breach of the peace; the trespass, as the facts of the cases showed, having been committed openly by a number of men. Those cases, therefore, well come within the provisions of the law, authorizing security being taken for keeping the peace. In the present case, as we have already observed, the intention of the accused, as found by the Courts below, was only to have illicit intercourse with the complainant's wife.

Mr. *Roy* next contended that the judgment went to show that it was proved that the defendant threatened to beat the complainant, but then there has been no conviction, for any offence of assault or criminal intimidation. In the absence of any such conviction, we do not think that any order under s. 106 of the Code of Criminal Procedure can stand. It is necessary, before an order under s. 106 of the Code of Criminal Procedure can be made, that the party should have an opportunity of answering to an accusation for an offence of the kind, upon a conviction for which such an order can be made. That requirement not having been complied with, the order under s. 106 of the Code of Criminal Procedure cannot stand and must be set aside.

B. D. B. *Order set aside.*

NOTES.

[See also 7 C. W. N., 25; 8 C. W. N., 517]

[25 Cal. 630]

The 3rd January, 1898.

PRESENT:

MR. JUSTICE HILL AND MR. JUSTICE WILKINS.

Ram Chandra Mistry............Petitioner

versus

Nobin Mirdha and others...... .....Opposite party.*

Appeal in criminal case—Criminal Procedure Code (Act X of 1882), ss. 404, 520, 522—Order as to restoration of immoveable property—Jurisdiction of Appellate Court to reverse such an order.

[631] There is no appeal from an order restoring possession of immoveable property under s. 522 of the Criminal Procedure Code (Act X of 1882), nor can such an order be regarded as an integral part of the judgment appealed from, so as to stand or fall according as the judgment is upheld or reversed.

Basudeb Surma Gossain v. *Naziruddin*, (1887) I.L.R., 14 Cal., 834; *Queen-Empress* v. *Fattah Chand*, (1897) I.L.R., 24 Cal, 499; *In re Annapurna Bai*, (1877) I.L.R., 1 Bom., 630, and *Rodger* v. *Comptoir D'Escompte de Paris*, (1871) L.R., 3 P.C., 465 (475), referred to.

THE facts of the case appear sufficiently from the judgment of the High Court.

Mr. *Jackson* (with him Mr. *P. L. Roy* and Babu *Baikant Nath Dass*) for the Petitioner.—The order of the Deputy Magistrate of Ferozepore directing the opposite party to be restored to possession is *ultra vires*. The petitioner's complaint was enquired into by the Deputy Magistrate who believed it, and convicted the opposite party who appealed, and their appeal was dismissed. The High Court in revision remanded the case for a rehearing of the appeal, and this appeal was heard by another Sessions Judge who acquitted them. By the original order of conviction the Deputy Magistrate decided that the petitioner should be restored to possession under s. 522 of the Criminal Procedure Code, and he has retained possession of the property ever since. There is no provision of law by which he can now be ousted from possession: See *Basudeb Surma Gossain* v. *Naziruddin*, (1887) I.L.R., 14 Cal., 834; *Queen-Empress* v. *Fattah Chand*, (1897) I.L.R, 24 Cal., 499; *In re Annapurna Bai*, (1877) I.L.R, 1 Bom., 630. There is no appeal from an order under s. 522, so the Sessions Judge had no jurisdiction to set that order aside. See s. 404 of the Criminal Procedure Code.

Sir *Griffith Evans* and Babu *Dwarka Nath Chakravarti* for the Opposite party.—Although there may be no procedure laid down as to how a person may be restored to possession, yet there can be no doubt that an Appellate Court has an inherent **[632]** power to deal with such matters; and if in the exercise of its judicial discretion it thinks fit to revise the order of the lower Court and to direct a person to be restored to possession, the executive authorites are bound to carry out that order. See *Rodger* v. *Comptoir D'Escompte de Paris*, (1871) L.R., 3 P.C., 465 (475).

In the present case the Sessions Judge had found that my clients were in possession, and the petitioner has been wrongfully put into possession; and it is idle to contend that effect cannot be given to the findings of the Sessions Judge by restoring them to the possession of the property which is lawfully their own. See *Ambler* v. *Pushong*, (1885) I.L.R., 11 Cal., 365.

* Criminal Revision No. 717 of 1897, made against the order of B. L. Gupta, Esq., Sessions Judge of Backergunge, dated the 23rd of September 1897.

The **judgment** of the High Court (**Hill** and **Wilkins, JJ.**), was as follows:—

The material facts of this case are as follows:—

In October 1896 Ram Chandra Mistry, the petitioner in this matter, charged four persons, Nobin Mirdha, Mohesh Mondal, Rajkishore Manbhi and Latim Shil (the opposite party), before the Deputy Magistrate of Ferozepore with offences under ss. 147, 148 and 326 of the Penal Code, alleging *inter alia* that they with some fifty or sixty armed men had forcibly deprived him of possession of certain land held by him as the tenant of one Lokenath. On the 21st December 1896, the Deputy Magistrate found two of the four accused persons guilty of the offence of rioting under s. 147, the other two of the offence of rioting being armed with a deadly weapon under s. 148, and Nobin Mirdha he further found guilty of an offence under s. 326; and he sentenced them accordingly to various terms of imprisonment. He at the same time made an order under s. 522 of the Code of Criminal Procedure for the restoration of the petitioner to possession of the disputed land. This order was carried into effect during the same month.

The opposite party then appealed to the Court of Session, which, in the first instance, upheld the decision of the Deputy **[633]** Magistrate. They afterwards, however, petitioned this Court with the result that the case was remitted to the Court of Session for retrial. Among other matters indicated for the guidance of the Court of Session the learned Judges pointed out that it was necessary under the circumstances of the case to come to a finding as to which of the two contending parties was in actual possession of the disputed land when the occurrence complained of took place. Upon the retrial the learned Sessions Judge came to the conclusion that the opposite party were at that time in actual possession, and, in respect of any violence they had used, he also held that, with the exception of Nobin Mirdha, they had acted within the right of defence of their property. He accordingly set aside the convictions and sentences under the rioting sections of the Code. In the case of Nobin Mirdha he held that the right of private defence had been exceeded, and therefore maintained his conviction under s. 326. He, however, reduced his sentence to one of six months' imprisonment, and as that period had then expired, ordered his release. The learned Judge further set aside the order passed by the Deputy Magistrate under s. 522 of the Code of Criminal Procedure. An application was then made to the Deputy Magistrate by Nobin Mirdha and his party to be restored to possession of the disputed land, but this was refused, the Deputy Magistrate being of opinion that it did not appear from the order of the Court of Session that Ram Chandra was to be turned out of possession for the purpose of replacing the other side in possession. Thereupon Nobin Mirdha applied to the Court of Session for relief in the matter, and that Court, on the 23rd of September 1897, passed the following order on the application:—

"I can give no further orders than what I have done. I have cancelled the Deputy Magistrate's order under s. 522, and all proceedings under that section are necessarily rendered null and void. I can give no orders to the police, but it is the duty of the Deputy Magistrate to give effect to the order of the Appellate Court, and also to maintain order and peace."

This was followed by another application by Nobin Mirdha and his party to the Deputy Magistrate for restoration of possession, and on the 27th September the Deputy Magistrate passed an order for the issue of a *perwanna* to the Police direct-**[634]**ing them "to give effect to the orders of the Sessions Judge at once."

It is to this order of the Deputy Magistrate, as being "vague and misleading," that the rule in this case is in terms confined, but at the hearing, the question which was, with our permission, chiefly discussed, was the legality of the order made by the Court of Session reversing the order passed by the Deputy Magistrate on the 21st December 1896, under s. 522 of the Code as well as of the order of the 23rd September 1897, by which the Court of Session in effect directed the Deputy Magistrate to carry out the order of reversal. It was contended on the part of the petitioner that both these orders were made without jurisdiction, and reliance was placed on the circumstance that no procedure is laid down by the Code effecting restitution of possession when a person has been ousted in pursuance of an order made under s. 522. On the part of the opposite party it was contended that when an Appellate Court comes to a conclusion different from that of a Subordinate Court upon the question of possession it must, upon principle, possess the power of undoing that which has been unlawfully done by the latter Court; that otherwise the action of the Courts might lead to grave injustice, and that as for the absence from the Code of any prescribed procedure for restoring to possession a person who has been wrongfully dispossessed it did not advance the argument for the other side, since the Code was likewise silent as to the procedure to be followed for giving effect to such an order when properly made. In the one case, as in the other, it was said it lies with the executive to carry out the orders of the Court. The learned Counsel for the petitioner in support of his contention cited the cases of *Basudeb Surma Gossain* v. *Nazirruddin*, (1887) I. L. R., 14 Cal., 834, and *Queen-Empress* v. *Fattah Chand*, (1897) I. L. R., 24 Cal., 499. In the former case the learned Judges, while setting aside an order made by a Magistrate under s. 517 of the Code, stated expressly that they were unable to order restitution of the property. In the latter also the Court set aside an order made under that section, but it was considered that the **[635]** question of the restitution of the property was not before the Court, and the learned Judges, therefore, expressed no opinion upon it. It can hardly therefore be claimed as an authority in support of the petitioner's contention. It was, however, argued on the authority of *Basudeb Sarma's* case, (1887) I. L. R., 14 Cal., 834, that if, notwithstanding the provisions of s. 520 of the Code, a superior Court has not authority to direct the restoration of property affected by an order made under s. 517 of the Code, the same must be the case with respect to property affected by an order under s. 522. We are not prepared, on the authority of this case, to commit ourselves to such a position. It may, indeed, be that the consideration which weighed with the learned Judges, who decided the case was, as the learned Counsel contended, that the Code does not provide any procedure for effecting restitution when possession has changed under an order made under s. 517, and if this was in fact their reason the case might perhaps be applied by way of analogy to the present case. But their reasons are not disclosed. They merely say that in this respect they follow the case of *In re Annapurna Bai*, (1877) I. L. R., 1 Bom., 630, in which likewise the reasons by which the learned Judges were guided are not stated. We think too, we may add, that it would be unsafe to conclude merely because the Legislature has not provided a remedy by way of restitution for a person, who has been improperly deprived of the possession of property of the kind to which s. 517 relates, that it, therefore, intended that a person improperly deprived of the possession of immoveable property in pursuance of an order made under s. 522 should be without a remedy of that nature.

On behalf of the opposite party Sir *Griffith Evans* referred us to a passage from the case of *Rodger* v. *Comptoir D'Escompte de Paris*, (1871) L. R., 3 P. C., 465 (475), in which the Judicial Committee of the Privy Council refer to

the duty of all Courts to take care that the act of the Court does no injury to any of the suitors. His contention was that since it was shown by the finding of the Court of Session on the question of possession remitted to it by this Court that his clients had been injuriously affected by the action of the Magistrate, [636] by which the petitioner had been placed in possession, the power must be inherent in the Courts and ought to be exercised of redressing this wrong by restoring to them the possession of which they had been wrongfully deprived. We need not say that in a case which we considered to be a fit one in all respects for its application we should not hesitate to enforce the principle referred to. The question, however, now before us is not whether we should ourselves exercise the power, if we possess it, of ordering the persons previously in possession to be restored to possession, but is confined to the legality of the reversal by the Court of Session of the Magistrate's order under s. 522 and of the subsequent measure taken to give effect to its reversal And if under the law as it stands the Magistrate's order was not open to review in the Court of Session, we think our proper course is to apply the law as we find it. We might, it is true, if satisfied that the ends of justice would be best served thereby, refuse to exercise the revisional powers of the Court in favour of the petitioner, but on the whole we think that more harm than good might now result from the adoption of that course. In our view of the law, the Court of Session, dealing as it did in the present case as a Court of Appeal with the judgment of the Deputy Magistrate convicting the accused, exceeded its jurisdiction in setting aside the order made under s. 522. Our primary reason for this opinion is that an order passed under that section must be subject to the general rule laid down by s. 404 of the Code; that no appeal shall lie from any order of a Criminal Court except as provided for by the Code; while there is, so far as we are aware, no provision made by the Code for an appeal from an order under s. 522. Nor can such an order be regarded as an integral part of the judgment appealed from, so as to stand or fall, according as the judgment is upheld or reversed. If that were so, the Legislature would no doubt have so provided. But it seems to have been intended, and the reasons for this are not difficult to conceive, that an order giving possession under the section being once made should, in so far as the Criminal Courts are concerned, have finality. We are strengthened in this view by the consideration that in the case of orders made under section 517, which falls within the same chapter of the Code, very precise provisions are laid down [637] by s. 520 in respect of the powers which may be exercised by superior Courts.

We should add that Sir *Griffith Evans* relied also on *Ambler* v. *Pushong*, (1885) I.L.R., 11 Cal., 365, but in the view which we take of the case we do not think that it is in point.

We make the rule absolute and set aside the order of the learned Sessions Judge, reversing the order made by the Deputy Magistrate under s. 522, as well as his order of the 23rd September 1897, and also the order of the Deputy Magistrate passed on the 27th September.

B. D. B. *Rule made absolute.*

NOTES.

[It has been held that the Criminal Procedure Code, 1898, sec. 423 (1) (*d*) confers power to interfere in appeal :—29 Cal., 724 ; 36 Cal., 41 ; 27 All., 415.]

[25 Cal. 637]

The 13th January, 1898.

PRESENT:

Mr. JUSTICE HILL AND MR. JUSTICE STEVENS.

Lal Mohan Chowbey............(Complainant) Petitioner

versus

Hari Charan Das Bairagi............(Defendant) Opposite Party.*

Act XIII of 1859, ss. 1, 4—Breach of Contract—Jurisdiction of Presidency Magistrates—"Magistrate of Police"—Criminal Procedure Code (Act X of 1882), s. 3.

A Presidency Magistrate of Calcutta may lawfully take cognizance, under section 1 of Act XIII of 1859, of a complaint in respect of a contract made in Calcutta, the breach of which has been committed beyond the local jurisdiction of his Court.

The expression "Magistrate of Police" in section 1, Act XIII of 1859 means "Presidency Magistrate."

IT appears that the defendant entered into a contract with the petitioner at Calcutta to manufacture tin canisters at Sikohabad in the District of Mainpuri in the N.-W. Provinces, and received an advance of Rs. 61 from the petitioner. After working for a month at Sikohabad, the defendant ran away to Calcutta without finishing the specified work contracted for. Thereupon the petitioner lodged a complaint against the defendant in the Court of the Presidency Magistrate of Calcutta for non-performance of the contract. The Honorary Presidency Magistrate, to whom the case was made over for trial, dismissed the complaint [638] on the preliminary ground that he had no jurisdiction to entertain the complaint, inasmuch as the breach of the contract constituting the offence took place admittedly beyond the local limits of the jurisdiction of his Court.

Against this order of dismissal the petitioner moved the High Court.

Babu *Atulya Charan Bose* for the Petitioner.

No one appeared to show cause.

The **judgment** of the High Court (**Hill** and **Stevens, JJ.**) was as follows:—

In this case a complaint was made to an Honorary Presidency Magistrate of Calcutta under section 1 of Act XIII of 1859, in respect of a contract which was made in Calcutta, but the breach of which is said to have taken place in a portion of the N.-W. P., to which the Magistrate states the provisions of the Act had not been extended. The Magistrate considered that he had no jurisdiction to entertain the complaint, inasmuch as the breach of the contract had taken place beyond the local jurisdiction of his Court, at a place outside the limits of the Town of Calcutta. The complainant has applied for a revision of the order made by the Honorary Presidency Magistrate dismissing his complaint. Section 1 of Act XIII of 1859 provides that in the case of a breach of contract to which that Act applies a complaint may be made to a Magistrate of Police. We think that the terms of the section do not imply that the complaint is to be made to the Magistrate of Police in the place where the

* Criminal Revision No. 796 of 1897, against the order passed by Babu N. C. Bural, an Honorary Presidency Magistrate of Calcutta, dated 7th of September 1897.

breach has taken place, and, moreover, section 3 of the Code of Criminal Procedure provides that in every enactment passed before that Act came into force, the expression "Magistrate of Police" shall be deemed to mean Presidency Magistrate. We, therefore, think that the Presidency Magistrate had jurisdiction to entertain this complaint.

We therefore set aside his order of the 7th of September 1897 dismissing the complaint, and direct that he do proceed to dispose of the complaint which he may lawfully take cognizance of in accordance with law.

B. D. B. *Order set aside, and case remanded for trial.*

NOTES.

[See also the explanation of this decision in *Ganesha* v. *Karam* (1910) P. R., 12.]

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[639] *The 16th February, 1898.*

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

Yusuf Mahomed Abaruth............Petitioner

versus

Bansidhur Siraogi............Opposite Party.*

Jurisdiction to try offence under s. 486 of the Penal Code (XLV of 1860)—Goods with counterfeit trade mark not intended to be sold within jurisdiction.

A Magistrate has jurisdiction to try an offence under s. 486 of the Penal Code if the accused be shown to be in possession of goods with a counterfeit trade mark for sale or any purpose of trade or manufacture, though the sale or the trade or the manufacture for the purpose of which the accused has the goods in his possession be not intended to take place within the jurisdiction of the Court in which the complaint is lodged.

THE facts of the case, sufficient for the purpose of this report, appear from the judgment.

Mr. *Jackson* on behalf of the Petitioner.—In order to give the Court jurisdiction the offence must be committed within its jurisdiction. In the trial of an offence under s. 486 of the Penal Code not only must it be shown that the accused has in his possession for sale or any purpose of trade or manufacture goods with a counterfeit trade mark, but also that the sale, &c., is intended to take place within the jurisdiction of the Court in which the trial is to be held.

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* Criminal Revision No. 120 of 1898, made against the order of F. W. Duke, Esq., District Magistrate of Howrah, dated the 2nd of February 1898.

No one appeared on behalf of the Opposite party.

The **judgment** of the High Court (**Banerjee** and **Wilkins, JJ.**) is as follows :-

This is an application under s. 439 of the Code of Criminal Procedure, asking us to set aside an order of the District Magistrate of Howrah directing the Deputy Magistrate to proceed with the trial of a case in which the accused has been charged with an offence punishable under s. 486 of the Indian Penal Code, and which the Deputy Magistrate had dismissed for want of jurisdiction.

The ground upon which the Deputy Magistrate held that he had no jurisdiction to try the case is given in his judgment in the following words: After referring to s. 486 of the **[640]** Penal Code, the learned Deputy Magistrate says: "Now, as I understand and interpret this section, I think this Court has no jurisdiction to try this case. The section says: 'Whoever sells or exposes or has in possession for sale or any purpose of trade or manufacture any goods, &c.' Now, looking to the evidence adduced, admittedly the tins of ghee were on transit from Etawah to Rangoon, and they were not intended for sale or any purpose of trade in Howrah or any place within its jurisdiction. Sale is one of the principal ingredients, as I think, to constitute an offence under this section. If those tins of ghee are intended for one's own consumption or as presents to others, then, I think, the accused can hardly be amenable. Taking this view of the law, I determine that this Court has no jurisdiction to try this case which is accordingly dismissed and the accused discharged under s. 253 of the Criminal Procedure Code."

Thereupon an application was made to the District Magistrate, who has directed a further inquiry under s. 435 of the Code of Criminal Procedure, but his order must be taken to have been made under s. 43, though he refers to s. 435. And the view taken by the District Magistrate is that the Howrah Court has jurisdiction, because within the jurisdiction of the Howrah Court, the accused had the goods in his possession for the purposes of sale, though the sale was intended to take place, not in Howrah, but in Rangoon.

The contention urged by the learned Counsel for the petitioner before us is, that in order to give the Court jurisdiction to entertain the case, the offence must be committed within its jurisdiction, and when the offence is constituted by the accused having in possession for sale any particular goods, not only must his having the goods in his possession occur within the jurisdiction of the Court in which the case is brought, but the possession must be for sale, which also must be intended to take place within the jurisdiction of the Court.

We are not prepared to accept this contention as correct. It is quite true that before the possession of goods with a counterfeit trade mark can be held to constitute an offence under s. 486, it must be shown that such possession was for sale or any **[641]** purpose of trade or manufacture. But there is nothing in the law to show that the sale, for the purpose of which the accused has the goods in his possession, must be intended to take place within the jurisdiction of the Court in which the complaint is lodged. It may be that the goods are found in possession of the accused within a particular jurisdiction, and the accused has them in his possession for sale in a different jurisdiction; and in such a case it cannot be said that, before the goods reach the place where they are intended to be sold, the possession of the goods by the accused does not constitute any offence.

It was urged that, if this view was correct, it would give any number of Courts exercising jurisdiction at any distances from the place where the goods are ultimately intended to be sold, jurisdiction to try the case.

Though that may be so, we do not see how that supports the view contended for by the learned Counsel. We may observe that the provisions of s. 182 of the Code of Criminal Procedure go to show that the policy of our law is to authorize more Courts than one to try an offence of this kind.

If the view taken by the learned Deputy Magistrate was correct, that would go, not so much to show that the Magistrate had no jurisdiction to try the case, as to show that no offence was committed until the goods in question reached the jurisdiction within which they were intended to be sold. That view cannot, in our opinion, be correct.

We are asked to determine, and we must for the present determine the case upon the view of the facts as disclosed in the orders of the Courts below; and upon that view we must hold that the Howrah Court has jurisdiction to try the case.

In making these observations we wish it to be understood that we do not determine any question of fact in the case. For the foregoing reasons we refuse this application.

S. C. B. *Application refused.*

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[642] ORIGINAL CIVIL.

The 19th and 30th April, 1898.

PRESENT :

MR. JUSTICE P. O'KINEALY.

William Robert Fink

versus

Moharaj Bahadur Singh.[*]

Practice—Receiver—Power to sue in his own name—Code of Civil Procedure (Act XIV of 1882), s. 503—Trust-deed to liquidate debts—Non-communication of trust-deed to creditors—Limitation—Limitation Act (XV of 1877), s. 10.

The Court has authority, under section 503 of the Civil Procedure Code, to confer on a receiver the power to sue in his own name; and if the order appointing the receiver gives him liberty, he may do so.

D S executed a trust-deed, whereby he made over his property to trustees to manage his affairs and liquidate his debts in manner therein directed. The deed contained this provision : "In order to prepare a list of my debts, the trustees shall ascertain the same by looking into my books of accounts; and they shall not admit any debt without *rokur*, *hath-chitta*, or *hundi* bearing the signature of myself or my *monib gomastas*, or without decree."

Held, in the absence of evidence that this deed was communicated to the creditors, that it did not create a trust in favour of the creditors, but enured only for the benefit of the

[*] Original Civil Suit No. 352 of 1897.

executant; that therefore the plaintiff, a creditor, was not entitled to rank as a beneficiary under it; and that it did not create a trust in his favour so as to take out of the operation of the Limitation Act a claim that otherwise fell within it.

THE following statement of the facts of this case is taken from the judgment of O'KINEALY, J.:—

This was a suit to recover the amount of three *hundis*, all dated the 30th of May 1893, drawn by Rai Dhunput Singh upon himself in the name of his firm at Calcutta, and payable to one Sew Bux Sureeka.

One of these *hundis* is for the sum of Rs. 1,200 payable 180 days after date, and the other two are for the sum of Rs. 2,500 and Rs. 383-11, respectively, each payable 360 days after date.

Sew Bux Sureeka died some time in the year 1896, and a suit for the administration of his estate was instituted in this Court. By an order made in that suit on the 28th of January 1897, the plaintiff was appointed receiver of the moveable property, and of the [643] rents issues and profits of the immoveable property belonging to the estate of Sew Bux Sureeka, with power to get in and collect the outstanding debts and claims due to the estate, and with all the powers provided for in section 503, clause (*d*) of the Code of Civil Procedure with certain exceptions which are not material for the questions which arise in this suit; and the order further provided that the receiver should have power to bring and defend suits in his own name. By a further order, dated the 6th of May 1897, the plaintiff was given liberty to institute a suit in this Court in respect of the three *hundis* above mentioned, and in pursuance of this order the present suit was brought.

In the month of February 1893, before the *hundis* were drawn, Rai Dhunput Singh was adjudicated an insolvent at the instance of one of his creditors under the provisions of the Act for the relief of insolvent debtors at Calcutta; but this adjudication was afterwards set aside on the ground that Rai Dhunput Singh had not committed any act of insolvency. On the 19th of July 1896, he executed a deed of trust by which he conveyed all his property to the defendants Gopi Chund Bathra, Surji Kumar Adhicary and Kirut Chund Srimal, as trustees, upon certain terms and conditions contained in the deed. On the 21st day of September 1896, Rai Dhunput Singh died, leaving him surviving the defendant Moharaj Bahadur Singh his sole heir under the Hindu law.

In the plaint as originally drafted the plaintiff set forth the above circumstances and prayed for judgment for the amount due upon the *hundis* and the costs of the suit. When the case was opened before me the plaintiffs' counsel, being pressed with the question of limitation as regards the amount of the *hundi* for Rs. 1,200, contended that that question did not arise as the defendants, the trustees, were constituted express trustees for him and the other creditors of Rai Dhunput Singh under the provisions of the deed of trust, and were bound to pay him the amounts due upon all the *hundis*. It was objected by the counsel for the defendants that this claim was not put forward in the written statement, and that he was taken by surprise owing to its being brought forward at the time it was. I thought the objection a reasonable one, and allowed the suit to be adjourned for the purpose [644] of having the plaint formally amended so as to raise the contention.

That has been done, and now in answer to the plaintiff's suit the defendants say:—

(1) That the plaintiff cannot sue in his own name; (2) that under the trust-deed, the trustees are not trustees for the plaintiff or the other creditors of Rai

Dhunput Singh; and (3) that the claim on the *hundi* for Rs. 1,200 is barred by article 69 of the second schedule to the Limitation Act, 1877. It was also contended that no relief could be granted to the plaintiff under the deed of trust in this suit as framed; but I do not think it is necessary to consider a defence which, if successful, would involve a further amendment of the plaint, or the dismissal of the suit on what may be called a technical ground, as I am of opinion that the second ground of defence taken by the defendants is a sound one.

Mr. *R. N. Mitter* and Mr. *J. N. Banerjee* for the Plaintiff.—The claim on the *hundi* for Rs. 1,200 is not barred; the trust-deed saves limitation. Before these claims were brought, Dhunput Singh made over his property to the trustees. The plaintiff is entitled to look to the trustees for payment just as he would to Dhunput Singh, but for the trust-deed. He was not a party to the deed; but he was informed of it, and he forbore to sue in consequence, but that forbearance does not entitle the defendant to plead limitation.

Next, as to the frame of the suit: as a general rule, no doubt, a receiver may not sue in his own name only--*Wilkinson* v. *Gangadhar Sirkar*, (1871) 6 B. L. R., 486; but in the present case, the order appointing the receiver expressly gave him power to sue in his own name or in the names of the parties to the suit, and the defendant must be bound by that order.

Mr. *J. G. Woodroffe* for the Defendant.—The question is, what is the meaning of the order? It means that the receiver may bring the suit, but must do so in the names of the parties. The order giving leave to sue may be binding, and yet objections **[645]** may be taken to the form of the suit when brought. [O'KINEALY, J. —Appeals constantly come up to the High Court from the Mofussil Courts where a receiver has sued in his own name.] No doubt. There may be cases where the receiver could be the only proper person to sue. But in England the rule is that a receiver cannot sue in his own name.—*In re Sacker*, (1889) 23 Q. B. D., 179. [O'KINEALY, J.— It is such a convenience to suitors for the receiver to sue in his own name. Some of the parties may be dead; and if the receiver is to use the names of the parties, he would have to get the suit revived. But if he sues in his own name, no such difficulties arise.] No doubt: but the authorities are against it. In one case PHEAR, J., held that the meaning of an order empowering the receiver to sue was that he may bring the suit, but must use the names of the parties. I submit he must do so, because a receiver has no proprietary or other interest in the property.

But there is another difficulty in the way of this creditor; and that is, that according to the rule in the case of *Garrard* v. *Lord Lauderdale*, (1830) 3 Sim., 1, this deed does not create a trust that he could enforce. The deed is merely a direction charging the estate with payment of debts; it was executed solely for Dhunput Singh's own benefit; and there is not a word in it to indicate that it was for the benefit of anybody else.

Section 10 of the Limitation Act applies only to a suit to follow property. This is really a suit for the administration of a trust; it cannot be a suit to follow trust property in the hands of the receiver, because the plaintiff has no interest to recover. [Mr. *Mitter*—We also rely on *Suddasook Kootary* v. *Ram Chunder*, (1890) I. L. R., 17 Cal., 620]. In this case there has been no charge of any specific property for the discharge of any specific debt. The question is, what is a debt? Did Dhunput Singh direct the trustees to pay all debts, whether barred by limitation or not? Can he be said to have created by this deed a greater liability than existed before its execution? There is nothing to indicate any such intention.

Mr. *J. N. Bannerjee* in reply.

[646] **O'Kinealy, J.** (after stating the facts as above set forth), continued as follows: —

The first question I have to consider is whether the plaintiff can maintain this suit in his own name; and I am of opinion that he can. The orders by which he was granted liberty to institute this suit gave that power to him in express terms, and the authority to give that power is, in my opinion, conferred on the Court by the provisions of section 503 of the Code of Civil Procedure. By that section the Court has power to grant to the receiver "all such powers as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in writing as the owner himself has;" and I read that as meaning that power is conferred upon the Court to substitute the receiver for the owner for those purposes, always supposing that the ownership of the property is completely represented in the suit in which the receiver is appointed. I am not disposed to put a narrow construction on this part of section 503, as it is often a great saving of time and trouble, so far as the receiver is concerned, and of expense to the estate in his hands, that he should have the power of bringing and maintaining suits in his own name. That the Court can give such a power is treated as clear by Mr. Justice WILSON in the case of *The Oriental Bank* v. *Gobind Lall Seal*, (1884) I.L.R., 10 Cal., 710, at p. 733.

The next question is, taking the plaintiff to be a creditor of Rai Dhunput Singh in respect of a debt existing at the time the deed of trust was executed, can he claim that he and the other creditors are beneficiaries under that deed, and can he call upon the Court to have the trusts contained in it administered for their benefit? I am of opinion that he cannot. This is a question depending upon the construction of the deed and the conduct of Rai Dhunput Singh and his creditors upon and after its execution.

In that document Dhunput Singh gives his reasons for exe-[647]cuting it. He says: "I was adjudicated an insolvent by an order of the Hon'ble High Court, Original Side, at Calcutta in its Insolvent Jurisdiction, dated the 16th day of February, year 1893, in consequence of which I became heavily involved in debts. I have managed to pay off many of the debts by sale and mortgage of properties; but there is still left a large amount of debts, and in order to pay off those debts to the best of my ability it is necessary for me to make some arrangement. Being myself troubled in body and mind, I am unable to manage (my) affairs properly any longer, and most of my creditors are desirous that I should make over the estate into the hands of trustees with a view to liquidation of my debts. For these reasons I make over all my moveable and immoveable properties, that is to say, whatever properties I am at present possessed of, to Srijoot Gopi Chund Bathra, son of the late Fakir Chund Bathra of Azimgunj, by caste Aswal, by occupation service holder, and Srijoot Kerut Chund Srimal, son of the late Mungni Ram Srimal and Srijoot Surji Kumar Adhicary, son of the late Bhogoban Chunder Adhicary, at present of Baloochur, by caste Brahmin, by occupation service holder, by appointing them trustees." That is to say, ill-health and mental anxiety having unfitted him for carrying out the work of paying off all his debts—a work which he himself had carried on up to that time--and his creditors being desirous that that should be carried on by the trustees, he appoints the trustees to carry on that work to completion. In other words, they are put in the place of Dhunput Singh himself so far as he could do so, and occupy the same position towards the creditors, and that position was certainly not that of a trustee. The deed then directs the manner in which the trustees are to proceed for the purpose

of liquidating his debts and recovering his outstandings, and declares that neither himself nor his heirs shall have power to interfere with the acts of the trustees, until all his debts shall have been paid. This last clause was strongly relied on by the plaintiff as showing an intention to create a trust for the creditors. It is equally consistent with the case for the defendant. It is, I think, nothing more than a clause confirming the trustees in the powers given to them by the deed. Then there is this provision : "In order to prepare a list of my debts, the trustees shall ascertain the same [648] by looking into my books of accounts ; and they shall not admit any debt without *roka*, *hatchitta* or *hundi*, bearing the signature of myself or my *monib gomastas*, or without decree." This shows that the creditors were to be ascertained on a future investigation to be made by the trustees in accordance with certain tests laid down by which they were to be guided. It seems to me that this provision is against the plaintiff's contention, for it shows that every person who claimed to be a creditor of Rai Dhunput Singh at the date of the deed was not intended to be provided for by it, but only those whose debts should have been ascertained in the manner of investigation pointed out in the deed. There is no evidence before me that any such investigation has ever been undertaken. I think that the true way to look at this provision is, to take it as indicating the course of proceeding which the trustees were to take, not for the purpose of finding out their beneficiaries but for the purpose of liquidating the debts on behalf of Rai Dhunput Singh their real and only beneficiary. The remaining provisions of the deed point in the same direction. I do not see any indication that these trustees were intended by Rai Dhunput Singh to be trustees for his creditors ; in my opinion they were and were intended to be (so far as I can gather his intention from the construction of the deed) trustees for himself for the purpose of carrying out the provisions of the deed of trust, and that he was, and his heir is, the only person who under the terms of that deed could call the trustees to account as trustees. There is no evidence before me to show that the deed of trust was communicated to the creditors, or that any of them accepted the position of beneficiaries under it. The evidence given by Heera Lall, the *gomasta* of Sew Bux Sureeka, is too shadowy to be relied upon as establishing the existence of any trust for the creditors or for Sew Bux Sureeka. This case is one of a class the best known example of which is *Garrard* v. *Lord Lauderdale*, (1830) 3 Sim., 1.

According to the view I have taken of this case the plaintiff cannot claim to rank as a beneficiary under the deed of the 19th of July 1896, and he is, therefore, not entitled to say that his [649] claim on the *hundi* for Rs. 1,200 is not subject to the ordinary law of limitation.

The result is that the plaintiff's suit fails as regards the *hundi* for Rs. 1,200 but he is entitled to a decree for the amount of the other two *hundis*, with interest at 6 per cent. per annum down to the filing of the plaint, together with the costs of the suit and interest on decree. The decree will be against the defendant Moharaj Bahadur Singh as the legal representative of Rai Dhunput Singh for the amount indicated above to be paid out of the property of Rai Dhunput Singh. I shall make no order as to the costs of the trustees. They did not sever in their defence from the infant, and there is no doubt that the estate of Dhunput Singh has benefited by the amount of the *hundi* for Rs. 1,200 being barred by limitation.

It must be understood that, although I give no relief to the plaintiff as against the trustees, I do so on the ground that the deed did not constitute them trustees for him, but trustees for Rai Dhunput Singh of the property included in the trust-deed. I decide nothing further as between the plaintiff

and the trustees, and all questions which may arise between them regarding the execution of the decree in the suit remain untouched by me.

Attorneys for the Plaintiff: Messrs. *Kally Nath Mitter* and *Sarbadhicarry*.

Attorney for the Defendant: Babu *B. N. Bose*.

H. W.

NOTES.

[As regards Receivers, see also (1899) 26 Cal., 772; (1907) 34 Cal., 305: 5 C. L. J., 270. As regards trusts, see also (1899) 26 Cal., 750.]

[25 Cal. 649]

The 22nd April, and 4th May, 1898.

PRESENT:

MR. JUSTICE P. O'KINEALY.

Foolcoomary Dasi

versus

Woodoy Chunder Biswas.*

Practice—Consent Decree, Setting aside—Motion.

A consent decree cannot be set aside on motion on the ground that it was obtained by fraud and misrepresentation A separate suit must be brought for that purpose. Charges of fraud cannot properly be tried upon affidavits.

Gilbert v. *Endean*, (1878) L. R., 9 Ch D., 259, *Huddersfield Banking Company, Limited* v. *Henry Lister & Son, Limited*, (1895) II Ch., 273; and *Ainsworth* v. *Wilding*, (1896) I. Ch., 673, applied.

[660] THE facts of this case were stated by O'KINEALY, J., as follows:—

This is a suit which arose out of the will of one Kedar Nath Ghose, who died in Calcutta, on the 15th of June 1893. By his will, which was made on the 14th of May 1893, he appointed his wife, the plaintiff, Foolmoni Dassee, and his cousin, the defendant, Woodoy Chunder Biswas, executrix and executor; dedicated all his properties to the worship of a *Thakoor* established by himself; directed that a sum of Rs. 6,500 which he had borrowed on mortgage of his dwelling house should be paid off; appointed the plaintiff and the defendant to be *shebaits* of the *Thakoor*; directed that his wife should have suitable residence, and an allowance of Rs. 15 a month; granted allowances to the defendant as *shebait*, and to others mentioned in the will; directed that his executrix and executor should consult his friends Baboo Bhupendra Nath Bose and Baboo Okhoy Koomar Bose in case of a difference of opinion between them; and gave power to these gentlemen to control the *shebaits* in the management of the debutter estate.

On the 11th of January 1894 the plaintiff and the defendant obtained probate of the will, but shortly afterwards disputes arose between them, and this dispute led to the institution of this suit on the 22nd of August 1895. In her plaint, the plaintiff brought various charges of misconduct against the defendant, and prayed for the construction of the will, administration of the estate, an injunction and a receiver, and other relief which it is unnecessary to specify. On the 6th of September 1895, Mr. Belchambers was appointed receiver

* Original Civil Suit No. 519 of 1895.

of the estate of the testator Kedar Nath Ghose. Nothing further seems to have been done in the suit till the 8th of September 1896, when a petition signed and verified by the plaintiff was presented to this Court on her behalf praying that a decree might be made in this suit on the terms stated in the petition, and that the receiver might be discharged and directed to hand over possession of the estate to one Poshupati Nath Bose. The prayer of the petition was consented to by the defendant's attorney, and Poshupati Nath Bose also signed a statement made at the foot of the petition consenting to act as the trustee of the estate of Kedar Nath Ghose. No order was entered on the **[651]** petition itself, but on the same day a decree was made with the consent of the attorneys for the plaintiff, and of the defendant, and of Poshupati Nath Bose in person, on the terms contained in a schedule annexed to the decree, those being the terms set out in the plaintiff's petition.

It is unnecessary to refer to those terms at any length. They follow to a certain extent the scheme of the testator's will. The distinguishing feature of the arrangement is that the receiver is to be discharged and the entire management of the testator's estate placed in the hands of Poshupati Nath Bose, who is to provide for payment of the debts and legacies, and the cost of this suit. The plaintiff's and the defendant's respective turns of worship as *shebaits* are also arranged for, and they are made responsible to the trustee for negligence in performing their duties as *shebaits*.

On the 1st of March last the plaintiff presented a petition to this Court, in which she prayed that the decree of the 8th September should be set aside, and the estate of the testator retained in the hands of the receiver appointed by the Court, and that her attorney in the suit, Babu Preo Nath Sen, should be prohibited from further acting for her. In this petition she alleges that she did not come to know of the decree of the 8th of September 1896 until recently, that her signature to the petition of the 8th of September was obtained by fraud and misrepresentation on the part of Poshupati Nath Bose and the defendant Woodoy Chunder Biswas, and she charges that her own attorney conspired with those persons for the purpose of defrauding her.

The plaintiff appeared in person.

Mr. *R. N. Mittra* appeared on behalf of the Defendant.

Mr. *Jackson* and Mr. *Allen* for Poshupati Nath Bose, and Mr. *Pugh* on behalf of Preo Nath Sen.

Mr. *Mittra*.—This consent decree is said to have been obtained by fraud and misrepresentation; it was made on the 8th September 1896, and yet, during the whole of 1897, no steps were taken to impugn it. There is no definite statement as to when the plaintiff discovered the alleged fraud. But even if the decree was obtained by fraud and misrepresentation, it cannot be **[652]** set aside on a motion; a separate suit must be brought—*Huddersfield Banking Company, Limited* v. *Henry Lister & Son, Limited*, (1895) II. Ch. 273, 276; *Ainsworth* v. *Wilding*, (1896) I. Ch., 673.

C. A. V.

O'Kinealy, J., (after stating the facts as above set forth).—The matter came before me once or twice with reference to an application by the plaintiff to be allowed to appear through an attorney other than Babu Preo Nath Sen, her attorney in this suit. That application I granted; and at my suggestion that the nature of the application was such, (involving as it did the professional conduct of an officer of the Court), that it should be disposed of without delay, the parties agreed that the matter should come on before me on Saturday, the 16th April. On that day there was not sufficient time to deal

with it completely; and I directed it to be placed on the ordinary cause list without prejudice to the right of the defendant Woodoy Chunder Biswas to raise the contention that the application was not one that I could entertain.

Babu Preo Nath Sen, Poshupati Nath Bose, and the defendant Woodoy Chunder Biswas all filed affidavits in answer to the charges brought against them in the plaintiff's petition, and when the matter came on for hearing Mr. *Mitra*, who appeared for the defendant Woodoy Chunder Biswas, contended that I could not go into charges of this nature or set aside the decree, in a proceeding of this kind, and that the plaintiff's only remedy is to file a regular suit to have the decree set aside on the ground of fraud. I am of opinion that that contention is correct.

I do not think it is a proper mode of procedure to try charges of fraud and misrepresentation on affidavits in an application of this kind. I think the only satisfactory method of dealing with them is in a regular suit brought for the purpose, and that is the course which, it is laid down, should be followed in such cases in the High Court of Judicature in England under the Judicature Acts. In *Gilbert* v. *Endean*, (1878) L. R., 9 Ch. D. 259, [653] it was the opinion of the Master of the Rolls, Sir George JESSEL, that a dispute as to whether a compromise ought to be set aside on the ground of misrepresentation or concealment of material facts ought to be decided in a new action. In a debenture-holder's action against Henry Lister & Son, Limited, a consent order was sought to be set aside on motion by one of the parties to the order on the ground of mistake as to material facts; but Mr. Justice VAUGHAN WILLIAMS refused to deal with the matter on motion, and an action had to be brought to have the order set aside. *Huddersfield Banking Company* v. *Henry Lister & Son*, (1895) II Ch, 273, 276. In *Ainsworth* v. *Wilding*, (1896) I Ch., 673, which was a suit by a second mortgagee against a first mortgagee and other defendants, a decree for an account was made by consent: and the first mortgagee afterwards moved to set aside that decree on the ground that the consent of the parties thereto was given by mistake. Mr. Justice ROMER refused the application with costs, on the ground that the proper remedy of the applicant was to bring a fresh action. These cases are stronger than the one I am dealing with, which is based on charges of fraud and misrepresentation of the gravest character I therefore refuse the application with costs.

Mr. *Pugh*, who appeared for Babu Preo Nath Sen, asked me to decide upon the affidavits before me, whether there was any ground for the charges which the plaintiff has brought against his client. I think I had better express no opinion on that question, for if I should come to the conclusion that the charges made against Babu Preo Nath Sen are frivolous, and express that opinion, that might hamper the plaintiff in taking further proceedings should she be advised to do so.

Attorney for the Plaintiff (on this application): Babu *Bepin Behary Bonnerjee*.

Attorney for the Defendant: Babu *O. C. Gangooly*.

Attorney for Poshupati Nath Bose: Babu *S. C. Mitter*.

H. W. *Application refused with costs.*

NOTES.

[The subject is fully discussed in (1909) 13 C. W. N., 1197: 10 C. L. J., 420 by MOOKERJEE, J. See also (1901) 3 C. L. J., 119.]

[654] SMALL CAUSE COURT REFERENCE.

The 16th March, 1898.

PRESENT :

SIR FRANCIS WILLIAM MACLEAN, KNIGHT, CHIEF JUSTICE, MR. JUSTICE MACPHERSON AND MR. JUSTICE TREVELYAN.

Cutler Palmer and Co.

versus

The British India Steam Navigation Co., Ld.*

Bill of Lading—Shipping Company, Liability of

A Shipping Company is *prima facie* bound to deliver goods in good order and condition, but this obligation is subject expressly to the conditions inserted in the Bill of Lading. Where a cask of brandy was shipped at Madras in good order and condition, but on arrival at Calcutta was found to be empty.

Held, that the Company were protected by the special words inserted in the Bill of Lading "Hogshead brandy covered with gunny, not responsible for condition and contents."

THE facts of this case appear sufficiently from the case stated for the opinion of the High Court by E. W. Ormond, Officiating Chief Judge of the Small Cause Court, dated 3rd June 1897:—

"The plaintiffs sue for damages for the non-delivery of a hogshead of brandy shipped by them on one of the defendants' steamers from Madras to Calcutta under the Bill of Lading, which is hereto annexed.

The cask of brandy was put on board at Madras in good order and condition, but on arrival at Calcutta the cask was found to be *empty* with one stave broken across.

The question which I have the honour to submit for your Lordships' opinion is whether, upon a proper construction of the manuscript clause at the foot of the Bill of Lading, "hogshead brandy covered with gunny, not responsible for condition and *contents*," the defendants are exempted from all liability in respect of this cask of brandy or not.

The defendants are admittedly not governed by the Indian Carriers' Act, and can, therefore, contract themselves out of anything. I hold that they were protected under the manuscript [655] clause, but not otherwise. Mr. *Graham*, for the plaintiffs, argued that this clause, in effect, meant no more than the ordinary clause "condition and contents unknown," or that the defendants did not hold themselves responsible for the then actual condition and contents of the cask, but I think some weight should be attached to the word "responsible," and to construe the clause as exempting the defendants from responsibility for the then actual condition and contents of the cask only would be giving no legal effect to the clause, for the defendants' responsibility could only begin from that time, *i.e.*, when the cask was taken on board, whereas the whole tenor of the Bill of Lading is to specify the defendants' responsibility as at the time of delivery to the consignee. Moreover, in the previous portion

* Small Cause Court Reference No. 2 of 1897.

of this clause (the " casks in bad condition " were some casks of beer shipped with this hogshead of brandy) the words " not responsible for leakage " would naturally refer to leakage which might occur whilst the casks were in defendants' charge and were probably meant to emphasise the condition in small print " The company is not to be responsible for............ leakage," which, from the context, is clearly not limited to leakage which might have occurred before the casks were put on board. For these reasons I held that the words " not responsible for condition and contents " absolved the defendants from all liability for the condition and contents of this cask of brandy so long as it remained in their charge. I dismissed the suit accordingly, but at the request of plaintiffs' counsel I made my judgment contingent upon the opinion of the High Court as to the construction to be placed upon the above manuscript clause.

If your Lordships are of opinion that the meaning of the said clause was to exempt the defendants from liability for the condition and contents of this cask of brandy, whilst it remained in their charge, the suit will stand dismissed ; otherwise there will be a decree for Rs. 500.

The Bill of Lading was as follows :—

BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED.

SHIPPED, in good order and well conditioned, by Messrs. Cutler Palmer & Co., in the Steam Ship *Kerbela*, Commander, or [656] whoever else may be placed in command for this present voyage, and now lying in Madras, and bound for Calcutta and intermediate ports—

C. P. & Co.	1 H. hd. Brandy, covered with gunny.
	Do.—3 Casks Ale, Roping.
Calcutta.	
	4 Four only.

being marked and numbered as in the margin, and are to be carried and delivered subject to the conditions aftermentioned including those at the foot of this Bill of Lading in the like good order and well conditioned, at the port of Calcutta.

The act of God, the Queen's enemies, restraint of princes or rulers, pirates or robbers by sea or land, accidents, loss and damage from vermin, barratry, jettison, collision, fire, accidents to, or defects latent or otherwise in hull, tackle, boilers, or machinery or their appurtenances, steam, and all the perils, dangers, and accidents, of the sea, rivers, land, carriage, and steam navigation of whatsoever nature and kind ; and accidents, loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company, or from any deviation, excepted ; with liberty to sail with or without pilots, and tow and assist vessels in all situations and circumstances ; and the Company are to be at liberty to carry the said goods to their ports of destination by the above or other steamer or steamers, ship or ships either belonging to the Company or to other persons, proceeding either directly or indirectly to such port : and in so doing to carry the goods beyond their port of destination, and to tranship or land and store the goods either on shore or afloat, and re-ship and forward the same at the Company's expense, but at merchant's risk ; and with liberty also, at the like risk, to deviate for any purpose from above voyage, and to call and stay at any ports or places whether in or out of the usual course of the voyage, and in any order, and for any purpose or at any time whatsoever unto Cutler, Palmer & Co., or to

his or their assigns. Freight for the said goods at the rate of has been paid in Madras by the shippers as per margin, steam ship lost or not lost.

[657] IN WITNESS whereof the Commander or Agents of the said Steam Ship have affirmed to one Bill of Lading.

Dated at Madras on 18th August 1896.

N.B.—The goods are shipped and this Bill of Lading granted subject to the following express conditions:—Any claim for short delivery of or damage done to goods, and all other claims whatsoever, to be made at port of discharge, or at ports of Calcutta or Bombay, and at no other port; payment of claims to be made at port of shipment or discharge at Company's option.

No claim for damage will be admitted unless notified in writing before the goods are removed.

No claim for short delivery will be entertained unless made within one month after the delivery of any portion of the goods entered in this Bill of Lading.

This Bill of Lading is issued subject to the following conditions:—

Weight, contents, and value when shipped unknown. The Company is not to be responsible for damage, evaporation, of effects of climate or heat of holds, leakage or breakage, or other consequences arising from the insufficiency of the address or package: or for the condition or contents of re-exported package.

The Company reserves the right of charging freight by weight, measurement, or value, and of re-measuring or re-weighing the same, and charging freight accordingly before delivery. Freight on dates, fruit, and perishable produce to be paid on the weight shipped; and no allowance will be made for wastage on the voyage.

The Company does not guarantee that the Steamers shall have room at ports of transhipment, or that there shall be no delay there.

Packages weighing more than 3 cwt. (excepting bales and boxes of manufactured goods) are only carried at advanced rates of freight and by special agreement.

The Company shall have a lien for freight unpaid on these goods, or upon any portion of the goods covered by the Shipping order granted in respect thereof, which may not have been [658] shipped, and for any charges herein stipulated to be borne or customarily borne by owners of goods.

Should all or any part of the within goods not be found, or if from bad weather or other cause the goods cannot be landed during the steamer's stay at port of destination, the Company reserves the right to convey same to the next or the final port of the voyage, to be returned thence at the Company's expense but at the merchant's risk; and should necessity arise for detaining and storing the goods, it shall also be done at the Company's expense, and the merchant's risk; and the Company shall not be answerable for any delay occasioned, or for loss of market.

The Company will not be accountable for gold, silver, bullion, specie, jewellery, precious stones, platedware, or other valuables, or beyond the amount of five hundred rupees for any one package, or relatively for any portion thereof, unless a declaration of the value of such goods has been made prior to shipment, and special shipping orders granted for same, with which the Bill of Lading shall correspond. A wrong description of contents or false declaration of value shall release the Company from all responsibility in case of loss, seizure or detention, and the goods shall be charged double freight on

the real value; which freight shall be paid previous to delivery. If medicinal fluids or any other goods of an explosive, inflammable, damaging or dangerous nature are shipped without being previously declared and arranged for, they are liable, upon discovery, to be thrown overboard, and the loss will fall upon shippers or owners of such fluids or goods. The shippers will not only be liable to the penalties imposed by statute, but also for all damage sustained in consequence of such shipment.

The goods are to be distinctly marked with the marks, numbers and port of destination, or the Company is not to be responsible for detention or wrong delivery.

Bill of Lading must be presented and delivered up cancelled before delivery of goods can be granted.

The Company to have the option of delivering these goods into receiving ship or landing them at consignee's risk and [659] expense, as per scale of charges to be seen at the Agent's offices, the Company having a lien on all or any part of the goods, against expenses incurred on the whole shipment. The Company's liability shall cease as soon as the packages are free of the ship's tackle, after which they shall not be responsible for any loss or damage, however caused. If stored in receiving ship godown or upon any wharf, all risks of fire, dacoity, vermin or otherwise, shall lie with the merchant, and the usual charges shall be paid before delivery of the goods Fire Insurance will be covered by the Company' agents on application.

Specie, gold, silver, bullion, jewellery, precious stones, platedware, or other valuables will not be landed by the Company. They can only be delivered on presentation of Bills of Lading on board, and will be carrid on at consignee's risk, if delivery is not taken during the steamer's stay in port.

In case of quarantine, goods may be discharged at risk of the owners of the goods into quarantine depot, lighter, barge, hulk, or other vessel, as required for the ship's despatch; quarantine expenses upon the goods of whatever nature or kind shall be borne by the owners of the goods.

Delivery by the Company of packages externally in good condition as received shall be conclusive evidence of delivery of full weight and contents.

Shippers are requested to note particularly the terms and conditions of this Bill of Lading with reference to the validity of their insurance upon their goods.

Receipt does not state mark, casks in bad condition, not responsible for leakage. Hogshead Brandy covered with gunny, not responsible for condition and contents.

W. STUART,
For Agents.

(*On back.*)

Received in part (2) two casks Ale in good order and condition.

N. N. ROY.

Received in full (2) two casks Beer and Whisky, condition as per certificate granted.

22-9-96. NOGENDRANAUTH ROY.

[660] Mr. *O'Kincaly* for the Plaintiffs. —The shipping Company say we will not be responsible for what the cask contains, but whatever it contains they must deliver it. They say we will not be responsible for the contents, but whatever we get from you we will deliver. *Grenon* v. *Luchmeenarain Augurwallah*, (1896) L. R., 23 I. A., 119, 125, *The Peter der Grosse*, (1875) L. R., 1 P. D., 414. They say in the Bill of Lading why they are not to be responsible for the condition and contents, but the Judge cannot read the clause

as if it were "non-delivery" or "short delivery." Here nothing was delivered: the contents had all escaped. All the shipowner says is, I don't know what is in this parcel. I am not to be bound by saying it is a hogshead of brandy in 1st part of the Bill of Lading, because I have not examined it: but I engage to carry it safely to its destination whatever it is. I shall deliver it to you as I got it. If the shipowners were contracting themselves out of all responsibility they would use appropriate words. Here the words "not responsible for condition and contents" do not free the shipowners from all responsibility if the contents are lost on the voyage or while in their charge.

Mr. *Henderson* for the defendants.—The words in the Bill of Lading are as general as possible. They may have put in these words because the hogshead was covered with gunny. A carrier is entitled to exempt himself in any way provided the Bill of Lading is accepted. The words mean that the company will not be responsible whatever happens to the cask, and is not confined only to the state of the cask and its contents at the beginning of the voyage.

The **judgment** of the High Court (MACLEAN, C.J., and MACPHERSON and TREVELYAN, JJ) was as follows:—

Maclean, C J.—This case raises a short point, but one not altogether free from difficulty. The question we have to decide appears from the reference made by the Judge of the Small Cause Court and I need not recapitulate the facts. The question really turns upon what meaning we are to attribute to the words, inserted by the defendants in writing in the Bill of Lading, "Hogshead brandy covered with gunny, not responsible for condition and con- **[661]** tents." I agree with the contention of the plaintiffs that, *primâ facie*, the defendants were bound to deliver the goods in good order and so forth. But this obligation is subject expressly to the conditions in the Bill of Lading, one of which is that which I have read. As appears from the finding of fact in the reference, the cask of brandy was shipped at Madras in good order and condition, but on arrival at Calcutta was found to be empty. The question is, are the defendants liable for the loss of the brandy? They repudiate such liability, and rely on the condition I have specially referred to.

We must give some effect to these words, which are an essential part of the contract, and it is difficult to see why we should not place their ordinary meaning upon them. If so, it appears to me that the defendants were not to be responsible for the contents of the cask. This special condition was possibly suggested to the defendants by reason of the circumstance that the cask was covered with gunny, and the defendants, the contents being unknown, wished to guard themselves against responsibility for such contents. It is urged that other parts of the Bill of Lading indicate that when the defendants are to be absolved from their *primâ facie* obligation to deliver, the Bill of Lading expressly so states, as in clause 7. Taking that to be so I do not think that any inference to be drawn from such provisions in the Bill of Lading is sufficiently strong to warrant us in not giving effect to the clause I have quoted, reading the language of that clause according to the natural meaning of the words used. In my opinion the Judge of the Small Cause Court was right in the view he took. The defendants must have their costs according to the fixed scale.

Macpherson, J.—I agree.

Trevelyan, J.—I also agree.

Attorneys for the Plaintiffs: Messrs *Dignam & Co.*

Attorneys for the Defendants: Messrs. *Orr, Robertson & Burton.*

C. E. G.

NOTES.

[See also *Sheik Mahomed Ravuther* v. *The British India Steam Navigation Co.*, (1908) 32 Mad., 95 F. B.]

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[662] APPEAL FROM ORIGINAL CIVIL.

The 5th April, 1898.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, KT., CHIEF JUSTICE, MR. JUSTICE MACPHERSON AND MR. JUSTICE TREVELYAN.

Amrito Lall Dutt

versus

Surnomoni Dasi and others.*

Hindu Law—Adoption—Widow—Direction to accumulate—Second Adoption.

Where a power to adopt was given by a testator to his widow, who was also the executrix of his Will and to two other executors conjointly :—

Held, that such power was bad. Under Hindu law power to adopt can be given to a widow only, and she has no capacity to adopt save under the express permission of her husband given in his life-time.

Per TREVELYAN, J.—A Hindu testator cannot direct the accumulation of the income of his estate for an indefinite period, if there is no beneficial interest created in the property, in order to render the gift whether under the will or *inter vivos* valid.

By a second adoption a widow divests herself of the mother's estate in the same way that she divests herself of her widow's estate on the first adoption.

THIS was a suit for the construction of a will and administration. The testator, Hurry Das Dutt, a wealthy Hindu of the Sudra caste and resident in Calcutta, died in October 1875, leaving a sole widow, the defendant Sreemutty Surnomoni Dasi, and two married daughters, the defendant Sreemutty Premmoni Dasi and Sreemutty Ranimoni Dasi. The first named of these daughters at the time of her father's death had three sons, the defendants Radha Prosad Mullick, and Kassi Prosad Mullick, and one since deceased. She also had had two sons born since her father's death, the defendants Peari Lall Mullick and Behary Lall Mullick. The other daughter had no children.

On the 30th of October 1875, the day of his death, Hurry Das Dutt executed his last will. By it he appointed his wife, his father Babu Modusudan Dutt, and his uncle Dwarka Nath Dutt to be his executrix and executors, and of these the testator's wife and uncle alone proved the will. The father apparently never performed any executorial duties or inter-[663]meddled in the management of the estate, but at the same time he never expressly renounced probate.

On the 9th of August the widow, with the consent of Dwarka Nath Dutt, purported to take a boy of five named Jotipersaud Mullick in adoption as the son of the testator in pursuance of a power in the will mentioned hereafter,

* Appeal from Original Civil No. 13 of 1897, in suit No. 535 of 1894.

but this adopted son died on the 29th of January 1881, when he was only ten years old.

On the 1st of April 1877 the testator's father died and on the 9th of February 1881 the plaintiff's natural father purported to give and the testator's widow purported to take the plaintiff, then a boy of eight, in adoption as the son of the testator, the executor Dwarka Nath Dutt being present on the occasion and consenting. This adoption like the former was intended to be in execution of the power contained in the testator's will, and it was admitted that prior to this action the legality of the adoption had never been called in question, on the contrary the plaintiff had throughout been brought up and treated as the duly adopted son of the testator. It will here be convenient to refer to those portions of the will especially relevant to the points raised in the case. They are as follows :—

In clause 2 the testator said :—

"I appoint my wife Sreemuty Surnomoni Dasi, the executrix, and my father Babu Modhusudan Dutt of Mullick's Street aforesaid, and my uncle Babu Dwarka Nath Dutt of Thontoneah, in Calcutta, aforesaid the executors and trustees of this my will."

Clause 8 provides as follows :—

"Whereas having no son born to me of my body I am desirous of adopting one in my lifetime, but in case I depart this life before carrying such my desire into effect I hereby authorize and empower my wife and executrix Sreemutty Surnomoni Dasi, and my executors and trustees to whom I give full permission and liberty to adopt after my decease a son, and in case of his death during his minority or on attaining his full age, and without leaving male issue to adopt a second son, and in case of his death during minority or on attaining such age and without leaving male issue to adopt a third son and no more. In any of the above cases of adoption should the adopted son die, leaving a son or sons, the power of adoption shall cease or remain in abeyance during the life or lives time of such son or sons of such adopted son, but shall revive on the death of such son or sons during minority."

[664] Clause 9 is as follows: —

"I direct my executors and executrix and trustees to pay out of the income and interest of my estate and effects monthly all necessary household expenses as well as for the worship of our family idol Sree Sree Radhagobindjee, and to pay my wife monthly during her natural life for her sole and separate use the sum of Rs. 200 (two hundred) and also the sum of Rs. 50 (fifty) monthly to such adopted son, who shall live and attain his full age of eighteen years after his so attaining such age of eighteen years during the lifetime of my said wife, provided he remains under her control and bears a good character, and if my said executrix and executors and trustees think fit and are satisfied with his conduct and behaviour and for the purposes of such monthly expenditure my executrix, executors and trustees shall set apart and retain out of the interest and income of my estate a sum sufficient to meet such expenditure for six months and invest the rest and residue of such income and interest in Government securities in their joint names, but in no case shall such adopted son have or exercise any control or dominion over my estate and effects until the death of my wife, after which event I direct my said executors and trustees to make over the whole of my estate and effects both real and personal or immoveable whatsoever and wheresoever and of what nature or quality soever to such adopted son, who shall survive my wife if he shall have attained his age of eighteen years during the lifetime of my wife, or on his so attaining such age after her decease, to whom and his heirs I give, devise and bequeath the same. But in case none of such adopted sons survive my said wife, or in case of either surviving my said wife and dying under the said age without leaving a son or sons, I desire and direct my executors after the death of my said wife or the death of such son after her, but under such age of eighteen years without leaving a son or sons to make over and divide the whole of my estate both real and personal unto and between my daughters in equal shares to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters

die without leaving any male issue surviving but leaving my other daughter her surviving, then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons, share and share alike."

The 13th clause is in the following terms:—

" I authorise and empower my said executrix, executors and trustees and the survivor of them, and the trustee for the time being of this my will to appoint any other person or persons to succeed them or him in the execution of the trusts of this my will."

Clause 14th appears to have been added as an after-thought, and by it the testator provided as follows: –

" In case of any accident arising to cause my wife to depart her natural [665] life before adoption of a male child my surviving executors are empowered to act with my full consent and direction to adopt a male issue."

It will be seen from these provisions that until the death of the widow the surplus income of the testator's residue after providing for certain monthly payments was directed to be accumulated.

It was contended before the first Court that as the adoptive son, and consequently the heir of his father, the plaintiff had an absolute interest in his estate subject only to be divested in certain events, and that as a result he was now entitled to have the whole estate transferred from the trustees to him subject only to adequate provision being made for certain periodical payments and expenses authorized by the will; and it was next contended that in any case he was entitled to the enjoyment of the surplus income of the estate until the widow's death. This contention was opposed on the part of the defendants and the grounds of opposition were: *First*, that there had been no valid adoption of the plaintiff; *secondly*, that the provision for accumulation was valid; and, *thirdly*, that even if there were any interest in the estate which had not been disposed of then, in the events which have happened it was on the widow as heiress of the deceased adopted son, and not on the plaintiff, that it had devolved.

For the purpose of disposing of these points the following issues were agreed to:

First.—Whether the power of adoption is valid at all in law?

Secondly.—If so, was it validly exercised?

Thirdy.—If so, is the plaintiff on the true construction of the will and as the adopted son of the testator entitled –

(*a*) To the surplus income of the property until the death of his adoptive mother;

(*b*) To the absolute interest in the property subject only to the payments mentioned in the will.

His Lordship, Mr. Justice JENKINS, in the lower Court dealt with these issues as follows:—

1. Whether the power of adoption is valid at all at law?

[666] The clauses of the will particularly bearing on this point are 8th and the 14th, both of which I have already read, and the argument urged against the validity of the power is shortly this: It is said that, though a husband can delegate to his widow a power to adopt, still he can delegate it to no one else; consequently it is argued the present power to adopt is bad, because though it is delegated to the widow still it is not to her alone but to her in association with others. Now it is admitted, on the part of the defendants, indeed it is a part of their argument, that though the widow's discretion under a delegated

power is absolute in the sense that she cannot be compelled to act upon it unless or until she so chooses, still any condition or clog can be imposed upon the exercise by her of this delegated power, and it therefore appears to me that, so far as the association of the two executors was a fetter on the absolute discretion and choice which might otherwise have existed, it cannot have vitiated the power. It may be that the widow alone is capable of performing the actual ceremony of adoption, that her hand alone can receive the child, but I do not find in the phraseology used by the testator any direction requiring or even justifying the inference that he desired or intended that the executors should take a part in the ceremony from which they are incapacitated by the rules of Hindu law.

It is clear from the prefatory recital with which the 8th clause of the will commences, that the testator did desire the adoption of a son in accordance with the provisions of the Hindu law, and though it may be unprofitable to speculate as to his motive, I think that he had a purpose beyond the mere designation of a beneficiary to take under his will and I must decline to put on the language of the will a construction that would render its provisions useless. In my opinion the testator associated the other executors with his wife for the purpose of ensuring a wise exercise of her discretion in the selection of a son for adoption and not with the intention of making it an essential condition of the adoption that they should take a part in the ceremony from which they were precluded, and I therefore hold that the power of adoption is valid.

[667] The next issue I have to consider is whether the power of adoption was validly exercised.

The contention of the defendants in this connection is twofold; for first it is argued that the power could not be exercised inasmuch as the father, one of the executors named by the will, was then dead and the power is not one that passed to the survivors, and next it has been argued by Sir *Griffith Evans* that it is evident from the terms of the deed of adoption and also from the evidence and admissions in the case, that the surviving executor Dwarka Nath Dutt did not take such a part in the adoption as was required of him by the power, so that even if there was a survival of the power still its terms were not observed.

Now both these points appear to me to be points of construction so that it is in the first place necessary to determine what the language of the will means, and in that investigation regard must be had to the circumstances of the testator and to every fact a knowledge of which may conduce to the right application of the words used. Cases are of little use except so far as they express or illustrate a general rule of construction; for the words of one will are seldom the same as those of another.

There is, however, a principle to be drawn from decisions which is of importance in relation to the question in hand, and it is this that where a power is vested in executors (though it may not be one reposed in them by the law) if on the true construction of the will it appears that the power was coupled with the executorial office, it will survive to the holders for the time being of the office as though it were a power attached to the office by law.

It obviously, therefore, is necessary first to determine whether or not as matter of construction the power of adoption contained in the will was not given to the executors in their official capacity.

In my opinion the power of adoption is connected with the office, and in confirmation of that view I may point to the fact that excepting the wife the

executors are not named, but are described by reference to their office, and again though the wife is named still she is described as executrix in a manner [668] which points to the conclusion that the power even in her case was not dissociated from the idea of the office. That is not necessarily decisive of the question whether the power was one that survived for any such inference to that effect that might be deduced from the association of the power with the office might be rebutted by a sufficient indication that the testator desired the selection implied by the power to be entrusted to the three persons named as his executors and to no less a number.

But to effect such a result the indication must be one of a reasonable clearness drawn from the testator's own words, and not merely based on a speculation as to what a man might be imagined to intend in the testator's circumstances. It is suggested that this indication is to be found in the concluding clause of the will, but after the best consideration that I have been able to give to that clause together with the rest of the document I am unable to arrive at that conclusion. That clause appears to me to indicate the testator's strong desire that a son should be adopted ; he may be supposed (not merely as a rigid presumption of law, but as a matter of notoriety) to have known that a Hindu widow of the Bengal School could with her husband's assent adopt, but fearing the contingency of his wife's death he inserted the last clause for what it might be worth.

I should also state that I am not led by this last clause to the conclusion that the testator did not intend that the adoption to be effected under clause 8 should take effect as, and have the results of, an adoption according to Hindu law. In support of the view that the power in question could only be exercised by the three persons appointed as executrix and executors by the Will I have been referred by the learned *Advocate-General* to two cases. The first is the case of *Surendrakeshav* v. *Doorga Sundari Dasi*, (1892) L.R., 19 I.A., 108, which no doubt establishes that the authority delegated to the widow must be followed strictly, so that where the power only authorized the simultaneous adoption of two sons, it was impossible to exercise the power otherwise than in strict compliance with its terms, [669] though the result of an attempted adoption in accordance with the power would be in contravention of the Hindu law and so without an effective result.

The second was a case of *Beemchurn Sen* v. *Heera Loll Seal*, (1867) 2 Ind. Jur. N.S., 225, in which the consent of another was required as a condition of the adoption, and it was held that the absence of that consent, though due to death, was a bar to the adoption. Now both these cases are open to the comment, that I have held as matter of construction, that the power contained in this will did in the circumstances of this case survive to those by whom it was exercised, so that in my view of the case the requirements of the power have been observed.

It may, however, be said that the case of *Beemchurn Sen* v. *Heera Loll Seal*, (1867) 2 Ind. Jur. N.S., 225, so closely resembles this, that I ought in this case to put a corresponding interpretation on this will. In the first place I could not assent to the proposition that there is any real similarity between the two cases, and next I must point out that in that case an adoption according to Hindu law could not have been contemplated, the delegation of the particular power, then under consideration, having been made not to a widow but to a son's widow, and on a careful perusal of the judgment it will be seen that Sir BARNES PEACOCK expressly guards himself from expressing an opinion what would have been the result had the adoption intended been one that could have been effective according to Hindu law. It still remains to notice the

argument that the terms of the power have not been complied with inasmuch as the widow alone and not in conjunction with the surviving executor actually took the son in adoption. I have already expressed my view of the meaning of the power, and if that view be right then it follows that this objection cannot prevail; the power does not in so many words say that the ceremony, which the law only allows to be performed by the widow, must be performed by the others, and I therefore hold that the mere fact of the surviving executors not having actually and physically taken in adoption is not a failure to comply [670] with the terms of the power, and I accordingly hold that the power was validly exercised.

This brings me to the third issue which turns upon the true construction to be placed on clause 9 of the will. The testator thereby directs his executors, executrix and trustees to make out of the income of his estate certain payments including a monthly payment of Rs. 200 to his wife during her life and a sum of Rs. 50 monthly to such adopted son who should live and attain the age of eighteen years during the lifetime of his wife, provided he remained under her control and bore a good character, and then he proceeds as follows:—

"My executrix, executors and trustees shall invest the rest and residue of such income and interest in Government securities in their joint names, but in no case shall such adopted son have or exercise any control or dominion over my estate and effects until the death of my wife."

Now it will be seen that there is here a direction to accumulate, and the first point to be decided is whether, according to the law applicable to Hindu wills, this direction is in operation or whether effect can be given to it.

Mr. *Bonnerjee*, no doubt, treated the point in his opening speech as beyond the realm of argument, but the learned *Advocate-General* declined to accede to that view, and I consequently must examine the point. I must, however, express regret that only a very slender argument has been addressed to me on this point on the part of the defendants -a course the more to be regretted by reason of my want of familiarity with the question, and I need hardly remark that the absence of such argument has not only greatly increased my labours, but compels me to decide the point on materials and information necessarily meagre.

Now accumulation is, with an exception immaterial for the present purpose, absolutely forbidden by section 104 of the Indian Succession Act, but on turning to section 2 of the Hindu Wills Act it will be found that section 104 is one of the few sections not applicable to Hindu wills, such as the one under consideration, and consequently there is no statutory prohibition which forbids accumulation directed in a will made by a Hindu.

It becomes, therefore, necessary to examine whether a direction [671] to accumulate is contrary to the provisions of Hindu law. Probably it would be wrong to attribute much force to the fact that section 104 is not made applicable to the will of a Hindu, but I certainly cannot accede to the argument that it is a recognition of the fact that accumulation was never allowed in the case of Hindu wills, for a similar train of reasoning would have excluded the application of other clauses of the Succession Act which do govern Hindu wills. Now it unquestionably is the case that a direction to accumulate is from time to time to be found in Hindu wills and the practice of inserting such a direction is of some standing.

In *Sreemutty Soorjeemoney Dossee* v. *Denobundhoo Mullick*, (1857) 6 Moo. I. A., 526, the will of a Hindu testator who died in 1841 was under considera-

tion, and the case was argued on demurrer before the Supreme Court of Calcutta, and in the course of their judgment the following remarks appear :—

"It was, we apprehend, competent to this testator, if he had been so minded, expressly to provide for the accumulation of the surplus income of his estate within the limits allowed by law, and to make their accumulations subject to the limitation even in the event of any son dying without leaving issue in the male line: but he does not appear to have done so either expressly or by necessary implication. Again in *Bissonauth Chunder* v. *Sreemutty Bamasoondery Dassi*, (1867) 12 Moo I. A., 41, the following passage is contained in the judgment of the Privy Council :—

"In the first place it is to be observed that the testator has given no direction to accumulate. It remains, therefore, to be seen whether the Court can find from the words of the will, as was argued, an irresistible inference that such was the intention of the testator.

"This is the more important because in the case of *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee*, (1859) 8 Moo. I. A., 66, which is relied on as governing this case, there is an express direction to accumulate. It was there directed that the surplus **[672]** was to be added to capital. There is an absence of that in this case. It is admitted that the testator could not dispose of the property of his son or prevent the heir of the son from inheriting his property, therefore the only question here is whether the testator has directed the accumulations of the property to be added to or made part of his own property, because if he has not it was the property of the son and the testator had no power of disposing of it. In this view of the case their Lordships think that this will, on whichever construction it is taken, shows an absence of any direction to accumulate."

It is true these cases do not decide that a direction to accumulate is good, but it is clear from them that the practice of directing accumulation is of long standing, and that at that time it was considered that such a direction would have effective operation. I asked Mr. *Bonnerjee*, who contends that a direction to accumulate is bad, to refer me to the authorities on which he relied, and I now propose to deal with them. The first case is that of *Kumara Asima Kishna Deb* v. *Kumara Kumara Krishna Deb*, (1868) 2 B. L. R., O. C. 11, the purport of which is set out in the head note as follows :—

"A Hindu, by will, attempted to create a trust for the accumulation, for ninety-nine years, of the surplus income (after certain yearly payments) of his estate, in purchase of zemindaries, etc., from time to time, and empowered his trustees to continue such trust after the expiration of the ninety-nine years' term. The will contained no disposition of the beneficial interest in the zemindaries so to be purchased. *Held*, that such trust was void.

"*Semble.*—Perpetuity (save in the case of religious and charitable endowments) is not sanctioned by Hindu law. *Goberdhan Bysack* v. *Sham Chand Bysack*, explained."

The contention in that case was that the trusts of the will were invalid and void, not only on the ground of perpetuity, but because there was no disposition of the beneficial interest in the estate.

The case in the first instance came before Mr. Justice NORMAN who said : "I may add that there is not in the will any disposition **[673]** whatever of the beneficial interest of the bulk of the testator's property . * * * * Even at the end of ninety-nine years there is no gift of the beneficial interest to any one. The manager for the time being may go on at his own will and pleasure indefinitely accumulating the estate. No right is given to

the heirs of the testator or the persons indicated as such in the will to use the property for their own benefit taken at that remote time. This goes a long way beyond that of Mr. *Thellusson's* will.

Then later he says:—

"In the case now before me the trust for perpetual accumulation would deprive the parties of all enjoyment of the profits on the estate. I think it clear that the trust for accumulation must be treated as a condition repugnant to the natural rights of every owner of property to the use or enjoyment of it, inconsistent with the nature of property itself and therefore void."

From this decision there was an appeal which came before the Chief Justice Sir BARNES PEACOCK and Mr. Justice MARKBY.

Sir BARNES PEACOCK says:—

"There is no doubt that this will if construed according to English law would be void under the law relating to perpetuities. The question is, is it valid under Hindu law?"

Further on he proceeds:—

"The will in the present case gives the residue of the property, which is the subject of dispute, to the grandson and his successors upon trusts that the profits of the estate are not to be beneficially used during a period of ninety-nine years, but are to be laid out in the purchase of fresh estates and the formation of a fund for the payment of the Government revenue upon it, and this provision is to be extended, as I understand, in perpetuity, if the Hindu law allows."

I am not aware of any rule of the Hindu law by which grants *inter vivos* or gifts by will in perpetuity are expressly prohibited, but it appears to me to be quite contrary to the whole scope and intention of Hindu law.

In the result the decision of Mr. Justice NORMAN was upheld, [674] but it appears to me, looking at the facts of the case and the judgments delivered, that the true *ratio decidendi* was that the direction to accumulate was an attempt to create a perpetuity, that thereby it was sought to suspend the enjoyment for a longer period than the absolute vesting could be controlled, and that it consequently was bad. The case did not call for a decision that an accumulation which did not aim at that, which for shortness I may call a perpetuity, is void, and I therefore cannot regard the case as an authority which is or even purports to deal with the point before me.

I was next referred to a case of *Srimati Bramamayi Dasi* v. *Jages Chandra Dutt*, (1871) 8 B. L. R., 400, but all that case decides which can be regarded as material to the present point is that an attempt to defer the period of payment to or enjoyment by a beneficiary of a vested interest is inoperative.

Then reliance was placed on the case of *Kally Nath Naugh Chowdhury* v. *Chunder Nath Naugh Chowdhry*, (1882) I.L.R., 8 Cal., 378, where the will before the Court contained a present gift of the testator's property to his grandsons followed by provisions postponing payment and directing accumulation, and it was there held in accordance with principles which are beyond dispute that an absolute gift could not be qualified by a direction to postpone payment and accumulate. The legality of a direction to accumulate was not in question in the case.

Mr. Justice PONTIFEX says:—

"But his will containing, as in our opinion it does, sufficiently direct words of present gift, the clauses in it, which attempt to postpone the enjoyment of

possession and to direct accumulation must be rejected or disregarded as inconsistent or repugnant."

The last case brought to my notice is that of *Mokoondo Lall Shaw* v. *Gonesh Chunder Shaw*, (1876) I.L.R., 1 Cal., 104, which decided that where a Hindu testator gave all his immoveable property to his sons but [675] postponed their enjoyment thereof by a clause that they should not make any division for twenty years, the restriction was void as repugnant to the gift.

Mr. Justice PHEAR in the course of his judgment says: "Now without saying that a Hindu testator might not give the current profits or income of the property to the trustees, and direct them to apply this to the payment of debts throughout a specified period such as twenty years, I do not think it is competent to him to give the corpus of the property to an adult person, and at the same time to forbid that person from enjoying the property in the way which the law allows.

"The prohibition against receiving and enjoying the income for twenty years appears to me simply to be a condition imposed on the property which is repugnant to the gift. It is not merely the giving of one portion of the property to one person or purpose and the remaining portion to another person or purpose, but it is giving the entire property to one person and coupling this gift with a prohibition against his enjoyment."

The key to this and the two previous decisions is obvious, and it simply is the repugnancy and consequent invalidity of a condition which attempts to fetter the enjoyment of an absolute gift, a principle which has no application here.

Mr. *Bonnerjee* very fairly admits that beyond these cases he is unable to refer to any decision or even dictum that a direction to accumulate is necessarily, and under all circumstances void, so as to entitle the heirs to claim the interest commensurate with the period of directed accumulation as though it were undisposed of, and I must therefore see whether there is any general policy, or principle of law, which calls for such a conclusion.

Is there then any principle of public policy which would discountenance accumulation? I take it that for this purpose regard must be had to Hindu and not to English policy, and so far as I can ascertain such a direction is in accordance with the modes of Hindu life and thought, and agrees in its aims with what is a matter of every-day practice and custom.

[676] Indeed had the life estate been given to the widow, then the accumulation which is directed would, in its practical result, be no greater a restraint on the expenditure of income than would have been almost necessarily incident to that situation. Does it then clash with any principle of law? First it is necessary to see what the effect of the accumulation in this case is. The direction is during the life of the testator's widow to invest the balance of the income, and after her death the trustees are to hand it over to such adopted son who shall survive the widow and shall answer the description given in the will.

It will, therefore, be noticed that apart from any question of legality the accumulations are disposed of so as to vest beneficially on the widow's death. It is true that the object of the testator's bounty is not ascertained at the testator's death, but that in itself is not a necessary indication of illegal remoteness. As has been said by a very learned Judge, in common sense it is only giving the accumulation to the person who is to take the fund itself, if it could be foreseen who that person is. That person may be the present plaintiff if he survives the widow, or it may be some one adopted in succession to him,

but it is clear in either case that the fund itself will be given and why not the accumulation.

If the testator be permitted to give the fund itself at a future time, it would seem anomalous that he should not be able to give the intermediate rents and profits.

If the individual to take on the widow's death were now ascertained it surely could not be doubted that his title to the intermediate income would prevail against that of the heir-at-law, and how has the heir better right by reason of that person being at present unascertained. If it be urged that the effect is to create an absolute interest at a future date without limiting an intermediate beneficial interest corresponding and commensurate with the interest, and that, therefore, the heir-at-law must take the profits to arise during the interval, then this argument, as it appears to me, is met by Mr. *Bonnerjee's* own concession that trustees might be directed to accumulate a fund for the payment of debts, and by the further fact that the trustees are in this case directed to hand over the intermediate income to the individual who is to **[677]** take the fund from which they spring. I may remark incidentally that this is an objection to accumulation which was put forward in the English Courts, but without success though the principle on which it is based has as much force in English as in Hindu law. It cannot be said that the adopted son to whom the fund is given on the widow's death is incapable of being a recipient of the bequest, for by section 99 of the Transfer of Property Act it is provided that if property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time the property shall at such later time go to that person. Seeing, therefore, the fact that the right to accumulate has been recognized, if not actually affirmed, both by the Supreme Court and the Privy Council, and that a direction to accumulate is no new expedient, and having regard to the various considerations I have discussed, I hold that it is not incompetent for a Hindu with proper limitations to direct an accumulation of the income of the property which under his will vests in his executors or trustees. That, however, is not necessarily conclusive of the present case, for it still remains to consider whether the particular direction in this case is bad as being in excess of what the law permits.

Now it appears to me on principle that if accumulations are permissible, then in the absence of special provision the limit must be that which determines the period during which the course or devolution of property can be directed and controlled by a testator, and applying that test to the present case I am of opinion that the directed accumulation is not in excess of that permitted by law.

In the view, therefore, that I take of the case I am of opinion that the plaintiff is not presently entitled to the surplus income or profits of the properties, until the death of his adoptive mother, and that he is not entitled (even after provision being made for the payments mentioned in the will) to have the corpus of the **[678]** estate made over to him. The plaintiff asks for an account, and as the Advocate-General does not oppose this, I am willing to accede to this inasmuch as when the case first came before me certain charges of breach of trust were waived on the understanding that the plaintiff should be entitled to take such objection to the trustees' conduct as might be open on the taking of the ordinary accounts, but I will only direct accounts at the

plaintiff's risk as to costs, and as it has been suggested that the accounts will probably not be required, it will be better that the decree for accounts should be conditional.

The decree, therefore, will contain a declaration that the plaintiff has been validly adopted, but that on the true construction of the will he is not entitled during the life of the widow to have the property left by the testator handed over to him or to receive the rest and residue of the income and interest of the testator's estate by the will directed to be invested: then the decree will direct accounts (at the plaintiff's risk as to costs) of the estate and debts of the testator, but it will be provided that no proceedings are to be taken under this direction without the leave of the Judge in Chambers. There will be an enquiry what is proper to be allowed for all necessary household expenses as well as for the worship of the testator's family idol Sree Sree Radhagobindjee. Further consideration will be adjourned and there will be liberty to apply. As it is so desired the costs of all parties up to and including the trial to be taxed on Scale 2 as between solicitor and client will come out of the estate.

The plaintiff appealed from this decree.

Mr. *Pugh* (Mr. *Bonnerjee* with him) for the Appellants.—Is a Hindu testator able to give an estate to *A* and say that he is not to enjoy the estate more than 50 rupees per annum during the life-time of *B*, to whom no income has been given? This is a direction to accumulate. Hurry Das Dutt died in October 1875: On 9th August 1876 the first adoption was made. Jotipersaud Mullick died on 29th January 1881 and on the 9th February 1881 the second adoption was made, and the plaintiff adopted. There is, therefore, an express gift of the accumulations. [TREVELYAN, J.—The Privy Council have held that, apart from adoption, it **[679]** might be a valid bequest under a power of appointment.] Section 13 of the Transfer of Property Act. The accumulations are without an owner until the death of the widow. [TREVELYAN, J.—The corpus and income must, according to Hindu law, be vested in the same person. It cannot be in the air.] There is a valid gift to Amrito Lall Dutt subject to its being divested. Amrito Lall Dutt is the owner of the estate and any restriction to his use and enjoyment is repugnant to that estate. *Gosavi Shivgar Doyagar* v. *Rivett Carnac*, (1888) I. L. R., 13 Bom., 463. [TREVELYAN, J.—There is also the case of *Lloyd* v. *Webb*, (1896) I. L. R., 24 Cal., 44]. I submit there is an immediate gift to my client. If that is not so my client is entitled as heir at law. *Tagore* v. *Tagore*, (1872) 9 B. L. R., 377; Mayne's Hindu law, sections 380, 381, 382. I do not think that there is a gift to trustees: even if there were it would not prevail according to the Tagore case. You cannot do by will what you cannot do *inter vivos*. *Brammamayi Dassi* v. *Jages Chandra Dutt*, (1871) 8 B. L. R., 400; *Mokoondo Lall Shaw* v. *Gonesh Chunder Shaw*, (1876) I. L. R., 1 Cal., 104; *Kally Nath Naugh Chowdhury* v. *Chunder Nath Naugh Chowdhury*, (1882) I. L. R., 8 Cal., 378.

The *Advocate-General* (Sir C. *Paul*), Mr. *Garth* and Mr. *Stephen*, for the widow Surnomoni Dasi.—The widow takes an estate by implication. Theobald on Wills, 4th Edition, p. 604; *King* v. *Inhabitants of Ringstead*, (1829) 9 B. & C., 218, 224; *Gardner* v. *Sheldon*. Tudor's Leading Cases, 625-630; *Bissa Nath Chunder* v. *Bama Sundary Dasi*, (1867) 12 M. I. A., 41. No trust for accumulations but a trust to invest. We say that the power to adopt is bad.—*Sumbhu Nath* v. *Surjamoni Dei*, (1897) Cal., W. N., 649. First point is that what he has given he could not intend, as it was not legal according to Hindu law. *Bhoobun Moyee Debia* v. *Kishore Acharj Chowdhry*, (1865) 10 M. I. A., 279, 281, 304; Golap **[680]** Chunder Sircar's Tagore Lectures, page 233; *Beemchurn Sen* v. *Heera Loll Seal*, (1867) 2 Md., Jur. N. S., 225; *Eaton*

v. *Smith*, (1839) 2 Beav. 236; *Crawford* v. *Forshaw*, (1891) L. R., 2 Ch., 261; Farnell on Powers, p. 457; Golap Chunder Sircar's Tagore Lectures, page 142; Babu Shama Charan Sircar's Vyavastha Darpana, 2nd Edition, page 907; *Ramasami Aiyan* v. *Venkataramaiyan*, (1879) L. R., 6 I. A., 196, 208; *Vellanki Venkata Krishna* v. *Venkata Rama Lakshmi Warsayya*, (1876), L. R.,: 4 I. A., 1, 9, 13; *Pudma Coomari Debi* v. *Court of Wards*, (1881) L. R., 8 I. A., 229; *Bykant Monee Roy* v. *Kisto Soonderee Roy*, (1867) 7 W. R., 392; *Jamnabai* v. *Raychand Nahalchand*, (1883) I. L. R., 7 Bom., 225; *Raoji Vinayakrao Jagganath Shankarsett* v. *Lakshmibai*, (1887) I. L. R., 11 Bom., 381, 397; *Gavdappa* v. *Girimallappa*, (1894) I. L. R., 19 Bom., 331. My client takes estate for life by limitation; section 4 of the Probate and Administration Act. It is clear that the son is not to take beneficially until after the death of the widow. If my first position is wrong then I say the estate is vested in the executors and trustee. Under section 104 of the Succession Act you cannot accumulate for more than a year. Under the Hindu Wills Act, section 104 is not applicable. The direction to accumulate is quite in keeping with Hindu notions. There is nothing in the will which says what is invested shall be added to the capital and form part of the estate. Heir is not to take until after the death of A and there is nothing to deprive A of the estate she took. As to the adoption, we say that there is no valid power to adopt. It is bad in law.—*Nilmoney Singh* v. *Bakranath Singh*, (1882) L. R., 9 I. A., 104. It was a joint power by three jointly or by two executors according to the scheme of the will. *Tagore* v. *Tagore*, (1872) Sup. Vol. I. A., 79, 78. If one person could perform ceremony efficaciously **[681]** others could join in it. In the case of *Surendra Keshab Roy* v. *Doorga Sundari Dasi*, (1892) L R., 19 I. A., 108., the adoption was simultaneously made and held to be bad. The power of adoption in its inception is bad. If I assume power is good it is still not validly exercised, it is exercised by two instead of by three. *Crawford* v. *Forshaw*, (1891) L. R., 2 Ch., 261; Sugden on Powers, p. 460. The power must not pass to others. Here the power was given to the uncle and the father. If a man dies leaving two sons and a widow, it is clear that the two sons take. If one son dies the widow takes the estate of that son, not the second son. In the case of adoption the mother holds as guardian and in trust until the first adoption. When the son dies it comes to her as her own as the mother and she cannot be divested by adopting a second son. Here the second adoption is made in derogation of the adopted mother's estate. If you inherit from the son there is no estate to pass on. When the adopted mother takes the estate of a son she has an estate which cannot be divested.

Sir *Griffith Evans* (Mr. *O'Kinealy* with him) for the other respondents.—The question of accumulation cannot be decided as between me and the widow. The trustee would in any event have to retain the corpus. The period of distribution is the death of the widow. What is to become of the surplus income between the death of the widow and the period of distribution. As it is impossible to predict who will come in at the period of distribution it will be necessary for the trustees to retain the estate until that period arrives. As regards the power of adoption being bad the executors were the proper persons to be appointed for the adoption, if it took place. Executors can always devolve their offices on the Administrator-General by the Administrator-General's Act. If the power attaches to the office it goes on to the end wherever the office goes. The reasoning of KEKEWICH, J., would apply to this case, because it is a naked power and does not attach to an executorial office. There is a great distinction between naked powers and powers given

to a person by virtue of his office. Farwell on powers, pages 129, 140. **[682]** There is no inflexible doctrine that the full beneficial interest must be vested in some person who is ascertained at the time. The first adopted son took dehors the will; he was entitled because the adoption made him heir-at-law instead of the widow. For five years he was entitled. The result would be if Joti Prasad was properly adopted, he took it as heir-at-law under the power of appointment, dehors the will. However if he acquired it his mother would be his heiress, and if she adopts a second time does she surrender the estate of the adopted son? There must be some limit; she cannot divest herself of any thing that did not belong to the testator. If a descent was cast in the way other than the mother, then there is an end of the second adoption. For instance, the widow of the adopted son, if there was one, would have taken to the exclusion of the second adopted son. As regards the doctrine of estates by implication there is the case of *Bissa Nath Chunder* v. *Bama Sundary Dassi*, (1867) 12 Mad., I.A., 11. Widow and female there could not take, and in case one of them dies held the female heirs shall not take.

Mr. *Pugh* in reply.

The **judgment** of the High Court (MACLEAN, C.J., MACPHERSON and TREVELYAN, JJ.) was as follows:—

Maclean, C.J.—The facts are not disputed on this appeal, and that being so, I do not propose to recapitulate them as they are accurately found and stated in the judgment of Mr Justice JENKINS. The questions we have to decide are questions purely of law; they are stated in the judgment of the Court below, and it will be convenient to deal with them in the same order as in that judgment.

The first question and one in sense the paramount question is whether the power to adopt in the testator's will is a valid power. It is urged for the respondents, against the validity of the power, that although it is competent to a Hindu testator to empower his widow to adopt, it is a power which can only be given to the widow and to the widow alone, and that, inasmuch as in the present case the power is given to her conjointly **[683]** with two other persons, *viz.*, the father and uncle of the testator, the power is invalid. If this contention be well founded, there is, at once, an end of the plaintiff's case, for, if there were no valid power to adopt, the plaintiff is not the adopted son of the testator, and has consequently no interest in the testator's estate and cannot maintain the present suit. He is suing as the testator's adopted son, and in that capacity alone. The testator doubtless was anxious that, if he had no natural son, he should have an adopted son, and the reasons for this, not merely on temporal but specially on spiritual grounds, are thoroughly recognised and understood in the Hindu community. But the question is, has he taken such a course as the Hindu law allows for giving effect to his desire?

It may, I think, be regarded as a well-established principle of the Bengal School of Hindu law that it is to the widow alone that the power of adopting a son can be delegated by the husband, and that she has no capacity to adopt, save under the express permission of the husband given in his lifetime. Now, looking at clause 8 of the will, which is admittedly the salient clause upon which, in a great measure, if not entirely, the case hinges, and reading the language of that clause according to the usual and ordinary meaning of the words used, there cannot, I think, as a matter of construction, be any reasonable doubt that the testator intended to give, and did give, the power of adoption, not to his widow alone, but to his widow conjointly with his father and uncle. If upon the true construction of the clause the power be given to the three, and not to the widow alone, it is not very important to consider whether

it was or was not given to them in their executorial capacity, though the language suggests that it was given to them in that capacity, and this view is fortified by a reference to clause 14 of the will, which indicates that, in the event of the wife's death before the adoption of a male child, the surviving executors were to have the power. It is conceded by the appellant's counsel that the power under clause 14 is invalid. That clause shows that the testator intended the surviving executors should have the power, and throws a light upon what was in the testator's mind, as regards clause 8, viz., that the power **[684]** was given to his executrix, executors and trustees. If it be conceded that the power given to the two executors under clause 14 is bad, it is somewhat difficult to see how the power under clause 8 given to the three executors and trustees, even though the wife be one, is not equally bad, unless one can reasonably place upon that clause the construction placed upon it in the Court below. But even if, in clause 8, the wife, father and uncle had not been alluded to as executrix, executors and trustees, the testator has associated with the wife in this power two other persons, which, under Hindu law, he cannot do as the power can only be delegated to the wife.

It is urged, however, for the appellant that clause 8 may be read as a power given to the wife alone, and that the association of the father and uncle in the power was not to give them the power of adoption, but merely a power of supervision in order to ensure a discreet exercise of the power by the wife. In other words, we were virtually invited to read the power as if it were one given to the widow alone to be exercised with the consent of the father and uncle. I do not see my way to adopt this construction of the language of the will. There is nothing, so far as I can see, in the language used, to warrant us in placing such a construction upon it; were we to do so, I think we should be going dangerously near to making a new will for the testator, rather than construing the will he has made. We must look at what the testator has actually said, not what he might have said had the effect of what he has said been drawn to his attention.

The learned Judge in the Court below says he must decline to put on the language of the will a construction that would render its provisions useless. I am entirely in accord with the learned Judge, if by that expression he means that, if the language of the will warrant it, the Court should place such a construction upon it as will give effect to the testator's intentions, rather than render the provisions of the will useless. But we must be guided by what the testator has said; we must gather his intention from the whole will, and then say whether or not effect can be given to that intention consistently with law. Here the ques-**[685]**tion appears to me to be- What did the testator intend, gathering, that intention from the language he has used? If he intended to give the power to the three, then, according to Hindu law, such a power is bad; if he intended to give the power to the wife alone and only associated the father and uncle as a fetter on her choice of a son, then it would be good. But I fail to extract the latter intention from the language used. The recent case in the Privy Council of *Surendro Kissen Roy* v. *Durga Sundari Dassi*, (1892) L R., 19 I. A., 108, must not be overlooked in discussing this question of the validity of the power.

For these reasons I am of opinion that the power to adopt was not a valid one.

In the view I take, it becomes unnecessary to discuss whether the power was validly exercised, but one of the grounds upon which Mr. Justice JENKINS decided that it was well exercised has a bearing upon the question of the validity of the power. Mr. Justice JENKINS holds that the power was intended

to be annexed to the executorial office, and treats the question as being whether the power of adoption contained in the will was not given to the executors in their official capacity, and he treats it as having been so given. But if the power of adoption were annexed to the executorial office, or if the power were given to the executors in their official capacity, the power is bad, for no such power can be validly given according to Hindu law. If, however, the true construction of clause 8 be such as the learned Judge in the Court below holds it to be, viz., a power of adoption to the wife alone, with the consent of the other executors and trustees, it would seem almost to follow that the testator intended the selection of an adopted son to be made with the consent of the father and uncle, as the *personæ designatæ* for this purpose in the will, and in whom a personal confidence was reposed by the testator. Clause 14 supports this view, whilst the case of *Beemchurn Sen* v. *Hera Loll Seal*, (1867) 2 Ind. Jur. N. S., 225, has a distinct bearing upon it. Had it been necessary for me to decide the point, I should have felt considerable difficulty in saying that the **[686]** power had been well exercised, the father of the testator having died before the adoption took place.

Holding the above views, it becomes unnecessary to express any opinion upon the other points which have been raised, as the plaintiff cannot maintain the present suit, though it is not to be inferred from my silence on those points that I am in accord with Mr. Justice TREVELYAN'S views upon them.

This is one of those cases in which, having regard to the time which has elapsed since the adoption, one's natural inclination would be to uphold it if possible. Having regard to that lapse of time I asked the appellant's counsel whether any question of limitation, estoppel, laches or acquiescence could be raised in the appellant's favour, but he very fairly replied that no such question could be successfully raised as against the infant respondents, who will take the property failing a valid adoption of the plaintiff. As, then, any such questions are eliminated, we may view the case as if the matter had been submitted for our consideration shortly after, and not many years after, the alleged adoption ; in other words, the lapse of time does not in point of law assist the appellant. It may seem a hard case on the plaintiff who, however, is responsible for having initiated the litigation, to be now told that his adoption is invalid : but, on the other hand, it would be equally hard on the infant respondents, if they have to hand over their property to one who has not been validly adopted as the testator's son. It is, however, not open to us to enter upon any question of hardship one way or the other. I think the appeal fails and must be dismissed.

The cross-objections must be allowed, and the suit dismissed. I will deal with the costs after the other judgments have been delivered.

Macpherson, J.—I agree with the learned Chief Justice. I do not think it necessary to express any opinion on the other questions raised in the case.

Trevelyan, J.—The two main questions in this case are (1) whether there is any valid gift of the accumulation of income ; and (2) whether the plaintiff has been validly adopted under Hindu law.

[687] I will deal with this second question first. The defendants are entitled to have it decided, as it goes to the root of the whole suit and is the subject of their cross-objection.

The first question which we have to determine is what the testator meant by his will. As put by their Lordships of the Privy Council in *Tagore* v. *Tagore*, (1872) L. R. Sup. Vol., p. 79: "The true mode of construing a will is to consider it as expressing in all parts whether consistent with law or not,

the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances to be conferred. It is true that in giving a power of adoption, a testator is contemplating to a great extent his own welfare, but legal effect cannot be given to his intention, unless he provides for the exercise of that power within the limits of the law. We cannot alter or add to any portion of his directions, and if we attempt to depart from the strict letter of his injunctions, we run the danger of being charged with attempting to make a will for him rather than construing and giving effect to the will which he has actually made. Numerous instances occur to me where powers of adoption have been given with the real object of obtaining a spiritual benefit, but the Courts have declined to give effect to those powers. I need only instance by way of illustration the case of a double adoption, which came before the Privy Council lately in the *Andul* case. In my opinion we must endeavour to ascertain the intention of the testator as expressed by the words of his will just as carefully and upon the same principles when he is seeking his own spiritual benefit as when he is conferring a bounty upon others. Having ascertained his intention from his will, and without reference to the law on the subject, it is then for us to apply the law and see if the power be valid I know of no authority which lays down that powers of adoption are to be construed differently from other powers. It has been suggested to us that it must be assumed that the testator knew the law, and that the portion of the power which is in accordance with the law must be accepted and the rest rejected. It is im-**[688]**possible for us to deal with the will on this footing. Testators very often, though they know the law, try to evade it The Law Reports abound with instances of this. The power, so far as is material for the present purpose, is given in the following words:

"I hereby authorise and empower my wife and executrix S. M Surnomoyee Dassee and my executors and trustees to whom I give full permission and liberty to adopt after my decease a son." There can be no doubt that the only person to whom a power of adoption can be validly given is the wife of the person giving the power. If the testator intended, as he says, that his executors and trustees should execute this power jointly with his widow, it would be impossible to carry out this power. The only way, as far as I can see, by which any effect can be given to this power is by supposing that the testator intended to give the power to the wife alone, but required her to act with the consent of executors. This construction is, however, to my mind an impossible one, having regard to the other terms of the will.

In the first place paragraph 13 authorises the executrix, executor and trustees and the survivor of them to appoint any other person or persons to succeed them or him in the execution of the trusts of the will The adoption was one of the trusts of the will, and this power shows that he contemplated the adoption being made by persons other than the widow. Leaving paragraph 13 entirely out of consideration I think that paragraph 14*a* is conclusive on this question. He there says · "In case of any accident arising to cause my wife to depart her natural life before adoption of a male child my surviving executors are empowered to act with my full consent and direction to adopt a male issue." This to my mind shows conclusively that the testator did contemplate that the adoption should be made by persons other than his wife, and therefore there is no reason for giving a forced construction to the earlier paragraph, which gives the power.

Moreover, it is noticeable that whereas the testator gives to his executors powers to adopt on the death of the wife he does not give to the wife any power to adopt in case of the death of the executors. This shows that the testator imposed a greater confi-**[689]**dence in his executors than in his wife. I feel it impossible, having regard to all the terms of the will, to hold that the power was anything but a joint power, and was therefore bad.

Even if the power be a good one, namely, that the widow could adopt with the consent of the executors and trustees, I am of opinion that the death of the father, who was one of the executors, prevented the exercise of the power.

Besides his wife the testator appointed his father and uncle as executors and trustees. I have no doubt that this personal relationship operated in the testator's mind when including them in the power of adoption.

Even if the power be construed as giving a power to the widow with the consent of the executors, I think the nature of this particular trust and the relationship of the executors show that, although the power is given to the executors, it is intended to apply only to these particular persons and does not devolve upon other holders of the office.

In the case of *Bheemchurn Seal* v. *Hera Chunn Seal*, (1867) 2 Ind. Jur. N. S., 225, Mutty Lal Seal was described as executor, yet Sir BARNES PEACOCK considered that a personal confidence was reposed in him.

An authority to adopt must be strictly pursued. *Choudhry Pudum Singh* v. *Koer Oodoy Singh*, (1867) 12 Moo I. A., 356, and if the confidence here imposed be a personal one, it follows that the death of one of the persons whose consent is necessary to the execution of the power must destroy the power.

We have been referred to a recent decision of this Court—*Surendra Nandan* v. *Sailaja Kant Das Mahapatra*, (1891) I.L.R., 18 Cal., 385, in which Sir BARNES PEACOCK'S decision seems to have been considered, but beyond expressing their concurrence with the judgment of the Court below, the learned Judges give no reasons for their decision, and, as a matter of fact, in that case the widow was only enjoined to obtain the advice and opinion of the manager. **[690]** The consent was not a condition. Conditions, whether they be possible or impossible of fulfilment, must be considered, and unless they are strictly carried into effect, the power cannot be exercised—see *Rangubai* v. *Bhagirthibai*, (1877) I. L. R., 2 Bom., 377. In my opinion the adoption was bad, and on that ground the suit ought to fail. I desire also to express my opinion as to the other question which has been argued, namely as to the right to the accumulations.

The determination of this question depends upon the terms of the ninth paragraph of the will.

It was contended by the learned *Advocate-General* that by the provisions contained in that paragraph the widow got an interest for life by implication, but this is scarcely consistent with the direction that she should be paid a fixed monthly sum and that the residue was to be invested. There is no doubt that there is no immediate gift of the residue of the income It is to be accumulated during the lifetime of the widow. On that event happening it is to be determined who is to succeed. The question is whether a Hindu testator can direct the accumulation of the income of his property for an indefinite or any time without providing for the beneficial interest. The circumstance that the property has been given to trustees is wholly immaterial. A Hindu testator cannot create by a trust an interest which is otherwise incapable of creating, One of the best known of the several important

principles which were enunciated in the *Tagore* case was that a man cannot be allowed to do, by indirect means, what is forbidden to be done directly, and that a trust can only be sustained to the extent, and for the purpose of giving effect to those beneficiary interests which the law recognizes.

As I understand the Hindu law, there must be a present beneficial interest created in property in order to render the gift, whether under a will or *inter vivos*, valid. In an unreported case (*Gopal Lal Seal* v. *F. J. Marsden*) decided on the 11th March 1887, I expressed my opinion on the subject in the following words :—" I do not think that a gift of this description is valid according to Hindu law. According to that law there must, as I **[691]** understand it, be a present beneficiary in order to make a gift valid. There may be a gift in *future*, but there must also be a gift *in present*. The law of gifts and of wills is the same, and in order that there may be a valid gift the donor must immediately divest himself of the property in favour of some existing beneficiary, and in the same way with regard to wills there cannot be a gift to a person to come into operation at a future date, unless there be a gift to a beneficiary in the interim." This is, as I understand it, merely what was decided in the *Tagore* case. In the judgment of that case we find the following: "Their Lordships for the reasons stated are of the opinion that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must, either in fact or in contemplation of law, be in existence at the death of the testator."

I cannot see how a direction to accumulate can be valid unless there be a present gift to support the direction to accumulate. The fact that in cases where there is a minor beneficiary, accumulation can be allowed, and that it may be possible to accumulate income for the purpose of paying debts does not to my mind help us. In the former case accumulation is rendered necessary by the incapacity of the beneficiary and is allowed in order that he may obtain the greater benefit from the gift which is made to him. In the latter case, the direction to accumulate is in aid of the proper administration of the testator's estate, and is sometimes necessary for the due performance of his legal and moral obligation to pay his debts.

I have assumed that the accumulations follow the gift of the *corpus*. I am very doubtful whether under the terms of this will there is any gift of the income.

In my opinion there is no valid gift of the income during the life-time of the widow.

There remains one matter in contest. It was contended that, even if there was no gift of the property, the widow took as heir of the first adopted son and by the second adoption did not divest herself of her mother's estate. There is no doubt that by adoption a woman divests herself of her widow's estate. I cannot see in **[692]** principle why she cannot divest herself of her mother's estate in the same way as she can divest herself of her widow's estate. The act is hers, and the object of it is to create an heir to her husband. Why that second adopted son should have different rights in the estate than those enjoyed by the first adopted son I cannot see. In my opinion, by a second adoption, a widow divests herself of her mother's estate in the same way as she divests herself of her widow's estate on the first adoption.

I agree that the suit should be dismissed.

Maclean, C.J.—As regards the costs of the suit the order as to them in the Court below may stand. As regards the costs of the appeal and of the cross-objections, the parties to the suit who are *sui juris* not objecting, the

costs of all parties of the appeal and cross-objections may, as between solicitor and client, be paid out of the estate.

C. E. G.

Attorneys for the Appellants. Messrs. *G. C. Chunder & Co.*

Attorney for the Respondents Mr. *R. Butter.*

NOTES

[The Privy Council **affirmed** this decision in **(1900) 27 Cal, 996.**

As regards accumulations, see also (1901) 26 Bom, 449, (1906) 34 Cal., 5.]

[25 Cal. 692]

FULL BENCH REFERENCE.

The 3rd February, 1898.

PRESENT:

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN, MR. JUSTICE GHOSE AND MR. JUSTICE RAMPINI.

Mangun Jha and others .... Defendants

versus

Dolhin Golab Koer and others. ... .Plaintiffs.*

Limitation—Suit for damages for cutting and carrying away crops—Act XV of 1877, Schedule II, Articles 36, 39, 48, 49, and 109.

In a suit for damages for cutting and carrying away crops—

Held, by the Full Bench (RAMPINI, J., dissenting) such suit does not come within the terms of Art. 36† of Schedule II of the Limitation Act (XV of 1877).

* Reference to Full Bench in Appeals from Appellate Decrees Nos 426, 460, 461, 462, and 463 of 1896, against the Decree of Babu Jogadurlabh Mozumdar, Subordinate Judge, First Court of Zilla Tirhoot, dated the 18th December 1895, reversing the decree of Babu Joya Pershad Pande, Additional Munsif of Sitamarhi, dated the 28th June 1895.

† [Art 36 —

Description of suit.	Period of limitation	Time from which period begins to run.
For compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for.	Two years.	When the malfeasance, misfeasance or nonfeasance takes place.]

[693] *Per* MACLEAN, C. J. (TREVELYAN, J., *concurring*).—Assuming that the case does not come within the terms of Art. 39*, the case is governed by Art. 49†. The crops, though immoveable in the first place, become specific moveable property when severed, and the fact that the severance was a wrongful act, does not make any difference.

Per MACPHERSON, J.—The case is governed by Art. 49 or 48‡, as the crops, after they had been cut, come under the description of specific moveable property. Possibly, also, the case might be brought under Article 109, if it is not brought under Article 39.

Per GHOSE, J.—Article 49 applied to this case. *Surat Lal Mondal* v. *Umar Haji*, (1895) I. L. R., 22 Cal., 877, followed.

Per RAMPINI, J. (*dissentiente*).—The suit, as framed, not being one for compensation for trespass, Article 39 does not apply. Art. 48 or 49 also does not apply as they deal with property which is *ab initio* moveable, and cannot be held applicable unless the first wrongful act, viz, the conversion of the immoveable into moveable property, be disregarded. Art. 109§ also does not apply, as it referred to a case in which possession of immoveable property was withheld. Art. 36, therefore, applied to the case.

Essoo Bhayaji v. *The Steamship "Savitri"*, (1886) I. L. R., 11 Bom., 133, referred to.

Pandah Gazi v. *Jennuddi*, (1878) I. L. R., 4 Cal., 665, dissented from by TREVELYAN, J.

THE plaintiffs in this case sued for a declaration of their zerait rights in respect of certain lands and for recovery of damages for the cutting and carrying away of crops grown by them upon those lands. The material portions of the plaint were as follow:—

"5. On the 23rd November 1892 (the defendants) being emboldened by the order passed in the said Foujdari case, and misunderstanding the order, wrongfully cut and carried away the *dhan* crop of 10 bighas 12 cottahs of khas zerait land of the plaintiffs, which was grown on behalf of the plaintiffs, besides the *dhan* crop of the said land sold by auction. Through fear of recognizance, the servants of the plaintiff were unable to oppose and hinder the defendants strongly, although the zerait land did not lie in the land sold by auction, and neither the defendants nor Ramlal Kopur had any concern with the

* [Art. 39:-

Description of Suit.	Period of limitation.	Time from which period begins to run.
For compensation for trespass upon immoveable property.	Three years...	The date of the trespass.]

† [Art. 49:—

For other specific moveable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same.	Three years...	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.]

‡ [Art. 48:—

For specific moveable property lost or acquired by theft or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same.	Three years...	When the person having the right to the possession of the property first learns in whose possession it is.]

§ [Art. 109:—

For the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years...	When the profits are received, or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession.]

said zerait land and the crop thereof. This wrongful act of the **[694]** defendants has been highly prejudicial to the right of the plaintiffs. . . .

"6. Although the plaintiffs are in possession of the zerait land, they should get the *dhan* appropriated by the defendants. As it is difficult for the plaintiffs to get it from the defendants without suing in Court for the same, the plaintiffs are obliged to institute the present suit for damages in respect of the produce of the land as well as for declaration of their right to the zerait land cultivated by them.

"8. The cause of action accrued to the plaintiffs within the jurisdiction of this Court on the 23rd November 1892, when the *dhan* crop was cut and carried away.

"9. The plaintiffs pray for a decree as follows:—

(*a*) That upon determination of the plaintiffs' right and possession, it may be declared that 10 bighas 12 cottahs of land form a part of the plaintiffs' khas zerait and jote; that the *dhan* crop of 1300 Fasli was grown by the plaintiffs; that the defendants had no right to cut, loot and appropriate the crop, and that it was an illegal act of the defendants to cut and appropriate the *dhan* crop of the said zerait along with that of Ramlal Kopur's land sold by auction, taking advantage of the recognizance of the plaintiffs' servants.

(*b*) That upon adjudication of the point alluded to in the first prayer, and upon declaration of the plaintiffs' right to 10 bighas 12 cottahs of zerait land, as per undermentioned boundaries, situate in mauza Pangawa, Rs. 458-9-3 principal with interest, mesne profit on account of *dhan* crop of 1300 Fasli appropriated by the defendants may be awarded against the defendants." . . .

The plaint was filed on the 16th February 1895. The defendants did not raise any plea of limitation in the Courts below. On the merits, the first Court found in favour of the defendants on the question of cutting and taking away of crops and dismissed the plaintiffs' suit. On appeal, the Subordinate Judge found for the plaintiffs and decreed the suit estimating the damage sustained by plaintiffs at Rs. 212.

[695] The defendants preferred a second appeal to the High Court, and one of the objections raised was that the claim for damages was barred by limitation, as the suit was instituted more than two years after the date of the cause of action.

The Division Bench (TREVELYAN and STEVENS, JJ.) before whom the case came on for hearing, being of opinion that there was conflict of opinion between different rulings on this point, made the following ORDER OF REFERNCE to a Full Bench:

In those cases the learned Vakil for the appellants has raised the objection that the suits are barred by limitation. This objection was not taken in the Courts below, but, having regard to the terms of s. 4 of the Limitation Act, it is an objection we are bound to consider.

The suits were brought for, amongst other things, damages for the cutting and carrying away of crops. This question of limitation only concerns the suits so far as they claim such damages. The suits were brought more than two years and less than three years, after the crops are said to have been cut and carried away. There have been contradictory decisions of this Court as to what Article of the Limitation Act applies to a suit for cutting and carrying away crops. The first case is a decision of MITTER and PRINSEP, JJ., in *Shurnomoyee* v. *Pattarri Sirkar*, (1878) I. L. R., 4 Cal., 625, in which the learned Judges held that a suit of this kind is a suit for profits of

immoveable property belonging to the plaintiff wrongfully received by the defendant within the meaning of Act IX of 1871, Art. 109, which corresponds with Art. 109 of Act XV of 1877, and not a suit for compensation for any wrong, malfeasance, nonfeasance or misfeasance independent of contract within the meaning of Art. 40 of the Act of 1871. Art. 40 of Act IX of 1871 corresponds with Art. 36 of the present Act. According to that decision these suits would not be barred. But in the same volume, page 665, will be found a case, *Pandah Gazi* v. *Jennuddi*, (1878) I. L. R., 4 Cal., 665, decided by MITTER and MACLEAN, JJ., which holds that Article 40 is applicable. These two cases are directly in conflict. In a case, *Surat Lall Mondal* v. *Umar* [696] *Haji*, (1895) I. L. R., 22 Cal., 877, in which GHOSE and RAMPINI, JJ., differed, and which was reheard by NORRIS, J., in consequence of such difference of opinion, NORRIS and GHOSE, JJ., considered that Art. 36 of Act XV of 1877 did not apply, and RAMPINI, J., considered that it did apply. They dissented from the case to which we have referred in I. L. R., 4 Cal., 665, but did not refer the matter to a Full Bench.

In our opinion this point is one of importance, and as there are conflicting decisions of this Court on the subject we refer these appeals for the final decision of a Full Bench.

We may mention that a question of costs was raised, but, as the appeals have to go to the Full Bench, it is not for us to determine that question.

Babu *Sarada Charan Mitra* and Babu *Lakshmi Narain Singh* for the Appellants.

Babu *Umakali Mukerjee* and Babu *Baldeo Narain Singh* for the Respondents.

Babu *Lakshmi Narayan Singh* for the appellants contended that the suit was barred by the two years limitation prescribed in Art. 36, Schedule II of the Limitation Act (1877). The suit was not one for trespass but for compensation for crops carried away. [MACPHERSON, J.—The suit involved a trespass] Reading paragraph 5 of the plaint, it appears that the object of the suit is not for recovering damages for trespass on the land as in Art. 39. [MACPHERSON, J.—Why should not Art. 49 apply ?] That article relates to specific moveable property. Here the crops became moveable after the wrong, but when standing they were immoveable property. *Pandah Gazi* v. *Jennuddi*, (1878) I. L. R., 4 Cal., 665. [RAMPINI, J.—There may be two suits with two different limitations: two years for cutting away the crops; three years for removing them.] The case of *Shurnomoyee* v. *Pattarri Sirkar*, (1878) I. L. R.. 4 Cal., 625, takes a different view. But in that case there was no trespass at all I rely on the judgment of RAMPINI, J., in the case of *Surat Lall Mondal* v. [697] *Umar Haji*, (1895) I.L.R., 22 Cal., 877, and the case of *Essoo Bhayaji* v. *The Steamship "Savitri,"* (1886) I.L.R., 11 Bom., 133, as to Art. 49. Art. 48 also deals with specific moveable and is, therefore, inapplicable. The case of immoveable property being made moveable is not specially provided for, and Art. 36 would apply. Another point was urged on behalf of some of the defendants who appealed on the ground that they were not allowed costs although they were exempted from the claim of damages in the lower Court.

Babu *Umakali Mukerjee*.—On the question of costs, there was no decree against those defendants (2 to 5) and there could be no appeal by them, and further the appeal has been valued at Rs. 212 only, in respect of the damages decreed and not in respect of costs of these defendants. It is a question of discretion which cannot be interfered with in second appeal. As to defendant No. 1, the Civil Procedure Code authorized the lower Court to saddle him with all costs. *Shib Pershad Chuckerbutty* v. *Gunga Monee Debee*, (1891) 16 W. R.,

291, (293); *Radhapershad Singh* v. *Ram Parmeswar Singh*, (1882) I. L. R., 9 Cal., 797, (802).

As to the question of limitation, the Article here applicable is either 109, 39, 48, or 49. Art. 36 does not apply. In *Pandah Gazi* v. *Jennuddi*, (1878) I. L. R., 4 Cal., 665, the question was whether the limitation was one year under Art. 26 of the old law or not. The present question was not decided. That article is now incorporated in Art. 49 of the present Act. [TREVELYAN, J.—If so, Article 49 also would not apply under that ruling]. Art. 36 would apply only if there be no other article applicable to the case. [RAMPINI, J.—Here, cutting of the crops is the principal wrong, that brings you under Art. 36.] The plaintiff wants the value of the *dhan* and nothing for cutting of the standing crops. He does not, it is true, say that he was dispossessed, but that should not be the reason for cutting down the period of three years to two. Paragraph 5 and prayer in the plaint would shew that the claim was for mesne profits. **[698]** Art. 109 would then apply. *Shurnomoyee* v. *Pattarri Sarkar*, (1878) I. L. R., 4 Cal., 625. Then, again, reaping may be considered as trespass on land, and Art. 39 would apply. The other wrong is misappropriation, that brings the case under 48 or 49. In any view three years is the limitation for the suit. RAMPINI, J.'s judgment in *Surat Lall Mondal* v. *Umar Haji*, (1895) I. L. R., 22 Cal., 877, was based on a consideration of the frame of the suit. In this case *dhan* or the value of the crop, and not of the plant or standing crop, is claimed specifically. Art. 109, 39, 48, or 49, applies, Art. 36 has no application.

Babu *Lakshmi Narain Singh* in reply read Wharton's Law Lexicon p. 613, and section 211 of the Civil Procedure Code on the construction of Art. 109, and urged that none of the Articles 39, 48, 49, fully contemplated a case like the present. Art. 36 would therefore apply.

On the question of costs the judgment of PIGOT, J., in *Secretary of State for India in Council* v. *Marjum Hosein Khan*, (1885) I. L. R., 11 Cal., 359 was cited

The Full Bench (MACLEAN, C.J., MACPHERSON, TREVELYAN, GHOSE and RAMPINI, JJ.) delivered the following **judgments**:—

Maclean, C.J.— The short point we have to decide is whether the case falls within Art. 36 of the Second Schedule of the Limitation Act, or whether it is within some one or other of the articles to which I will refer in a moment. According to the reference, the suit was brought for, amongst other things, damages for cutting and carrying away crops, and it is admitted that, if Art. 36 applies, the suit is out of time, but that if Art. 39 or Arts. 48 or 49 or Art 109, which are the articles upon which the plaintiff relies, apply, then, as the period of three years, which is the period under the latter articles, had not elapsed when the suit was instituted, it was brought within time, and the statute of limitations is not a bar. To my mind Art. 36 does not apply to this case. In the first place that section is a general one and only applies when the particular **[699]** case is not specially provided for in the Act. Again, the words "malfeasance," "misfeasance" or "nonfeasance" are scarcely the terms one would ordinarily apply to such a tort as the present. They are terms which more generally, at any rate, I do not say entirely, are applied to some wrongful act committed by persons standing in a fiduciary or *quasi*-fiduciary character, such as executors, trustees, and directors of companies. But be this as it may, I think this particular case is otherwise specially provided for in the Act. Looking at the pleadings, and the nature of the relief sought, I am by no means satisfied that the case does not come within Art. 39, namely, compensation for trespass upon immoveable property. But assuming that not to be so, I think the case comes within

Art. 49, and I agree in the judgment of Mr. Justice GHOSE, in the case of *Surat Lall Mondal* v. *Umar Haji*, (1895) I. L. R., 22 Cal., 877. It is difficult to say that, under the circumstances of this case, the crops having been severed from the soil, it was not specific moveable property in respect of which the plaintiff was seeking compensation for the wrongful taking away of the same. Though immoveable in the first place, the crop became moveable property specific in the sense that it was in specie, as soon as it was severed from the soil, and I do not see why, for the purposes of this article, the fact that the severance was a wrongful act on the part of the tortfeasor ought to make any difference. Seeing that the defence is a statutory one, it is for the defendant to show clearly that the case comes within Article 36. However, agreeing as I do with Mr. Justice GHOSE'S judgment in the case I have referred to, I do not think I can usefully add anything to what he has said.

With respect to the question of costs I see no reason whatever for interfering upon that point with the decision of the Court below.

Macpherson, J.—I agree. I would only add that I cannot see any real conflict of opinion in the cases of *Shurnomoye* v. *Pattari Sirkar*, (1878) I. L.R., 4 Cal., 625, and *Pandah Gazi* v. *Jennuddi*, (1878) I.L.R., 4 Cal., 665, or between these **[700]** cases, and the case of *Surat Lall Mondal* v. *Umar Haji*, (1895) I. L. R., 22 Cal., 877. Mr. Justice GHOSE has clearly stated in the latter case the grounds on which he distinguished the case in I. L. R , 4 Cal., 665. Taking the question referred to us in this case to be whether Art. 36 applies to facts of the case as found, I agree with the learned Chief Justice that it does not apply. That article only applies to cases which are not otherwise specifically provided for by the Act. In this case the plaintiff's direct complaint is of an act of trespass on his land coupled with the cutting and carrying away of the crops off his land. Clearly he would be entitled to recover damages for trespass. The plaintiff claimed in addition damages for the crops which the defendants wrongfully cut and carried away, and although standing crops are immoveable property, I do not see on what ground we can hold that crops, after they have been cut, do not come under the description of specific moveable property, to which Art. 49 or 48 might apply. Possibly also the case might be brought under Art. 109, if it is not brought under Art. 39. It seems to me immaterial, or of very little importance, under which of the other articles it comes, because the plaintiff would, in any case, have three years from the date of the cause of action within which to bring his suit, and consequently would be in time. On these grounds I think that the appeal must be dismissed.

Trevelyan, J.—I entirely agree with the view expressed by the learned Chief Justice. I only wish to add this in regard to what Mr. Justice MACPHERSON has stated, although for the purposes of this appeal, it seems to me unnecessary to decide it. At the time of the reference, I thought, and I still think, that there is a distinct conflict of opinion between the decision of the learned Judges in the case reported in I. L. R., 22 Cal , and the decision of Mr. Justice MITTER reported in I.L.R., 4 Cal., 665. I think that the conclusion in the latter case as to Art. 40 of the second Schedule of the Limitation Act IX of 1871 is equivalent to a conclusion that Art. 36 of the second Schedule of the Limitation Act XV of 1877, which differs only from Art. 40 of Act IX of 1871 in the **[701]** prefixing of the word "wrong" to the words "malfeasance," "misfeasance" and "nonfeasance" would be applicable, whereas the ruling in the case in I. L. R., 22 Cal., is that it is not applicable. But, as I said before, having regard to the facts of this case and the judgment of the learned Chief Justice, it does not really very much matter whether those two cases agree or whether they differ.

Ghose, J.—I agree with the Chief Justice in holding that Art. 36 of the Limitation Act does not apply, but that Article 49 does apply, to the facts of this case. In the case of *Surat Lal Mondal* v. *Umar Haji*, (1895) I. L. R., 22 Cal, 877, I have fully given my reasons for arriving at the conclusion at which I then did, and at which I do now arrive; and I do not think I should be justified in referring to them again.

As regards the case decided by Mr. Justice MITTER and Mr. Justice MACLEAN reported in I. L. R., 4 Cal, 665, to which reference has been made, it is sufficient to say that for the reasons I gave at page 886 of I. L. R., 22 Cal., I do not think that *that* case decided the precise point which is raised before us in this case.

Rampini, J. -I regret I am unable to agree with the view taken of this case by the learned Chief Justice and by my learned Colleagues. I am of opinion that Art. 36 of the second Schedule of the Limitation Act applies to this case. I may say briefly that my reasons for thinking so are the same as those which I gave in my judgment in the case of *Surat Lall Mondal* v. *Umar Haji*, (1895) I. L. R, 22 Cal., 887. It appears to me that this case is on all fours with that case. The plaintiff in this case seeks to recover damages for the cutting and carrying away of his crops by the defendants, and consequently it appears to me that no other article of the Limitation Act, except Art. 36, will apply to such a case. The learned pleader for the respondent has argued that the case comes under either Art. 39 or Arts. 48 and 49 or Art. 109, but it appears to me that none of these articles will apply.

Art. 39 will not, in my opinion, apply because the suit, as framed, is not one for compensation for trespass upon immoveable [702] property. Arts. 48 and 49 will not apply, because this is not a suit for wrongfully misappropriating or injuring specific moveable property or for compensation for taking and determining the same. It is a suit, as is clearly shown from paragraph 5 of plaint, for the cutting and carrying away of standing crops which are immoveable property, whereas Arts. 48 and 49 can only apply to moveable property, which is *ab initio* moveable, and has not been converted from immoveable to moveable property by the act of the tortfeasor. In my opinion Arts. 48 and 49 cannot be held applicable unless the first wrongful act committed by the tortfeasors (in many cases, the principal wrong), viz., the conversion of the immoveable into moveable property, be disregarded. Article 109 will not apply because that article appears to me to refer to a case in which possession of immoveable property has been wrongfully withheld from the plaintiff. That is not the case in the present suit. The defendants disclaim all interest in the land, and it is not alleged that they wrongfully took possession of the land. That this is the correct interpretation of Art. 109 is apparent from the language of the article itself, from the definition of mesne profits given* in section 211 of the Code of Civil Procedure, and from the description of "an action for mesne profits" given at page 479 of Wharton's Law Lexicon, 9th edition, where it is said,—"An action for mesne profits is an action of trespass brought to recover profits derived from land whilst the possession of it has been improperly withheld."

For these reasons I am of opinion that Art. 36 applies, and I am supported in this view by the decision in the case of *Pandah Gazi* v. *Jennuddi*, (1878) I. L. R., 4 Cal., 665. I may also add that, as a matter of policy, it is a matter of some importance that the period of limitation in such cases should be short. In the case of *Essoo Bhayaji* v. *The Steamship "Savitri"*, (1886) I.L.R., 11 Bom., 133, FARRAN, J., says: "There are no cases in which it is more desirable that the evidence by which they are supported or rejected should be promptly given and scrutinized than in actions of tort," and in my opinion this observation is

[703] particularly applicable to cases of cutting crops, so common in Bengal. I have only to add that I have no reason to dissent from the judgment of the learned Chief Justice with regard to the costs of this case.

Maclean, C.J.—It is admitted that the appeals Nos 460, 461, 462 and 463 will be governed by this decision. The same order will be made in those cases also.

S. C. C. *Appeal dismissed.*

NOTES.

[I. As regards the scope of Art. 36 of the Limitation Act, see also (1909) 36 Cal., 141 : 12 C.W.N., 1090 : 9 C.L.J., 109 ; (1913) 25 M.L.J., 447 F.B. ; (1912) 17 I.C., 906 ; (1907) 29 All., 615. In (1913) 17 C.W.N., 308, however, the case in 36 Cal., 141 was **reversed** on the ground that standing crops when severed from the land were moveable property, though the act of severance might itself be a wrong ; and that as such, Arts. 48 and 49 would be the proper Articles to apply and not Art. 36. See also (1909) 10 C.L.J., 25 ; (1912) 23 M.L.J., 618 ; (1909) 10 C.L.J., 226.

II. As regards the onus of proof, see also (1911) 14 C L.J., 598 : 14 C.W.N., 96 : 11 I.C., 164.

III. Where the necessary and sufficient facts are on the record, the objection of limitation may be taken at any stage of appeal. (1901) 28 Cal., 86 ; (1902) 6 C.W.N., 903 ; (1903) 9 C.W.N., 56 ; (1900) P.L.R., 45 ; (1907) 34 Cal., 941 : 11 C.W.N., 959 : 6 C.L.J., 237.]

[25 Cal. 703]

The 16th March, 1898.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN,
MR. JUSTICE BANERJEE AND MR. JUSTICE JENKINS.

Kedar Nath Raut............Judgment-debtor
versus
Kali Churn Ram (Decree-holder) and Khubi Lal.........Auction-Purchaser.*

Civil Procedure Code (Act XIV of 1882), s. 310A—Sale in execution of mortgage decree—Application by mortgagor under s. 310A, Civil Procedure Code—Transfer of Property Act (IV of 1882), s. 104, Rules framed under Civil Procedure Code Amendment Act (V of 1894)

Held by the Full Bench :—

Section 310A of the Civil Procedure Code (Act XIV of 1882, as amended by Act V of 1894) does not apply to sales of mortgaged property under the Transfer of Property Act (IV of 1882.)

The rules framed by the High Court (Circular Order No. 13, dated 27th April 1892) under the provisions of s. 104 of the Transfer of Property Act do not make s. 310A applicable to such sales.

Ashruf Ali Chowdhry v. *Net Lal Sahu*, (1897) I. L. R., 23 Cal., 682, overruled ; *Raja Ram Singhji* v. *Chunni Lal*, (1897) I. L. R., 19 All., 205, dissented from.

Quere.—Whether a rule by the High Court under s. 104 of the Transfer of Property Act making s. 310A of the Civil Procedure Code applicable to sales of mortgaged property under the said Act would not be *ultra vires*.

KALI CHURN RAM instituted a suit for sale on a simple mortgage bond against Kedar Nath Raut, and obtained a decree on [704] the 29th January

* Full Bench Reference on Rule No. 2180 of 1896, issued by TREVELYAN and BEVERLEY, JJ., on 8th September 1896, against an order of Babu Sripati Chatterjee, Munsif at Arrah, dated the 17th February 1896.

1895, declaring the amount due on account of the mortgage and costs, and directing the defendant to pay the amount within three months from the date of decree. The decree was made absolute on the 22nd June 1895, and proclamation for sale issued. After several postponements, the sale was held on the 7th December 1895, and the mortgaged property was sold to Khubi Lal.

On the 10th December 1895, one Abdul Hye, alleging himself to be sublessee of the mortgaged property under the defendant applied to deposit the decretal amount and the purchasers' compensation under s. 310A of the Civil Procedure Code and made the deposit on the 12th December. On the 23rd December, the judgment-debtor applied to deposit the decretal amount, stating that the amount deposited by Abdul Hye really belonged to the judgment-debtor, but as that deposit was made in the name of Abdul Hye, a fresh deposit was rendered necessary. The correct amount was ascertained from the Court and deposit was made by the judgment-debtor on the 4th January 1896.

The decree-holder and the auction-purchaser raised several objections to the sale being set aside. The Munsif held with reference to one of the objections that he had no power to set aside sales under the Transfer of Property Act under the provisions of s. 310A of the Civil Procedure Code unless and until the High Court exercised its powers under s. 104 of the Transfer of Property Act and made s. 310 applicable to such sales The judgment-debtor's application was refused and the sale was confirmed on the 17th February 1896.

The judgment-debtor preferred an appeal to the District Judge, but the appeal was dismissed on the ground that no appeal was provided by law in respect of an order passed on an application under s. 310A.

The judgment-debtor then moved the High Court (TREVELYAN and BEVERLEY, JJ.) and that Court issued a rule calling upon the opposite party to shew cause why the order, dated the 17th February 1896, should not be set aside.

This rule (No 2180 of 1896) came on for hearing on the 27th [705] July 1897, before Mr. Justice TREVELYAN and Mr. Justice STEVENS who referred the case to a Full Bench.

The ORDER OF REFERENCE was as follows —

The question in this case is whether s. 310A of the Civil Procedure Code applies to sales of mortgaged property under the Transfer of Property Act. The only reported case of this Court on this question is *Ashruf Ali Chowdhry* v. *Net Lal Sahu*, (1896) I. L. R , 23 Cal., 682. In that case it was held that this section applied. The learned Judge then says "that by the rules framed by this Court (C. O. No. 13, dated the 27th April 1892) the provisions of the Civil Procedure Code are made applicable to sales of mortgaged property ordered by the Court under the Transfer of Property Act." On referring to the rules in question we find that the Code generally was not made applicable, but certain sections only were applied. As s. 310A had not been passed at the time the rules were framed, it is of course not included among the sections mentioned. It is only by the rules passed under s. 104 of the Transfer of Property Act that any portion of the Civil Procedure Code applies to Chapter IV of the Transfer of Property Act. As s. 310A has not been applied by the rules, we are unable to see how force can be given to it. Having grave doubts as to the correctness of the decision to which we have referred, we refer this matter for the final decision of a Full Bench.

The decision, which we have mentioned, was followed by a Division Bench of this Court in Appeal from Appellate Order No. 251 of 1895, decided on the 8th of June 1896.

Circular order No. 13*, dated 27th April 1892, alluded to in the reference runs thus :—

(1) An application under s. 89 of the Transfer of Property Act shall be made by means of a verified petition stating the facts.

(2) If the Court passes an order directing that the property, or any part of it, shall be sold, it shall issue a proclamation of sale and cause it to be served in the manner provided by the Code of Civil Procedure for the service of proclamations regarding the sale of immoveable property.

[706] (3) Sections 286 to 294, both inclusive, of the Code of Civil Procedure shall apply to such sales.

(4) Sections 304 to 319, both inclusive, and ss. 328 to 335 of the Code of Civil Procedure, shall apply to proceedings subsequent to sale under a mortgage.

(5) The procedure to be followed in the execution of a decree passed under s. 90 of the Transfer of Property Act is that prescribed by the Code of Civil Procedure.

Section 310A of the Code of Civil Procedure was added to the Code by Act V of 1894, which was passed on 2nd March 1894.

The reference came on for hearing before the Full Bench on the 28th January 1898.

Babu *Karuna Sindhu Mukerjee* (Babu *Asutosh Mookerjee* with him) for the petitioner contended that under the rule of the circular No 13, ss. 304 to 319 of the Code having been applied to mortgage decrees, 310A, which was only an addition to 310 should also be applied, the provision was one of procedure only, and the enumeration of the sections was not exclusive. *Achalabala Bose* v. *Surendra Nath Dey*, (1897) I. L. R., 24 Cal., 766 (772): 1 Cal. W. N., 550 (555), *Jogodanund Singh* v. *Amrita Lal Sircar*, (1895) I. L. R., 22 Cal., 767. Section 310A is, in its scope and purpose, retrospective. Assuming it to be a section conferring a right, it may be extended to mortgage cases. In *Raja Ram Singh* v. *Chunni Lal*, (1897) I. L. R., 19 All., 205, 208, s. 291 of the Code has been extended, although s. 89 provided that the right of redemption was extinguished. The same view was taken in a case, *Vallabha Valiya Rajah* v. *Vedapuratti*, (1895) 5 Mad. L. J., pp. 282, 289: I. L. R., 19 Mad., 40. The correct view appears to be that the Code is applicable to all cases, except as otherwise provided for in the Transfer of Property Act. The latter enactment is not complete by itself and cannot exclude the general procedure, and the rule made under s. 104 was not meant to be exhaustive. *Ashruf Ali Chowdhry* v. *Net Lal Sahu*, (1896) I. L. R., 23 Cal., 682. Before the rules of the High Court came into operation in 1892, the Code was made applicable in the mofussil to all cases under the Transfer of Property [707] Act, and that was for ten years from 1882 when the Act was passed. The Privy Council has taken the same view—*Brij Mohun Thakur* v. *Rai Uma Nath Chowdhry*, (1892) I. L. R., 20 Cal., 8.

Syed Shumsul Huda for the opposite party.—When the rules were framed s. 310A had no existence, and the rule that "ss. 304 to 319 shall apply," did not include 310A. It could not, moreover, have been intended that any future alterations should be incorporated in the rule. The provision of s. 310A is also one which does not come within the purview of s. 104 of the Transfer of Property Act. The application of that section (310A) would not be "consistent" with the Act nor would it "carry out the provisions" of Chapter IV. Reads s. 89 and s. 88. The application of 310A would involve a variation in the decree. It would also be inconsistent in the case of a sale on a second mortgage s. 96. The case cited from I. L. R., 19 Allahabad, is not in point.

***Calcutta Gazette* of 9th April 1892, Part I, p. 414, and *Assam Gazette* of 16th April 1892, Part III, p. 272.

There is only an *obiter dictum* on the present question. As to the general application of the Code, *vide Deefholts* v. *Peters*, (1887) I. L. R., 14 Cal., 631; *Himatram* v. *Khushal Jethiram Gujar*, (1893) I. L. R., 18 Bom., 98; Claim sections were held inapplicable.

Babu *Karuna Sindhu Mukerjee* in reply.

The **judgments** of the High Court (MACLEAN, C.J., MACPHERSON, TREVELYAN, BANERJEE and JENKINS, JJ.) were as follows:—

Maclean, C.J.—The question we have to answer is, whether or not s. 310A of the Code of Civil Procedure applies to a sale of mortgaged property under a decree made in accordance with the provisions of the Transfer of Property Act. The question has arisen by reason of the decision in *Ashruf Ali Chowdhry* v. *Net Lal Sahu*, (1896) I. L. R., 23 Cal., 682, from which the referring Judges, TREVELYAN and STEVENS, JJ., dissented. That case appears to me to be based upon the view that under rules framed by this Court (C. O. No. 13, dated 27th April 1892) "the provisions of the Code were made applicable to sales of mortgaged property ordered by the Court **[708]** under the Transfer of Property Act." I think this, which is the foundation of that judgment, is a mistake, the rules in question only make certain sections of the Code applicable to such sales, and not the whole Code. Section 310A of the Civil Procedure Code only became law in 1894, whilst the above rules came into effect in April 1892. The judgment-debtor, the mortgagor, has contended that the property was sold "under Chapter 19" of the above Code, within the meaning of s. 310A. That, to my mind, is a fallacy; the property was sold under the decree made in pursuance of the provisions of the Transfer of Property Act. As s. 310A had not been passed at the time the above rules came into effect, that section could not have been included among those mentioned in the rules in question. But even if it had been, I question whether such a rule would not have been *ultra vires*. Section 104 of the Transfer of Property Act only enables the High Court to make rules "consistent with this Act" (The Transfer of Property Act) "for carrying out . . . . the provisions contained in this chapter." Let us consider what the effect would have been of a rule which made or purported to make s. 310A applicable to such a sale as that in question. Under s. 89 of the Transfer of Property Act, if an order for an absolute sale be passed, the mortgagor's right to redeem and the security are extinguished and the proceeds of sale are to be applied according to the provisions of s. 88 of the same Act. Those are the mortgagee's rights under that Act. But if s. 310A of the Code is to apply to such a case, the mortgagee's rights are materially affected as are those of the purchaser, since, after the sale has been made, the mortgagor, on certain terms, may yet redeem his property. In other words, the period for redemption is substantially extended. If, then a rule had been made by the High Court making s. 310A applicable to such a sale, it seems to me exceedingly doubtful whether such a rule would have been "consistent with the Act." And in the case of a sale ordered at the suit of a puisne mortgagee or where there are a succession of puisne incumbrances inconvenience at least, if not substantial difficulties, might arise from applying s. 310A to a sale in such a case.

Whilst there is good reason for such a section as 310A **[709]** in relation to sales of property, other than mortgaged property, there is no such reason as regards the latter. In the former case the sale may have been hurried on, the debtor may consequently not have been able to get the money, and the Legislature may have reasonably thought that the debtor should have one more chance of, perhaps, retaining his ancestral property, by paying the money on certain terms. But this reasoning has no application to the case

of mortgaged property, where under the decree the mortgagor is given at least six months to redeem. The case of *Raja Ram Singhji* v. *Chuni Lal*, (1897) I. L. R., 19 All., 205, is cited by the applicants as an authority in their favour, but the express point we are now discussing was not decided in that case, and the observations of the Judges were admittedly *obiter dicta*. I am unfortunately unable to concur in them.

It is urged that the provisions for the execution of decrees in the Code of Civil Procedure are general in their application, and apply to the sales of all mortgaged properties, where the decrees have been made under the Transfer of Property Act. I am unable to accede to this view, for, if this were so, it is very difficult to see why s. 104 was introduced into the Act. In other words, if the whole of the provisions of the Code as to the execution of decrees apply to a sale such as that in question, s. 104 of the Transfer of Property Act, was quite unnecessary. But it is abundantly clear that the Legislature left it to the High Court to frame rules consistent with the Act to carry out the provisions of that particular chapter of that Act, some of which relate to the sale of mortgaged properties. In the face of this particular section (s. 104) it is difficult to say that the provisions of the Code of Civil Procedure were to apply, and least of all, a provision which was not even law when the Transfer of Property Act was passed. I may add that to apply s. 310A to the sale of mortgaged properties in Calcutta would not only, in my opinion, have a mischievous tendency, but would, I consider, be inconsistent with the practice which has hitherto prevailed. For these reasons I answer the question by saying that s. 310A of the Civil Procedure Code does not apply to sales of mort-**[710]**gaged property under the Transfer of Property Act. The rule must be discharged with costs, including the costs of this reference.

Macpherson, J.—I agree.

Trevelyan, J.—I also agree.

Jenkins, J.—I agree with the Chief Justice.

Banerjee, J.—The question referred to us is whether s. 310A of the Civil Procedure Code applies to sales of mortgaged property under the Transfer of Property Act.

I agree with my learned colleagues in thinking that the question ought to be answered in the negative; and I base my decision upon this short ground.

Section 310A, as its language clearly shows, applies by its own force only to sales of immoveable property under the chapter of the Civil Procedure Code in which it is included; and it may apply to any other sales to which it may be made applicable expressly or by necessary implication. Now the sale in this case was one not under the Code of Civil Procedure, but under the Transfer of Property Act; that is under the rules made by this Court under s. 104 of that Act; and neither by these rules, nor by any other rule or law, has s. 310A been extended to such a sale. Section 310A cannot, therefore, apply to the sale in question.

It was argued that as by the rules made by this Court under s. 104 of the Transfer of Property Act, most of the provisions of the Code of Civil Procedure are made applicable to sales under that Act, such sales should be held to be sales under Chapter XIX of the Code, and s. 310A should be held applicable to them in consequence; and in support of this argument the case of *Ashruf Ali Chowdry* v. *Net Lal Sahu*, (1896) I. L. R., 23 Cal., 682, was relied upon. The case cited is no doubt in point. But I must respectfully dissent from it, as the sale is one under the rules made by this Court and not under Chapter XIX of the Code of Civil Procedure, and none the less so, because certain of

the provisions of that chapter have been made applicable to it. Section 310A had not been enacted when the rules in question were made by this Court, and [711] these rules do not say that sales under the Transfer of Property Act are to be held under Chapter XIX of the Code of Civil Procedure, or that the provisions of that chapter, taken as a whole, shall apply to such sales. The enactment of s. 310A cannot, therefore, affect such sales.

In this view of the case I think it unnecessary to decide whether this Court has the power under s. 104 of the Transfer of Property Act to make s. 310A apply to sales under that Act. If it had been necessary to decide that question, I should have been inclined to answer it in the affirmative.

S. C. C. *Rule discharged.*

NOTES.

[The corresponding provisions of the Transfer of Property Act, 1882, have been added on to the Civil Procedure Code, 1908, in Order 34. This decision is no longer law and the Legislature has accepted the views of the other High Courts, (1902) 25 Mad., 244; (1898) 22 Mad., 286; (1900) 25 Bom., 104; (1897) 19 All., 205.

In (1900) 4 C.W.N., 474, the scope of this decision was explained having regard to the rules of the High Court framed under sec. 104, T.P.A., 1882. See also (1908) 7 C.L.J., 581; 12 C.W.N., 282; (1910) 12 C.L.J., 65; (1903) 8 C.W.N., 102; (1907) 7 C.L.J., 1; (1899) 28 Cal., 73.]

[25 Cal. 711]

APPELLATE CRIMINAL.

The 24th March, 1898.

PRESENT:

MR. JUSTICE AMEER ALI AND MR. JUSTICE HILL.

Taju Pramanik and others............Appellants

versus

Queen-Empress............Respondent.*

Charge to the Jury—Misdirection—Criminal Procedure Code (Act X of 1882), s. 423—Setting aside verdict of the jury—Power of Appellate Court to deal with the case.

It is the duty of the Judge to call the attention of the jury to the different elements constituting the offence and to deal with the evidence by which it is proposed to make the accused liable. Failure to do so amounts to misdirection.

Queen-Empress v. *Balya Somya*, (1890) I. L. R., 15 Bom., 369, followed.

Statements by some of the accused persons, which do not amount to a confession, and which do not in any way incriminate them, are not admissible in evidence against any persons other than those making them. Omission to direct the jury that in dealing with the evidence against the accused other than those making the statements they are not to take into consideration such statements, also amounts to misdirection.

If the verdict of the jury is set aside on any of the grounds mentioned in cl. (*d*) of s. 423 of the Criminal Procedure Code (Act X of 1882) then there is no restriction on the powers of the Appellate Court to deal with a case of which it has complete seizin in any of the manners provided in that section. [712] The law nowhere lays down that when the verdict of the jury is set aside the Court must necessarily direct a new trial.

* Criminal Appeal No. 110 of 1898 against the order of F. S. Hamilton, Esq., Additional Sessions Judge of Mymensingh, dated the 3rd of December 1897.

Wafadur Khan v. *Queen-Empress*, (1894) I. L. R., 21 Cal., 955, dissented from. The course adopted in *Queen-Empress* v. *O'Hara*, (1890) I. L. R., 17 Cal., [642] *Regina* v. *Naoroji Dadabhai*, (1872) 9 Bom. H. C., 358, and *Queen-Empress* v. *Haribole Chunder Ghose*, (1876) I. L. R., 1 Cal. 207, followed.

THE facts of the case sufficient for the purpose of this report appear from the judgment.

Babu *Promotho Nath Sen* appeared on behalf of the Appellants.

The *Deputy Legal Remembrancer* (Mr. *Gordon Leith*) appeared on behalf of the Crown.

The **judgment** of the High Court (**Ameer Ali** and **Hill, JJ**) is as follows :—

Eight persons were charged in the Sessions Court of Mymensingh under ss. 395 and 412 of the Indian Penal Code and tried with a jury on the 3rd of December 1897. Four of the men so charged were acquitted; against the remaining four named, respectively, Taju Pramanik, Kasir Khan, Shahabatullah *alias* Sadatullah and Surat Khan the jury returned an unanimous verdict of guilty. Surat Khan was convicted under s. 412 and sentenced by the Additional Sessions Judge to six months' rigorous imprisonment, Taju Pramanik was convicted under section 395 and sentenced to three years' rigorous imprisonment; whilst Kasir Khan and Shahabatullah *alias* Sadatullah were convicted under s. 395 read with s. 75 and sentenced to four and five years' rigorous imprisonment respectively.

On appeal it has been contended before us that the verdict of the jury was erroneous owing to the misdirection of the learned Sessions Judge in not calling their attention either to the ingredients which constitute the offence of dacoity or to the evidence affecting the appellants in relation to the charge under s. 395. It is said that the learned Sessions Judge merely read to the jury the definition of dacoity and left it to them to apply the law; and that **[713]** considering the complex character of the offence he ought to have explained the law to the jury with special reference to the facts proved in the case. It is also contended that the learned Judge was wrong in admitting against the appellants the statements of two men who were also accused in the case and certainly in not calling the attention of the jury to the fact that those statements were not admissible against the appellants, and that no weight should be attached to them in considering the case against any of the accused other than those making them. There are other contentions raised in connection with the question of misdirection, to which we think it unnecessary to refer, as, in our opinion, the verdict must be reversed on the two grounds to which we have already adverted.

In our opinion it was not sufficient for the Judge merely to read to the jury the definition of dacoity, and to leave it to them to find out whether the evidence produced for the prosecution made out a case under s. 395 against the accused. It was the duty of the Judge to call the attention of the jury to the different elements constituting the offence, and to deal with the evidence by which it was proposed to make the accused liable under the section. His failure to do so, in our judgment, amounts to misdirection. The charge of the learned Sessions Judge under section 412 seems to us equally defective. In the case of *Queen-Empress* v. *Balya Somya*, (1890) I. L. R., 15 Bom., 369, the accused were charged with retaining stolen property under s. 411 of the Indian Penal Code. The Sessions Judge, in his charge to the jury, merely directed them to find whether the property was stolen, and whether it was retained by the accused. The Bombay High Court held that the charge was defective and amounted to a misdirection. It appears to us that in the present

case also it was incumbent on the Sessions Judge to have explained to the jury that, in order to convict the accused under s. 412, it was necessary to find they retained or had possession of the goods with guilty knowledge. We think also that the Judge ought to have brought to the notice of the jury the fact that the appellants, at the time of the search, were in Police custody. It would then **[714]** have rested with the jury to draw any inference of fact they chose regarding the *bonâ fides* of the search.

As regards the second contention, namely, the improper admission of the statements made by some of the accused, it is enough to say that those statements do not amount to a confession. They do not in any way incriminate the persons making them. The learned Sessions Judge, in his charge to the jury, stated as follows: "There being no evidence against Basir and nothing against Haran, but an uncorroborated statement of the accused Wazir, on which it is not safe to rely without corroboration, I direct you to return a verdict of not guilty against them."

But the Judge did not direct the jury that in dealing with the evidence against the present appellants they were to omit entirely from consideration the statements made by Fakir and Uzir, and we are distinctly of opinion his failure to do so has resulted in a miscarriage of justice. Those statements, without a direction from the Judge to the effect that they were not admissible in evidence against any person other than the men making them, must have weighed with the jury in bringing in a verdict of guilty against the present appellants, certainly against Shahabatullah *alias* Sadatullah, against whom there is no evidence on which he could possibly be convicted under s. 395 or s. 412.

Upon these grounds we are of opinion that the verdict of the jury must be reversed, and we accordingly reverse it. The verdict being thus set aside, we have under s. 423 the power to deal with the case upon the facts; and after going through the evidence we are of opinion that Shahabatullah *alias* Sadatullah must be acquitted and the other two appellants retried.

Mr. *Leith* however contends on the authority of the case of *Wafadur Khan* v. *The Queen-Empress*, (1894) I. L. R., 21 Cal., 955, that we have no power to consider whether the evidence is sufficient or not against any of the accused, and the only thing we can do, if we find the verdict must be reversed, is to direct a retrial. No doubt this proposition is broadly laid down in that case, but we are not prepared to agree with the view of the law enunciated there. We **[715]** do not, however, think it necessary to refer the question to a Full Bench as, in our opinion, the course taken by the full Court in the case of *The Empress* v. *O'Hara*, (1890) I. L. R., 17 Cal., 642, fully warrants the view we take of the law. The same course was adopted by the Bombay High Court in the case of *Regina* v. *Nauroji Dadabhai*, (1872) H. C., 9 Bom., H.C., 358, and by this Court in that of *The Empress* v. *Huribole Chunder Ghose*, (1876) I. L. R., 1 Cal., 207. These cases are not referred to by the learned Judges in *Empress* v. *Wafadur Khan* who proceed simply on the principle laid down in *Makin* v. *The Attorney-General for New South Wales*, (1894) L. R., A. C., 57 We admit that theoretically the principle enunciated in Makin's case is of considerable importance. But it seems to us the policy of the law in this country is different, and that the Legislature has, with a distinct purpose, vested the Appellate Court with very large powers. A reference to s. 423 of the Criminal Procedure Code will make clear our meaning on this point. That section deals with the powers of the Appellate Court and runs as follows:—

"The Appellate Court shall then send for the record of the case, if such record is not already in Court, after perusing such record, and hearing the

appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under s. 417, the accused, if he appears, the Court may, if it considers there is no sufficient ground for interfering, dismiss the appeal, or may—

(*a*) In an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law.

(*b*) In an appeal from a conviction (1) reverse the finding and sentences and acquit or discharge the accused, or order him to be retried, by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial ; or (2) alter the finding, maintaining the sentence, or with or without altering **[716]** the finding, reduce the sentence ; or (3) with or without such reduction, and with or without altering the finding, alter the nature of the sentence, but not so as to enhance the same.

(*c*) In an appeal from any other order, alter or reverse such order.

(*d*) Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

Clause (*d*) restricts the grounds on which the verdict of the jury can be reversed or altered. But once the verdict is out of the way, there is no restriction on the powers of the Court to deal with the case of which it has complete *seizin*, in any of the manners provided in that section. For example, taking clause (*b*) the High Court, as the Appellate Court, has the power either to reverse the finding and sentence and acquit or discharge the accused, or order him to be retried, or alter the findings, maintaining the sentence, or, without altering the finding, reduce the sentence. Nowhere does the law lay down that, when the verdict of the jury is set aside, the Court must necessarily direct a new trial.

In this view it seems to us that a reference to a Full Bench will only cause unnecessary harassment to the appellants. As already stated, against Shahabatullah *alias* Sadatullah there is no evidence whatsoever to warrant a conviction. We accordingly set aside his conviction and acquit him and direct that he be discharged. We also set aside the conviction of the other two, Taju and Kasir and in their cases direct a retrial.

S. C. B

NOTES.

[This was approved in 10 Bom. L.R., 565 ; 30 Mad., 11.]

[717] APPELLATE CIVIL.

The 21st March, 1898.

PRESENT:

MR. JUSTICE O'KINEALY AND MR. JUSTICE RAMPINI.

Punuk Lall Mundar............Defendant

versus

Thakur Prosad Singh and others............Plaintiffs.*

Land Registration Act (Bengal Act VII of 1876), s. 78 and s. 42--Suit for rent by unregistered proprietor—Transfer of proprietary right by succession.

Section 78 of the Land Registration Act, 1876, precludes a person claiming as proprietor from suing a tenant for rent unless his name has been registered as such under the Act. It is immaterial how the transfer of proprietorship is effected, whether it is a case of transfer by purchase or a case of transfer by succession.

Section 42 of the Act makes it clear that every person succeeding to the proprietary right in any estate must apply for registration of his name. *Surjakanta Acharya Bahadur* v. *Hemanta Kumari*, (1889) I. L. R., 16 Cal., 706, applied.

THE plaintiffs, who were the heirs of the registered proprietors, brought this suit for the recovery of arrears of rent. The defendants pleaded, amongst other things, that the suit could not proceed, as the plaintiffs had not been registered as proprietors as required by s. 78 of Bengal Act VII of 1876. The District Judge held that that section was applicable to cases of transfers of proprietorship and not to cases of its devolution on the heirs of registered proprietors, and decreed the plaintiffs' suit. The plaintiffs appealed to the High Court.

Babu *Prosunno Chunder Roy* appeared for the Appellant.

Babu *Lakshmi Narain Sinha* appeared for the Respondents.

The **judgment** of the High Court (**O'Kinealy** and **Rampini, JJ.**) is as follows:—

This is a suit for arrears of rent, to which objection is raised by the defendant that the plaintiffs are not entitled to sue for rent, **[718]** inasmuch as their names have not been registered under the provisions of s. 78 of Bengal Act VII of 1876. The learned District Judge has overruled this objection and decreed the suit, and the defendant now appeals to this Court.

We are of opinion that the judgment of the District Judge is not correct. We think that the objection under s. 78 of the Land Registration Act must prevail. The learned District Judge says that the case of *Surjakanta Acharya Bahadur* v. *Hemanta Kumari*, (1889) I. L. R., 16 Cal., 706, is not a precedent in this case, because that refers to a case of transfer of proprietorship and not to one, as in this case, of sons succeeding their parents. We think, however, that under section 78 it is immaterial how the transfer of proprietorship is effected, whether it is a case of transfer by purchase or a case of transfer by succession. It is further apparent, under the provisions of section 42 of the Act, that every person succeeding to the proprietary right in any estate, must apply

* Appeal from Appellate Decree No. 709 of 1896 against the decree of C. M. W. Brett, Esq., District Judge of Bhagulpore, dated the 31st of January 1896, affirming the decree of Babu Prayag Nath, Munsif of Mudhepurah, dated the 22nd of June 1895.

for registration of his name. The learned pleader for the respondents in this case urges that his clients are governed by the Mitakshara law, and they succeed by survivorship. We think, however, that in these circumstances the provisions of the second clause of s. 42 of the Act still apply. In any case, the plaintiffs come within the terms of s. 78 of the Act, and they are barred from recovering rent by suit under the provisions of that section.

We decree the appeal, and, setting aside the decrees of both the lower Courts, dismiss the suit with costs in all the Courts.

S. C. B.

[25 Cal. 718]

The 14th January, 1898.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE AMEER ALI.

Iswar Chandra Dutt and others............Plaintiffs

versus

Haris Chandra Dutt and others............Defendants.*

Code of Civil Procedure (Act XIV of 1882), ss. 244 and 258—Uncertified adjustment—Separate suit—Suit by judgment-debtors to recover back **[719]** *their property, which the decree-holder obtained possession of, in execution of his decree, whether maintainable.*

One *M* obtained a decree for possession of a *jote* and for mesne profits against the plaintiffs. Subsequently, by a registered *ekrarnamah*, the decree-holder having received from the judgment-debtors (the plaintiffs) the amount due on account of mesne profits, and also a further consideration of Rs. 156, relinquished an eight-anna share of the *jote* in favour of them. The remaining eight-anna share of the *jote* was also sold by the decree-holder by a registered *kobala* to the judgment-debtors. The heirs of the decree-holder on his death applied for execution of the decree, but notwithstanding the judgment-debtors' objection that the decree could not be executed, it having been satisfied by virtue of the aforesaid *ekrarnamah* and *kobala*, they obtained possession of the *jote*; the adjustment, not having been certified, was not taken into account by the Court executing the decree. On a regular suit by the judgment-debtors for a declaration of title to, as well as for the recovery of, possession of the *jote*, the defence mainly was that under s. 244 of the Code of Civil Procedure no separate suit would lie.

Held, that such a suit was maintainable, and that s 244 of the Code of Civil Procedure was no bar to it.

Azizan* v. *Matuk Lall Sahu, (1893) I. L. R., 21 Cal., 497, distinguished.

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* Appeal from Appellate Decree No. 1711 of 1896 against the decree of Babu Mohendra Nath Roy, Officiating Subordinate Judge of Pubna and Bogra, dated the 27th of June 1896, reversing the decree of Babu Amar Chandra Mookerjee, Munsif of Pubna, dated the 30th of April 1895.

THE facts of the case, so far as they are necessary for the purposes of this report, are sufficiently stated in the judgment of the High Court.

Babu *Saroda Charan Mitter*, with him Babu *Hara Kumar Mitter*, for the Appellants

Babu *Girija Sunker Mazumdar* for the Respondents.

The following **judgments** were delivered by the High Court (GHOSE and AMEER ALI, JJ.) :- -

Ghose, J. --The facts of this case are stated by the Subordinate Judge in his judgment as follows: "One Mohesh Chunder Dutt obtained a decree for possession of a *jote* against the defendants, appellants (it should be plaintiffs, respondents), and also for mesne profits for the period of dispossession. Subsequently to the passing of the decree, on the 12th of Sraban 1298, Mohesh Chunder received from the judgment-debtors the amount due on account of *wasilat*, and for a further consideration of Rs. 156 relinquished an eight-anna share of the *jote* in favour of the **[720]** judgment-debtors by an *ekrarnamah* which was duly registered. By a subsequent *kobala* (also registered), dated the 19th of Bhadra 1299, Mohesh sold the remaining eight annas share of the *jote* to the judgment-debtors. But, on his death, his heirs, the present appellants, took out execution of the decree, and the judgment-debtors raised the objection that the decree was satisfied by virtue of the *ekrarnamah* and *kobala* executed by Mohesh, but as this adjustment was not certified under s. 258 of the Civil Procedure Code, it was not taken into account, and the heirs of the decree-holder, Mohesh Chunder, were put in possession of the *jote*. Thereupon the judgment-debtors, the present respondents, brought a regular suit against the heirs of the decree-holders, the present appellants, claiming the following reliefs, viz., (1) a declaration of the plaintiffs' rights to the *jote* in question; (2) a declaration that the heirs of Mohesh Chunder have no right to the *jote* in question; (3) for recovery of possession of the *jote* in question; (4) for an order restraining the defendants from recovering the mesne profits in execution of the decree; (5) for recovery of the value of the crops taken by the defendants from the *jote* in question; (6) for mesne profits for the period the plaintiffs were kept out of possession; (7) for costs of the suit, and (8) for any other suitable relief."

The main defence to this action was that it was barred by the provisions of s. 244 of the Code of Civil Procedure.

The Court of First Instance overruled this plea, and held that the plaintiffs were entitled to the reliefs asked for in the plaint, save and except the fourth relief, namely, that the defendants may be restrained from recovering the mesne profits in execution of the decree. So far as this particular matter is concerned, it is not before us, the plaintiffs not having appealed in the Lower Appellate Court against the judgment of the Court of First Instance. The Subordinate Judge has, on appeal by the defendants, dismissed the suit upon the ground that s. 244 of the Code is a bar to the maintenance thereof; and in support of this view he has quoted the case of *Azizan* v. *Matuk Lal Sahu*, (1893) I. L. R., 21 Cal., 437. The sole ques-**[721]**tion, therefore, for our consideration is whether, by reason of the provisions of s. 244 of the Code, this suit is barred.

Now, it will be observed that the deeds under which the plaintiffs sought for the reliefs to which we have already referred, are deeds that were executed in their favour by the decree-holder upon dates subsequent to the passing of the decree, and for fresh consideration. No doubt, when the decree was sought to be executed, the plaintiffs contended before the execution Court that, by reason of the said two deeds, the decree in question had been satisfied, and, therefore,

it could not be executed. But the Court in execution declined to go into the question, as indeed it was not competent to go into it, having regard to the provisions of s. 258 of the Code of Civil Procedure, the adjustment of the decree having been made out of Court, and having not been certified to the Court in accordance with the Code. Section 258 in the last paragraph provides: "Unless such a payment or adjustment" (that is to say payment or adjustment out of Court) "has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree." So that it seems to be quite clear that the execution Court was not competent to recognize the adjustment, which was pleaded by the plaintiffs, of the decree in question.

In the case of *Azizan* v. *Matuk Lal Sahu*, (1893) I. L. R., 21 Cal., 437, referred to by the Subordinate Judge, the facts were that the defendant had obtained a decree against the plaintiff, which he partially executed, and thereupon an adjustment of account took place between the plaintiff and the defendant, in which a certain sum was found due by the plaintiff to the defendant, for which sum the plaintiff gave a bond to the defendant, and in consideration of which the defendant agreed to exonerate the plaintiff from liability for the balance due under the decree. This satisfaction of the decree was not certified to the Court. Subsequently, the defendant applied for further execution of the decree. In a suit for a declaration that the defendant had no right to execute the decree, and for an injunction to restrain him from executing it, it was contended that the action was barred by s 244 of the Civil Procedure Code. [722] It was held by the majority of the Judges who composed the Divisional Bench that s. 244 is not limited by s. 258, and that the suit is not maintainable, and that where a decree is satisfied by an agreement out of Court, and such satisfaction is not certified to the Court, a subsequent suit on the agreement is not maintainable if the object of the suit is to restrain the decree-holder from executing his decree in contravention of the agreement.

The circumstances of this case are very different. Eliminating from our consideration the fourth relief, which the plaintiffs asked for, namely, that the defendants might be restrained from recovering the mesne profits in execution of the decree, the object of the present suit is not to restrain the decree-holder from executing his decree in contravention of the agreement entered into between the parties as evidenced by the two documents, the *ekrarnamah* and the *kobala*, to which we have already referred, but rather the suit is with the object of recovering property under that agreement. The defendants, decree-holders, have already in execution of the decree been put in possession of the properties covered thereby, and what the plaintiffs now say is in effect this: Subsequent to the decree, you received from us certain considerations for which you conveyed the property covered by the decree; we were not at liberty to oppose the execution of the decree, and so you were put in possession of the property in execution; but we are, notwithstanding, entitled to recover the same from you upon the conveyances executed by you. We think that this action is quite maintainable.

It has, however, been contended by the learned Vakil for the respondents that the adjustment which was pleaded by the plaintiffs in the execution department could have been dealt with by the Court under section 244 of the Code of Civil Procedure, and, therefore, the present suit is incompetent But having regard to the provisions of the last paragraph of section 258, to which we have already referred, we are unable to hold that the executing Court could go into a question which is distinctly prohibited from being gone into by "any Court executing the [723] decree." It seems to us, therefore, that there is no reason why the plaintiffs should not be entitled to recover upon

the documents to which we have already referred—documents executed subsequent to the passing of the decree, and by which distinct rights were conveyed to them.

Upon these considerations we think that the decree of the Court below should be set aside, and that of the Court of First Instance restored with costs, the *ekrarnamah* and *kobala* having been found to be genuine by the Court of First Instance, and that finding not having been impeached by the defendants before the Lower Appellate Court.

Ameer Ali, J.—The only question in this case is whether, having regard to the provisions of s. 244 of the Code of Civil Procedure, this suit is maintainable. Mohesh Chunder Dutt, the predecessor of the defendants, appears to have obtained a decree against the plaintiffs in respect of the lands in suit. Subsequent to the decree an arrangement was arrived at between him and the plaintiffs by which, in consideration of a certain sum of money paid by the plaintiffs, he transferred to them, or relinquished in their favour, a moiety of the said lands. Subsequent thereto he conveyed to them the remaining moiety also for consideration. Upon the death of Mohesh Chunder the defendants took out execution of the decree obtained by him. The plaintiffs objected that the decree having been adjusted no execution could issue. That objection was overruled on the ground that, inasmuch as the adjustment had not been certified, the Court was not in a position to entertain it. The defendants, thereupon, in execution of the decree, obtained possession of the lands in suit. The plaintiffs now bring this suit for a declaration of their right in respect of this *jote* upon the basis of the relinquishment and the conveyance executed by Mohesh, and they pray for the usual ancillary reliefs. They also ask for an injunction, which has been refused by the first Court. The suit, therefore, was not directed to interfere in any way with the execution of the decree that had been obtained by Mohesh nor was its scope parallel to any of the matters referred to in s. 244 of the Civil Procedure Code, and consequently it does not appear to be barred in any way by the provisions [724] of that section. But it is contended that, under the ruling in the case of *Azizan* v. *Matuk Lal Sahu*, (1893) I. L. R., 21 Cal., 437, the suit is not maintainable because the plaintiffs could have, in the course of the execution of the decree, raised the objection that, there being this relinquishment and conveyance from Mohesh in their favour, the decree could not be executed. But if regard be had to the provisions of s. 258 it will be seen that it covers a much larger ground than what is covered by s. 244 of the Code of Civil Procedure. Section 258 deals with all adjustments arrived at between the decree-holder and the judgment-debtor. An adjustment may not be confined to the satisfaction or discharge of the decree. There may be matters in the course of an adjustment which may be outside that, and there is no reason whatsoever why, if any other arrangement has been arrived at, the judgment-debtors should not be entitled to maintain an action upon it, nor does there appear to be any ground based upon the provisions of s. 244 which would preclude the maintenance of such an action.

I may observe that the case of *Azizan* v. *Matuk Lal Sahu*, (1893) I. L. R., 21 Cal., 437 is one of a peculiar character. The decision there is limited to the reason that a subsequent suit brought with the object of interfering with the execution of the decree cannot be maintained under s. 244. How far I would be prepared to concur in the conclusion arrived at in that case it is not necessary to consider in the present case, for the facts here are totally different.

I am of opinion, therefore, that the suit was maintainable, that there is nothing in the provisions of s. 244 which covers this suit, and that the Lower

Appellate Court was wrong in dismissing the plaintiffs' action on the ground it has done. I agree, therefore, in setting aside its order and in restoring the decree of the first Court.

S. C. G. *Appeal allowed.*

NOTES.

[See also (1904) 31 Cal., 480, (1906) P.R., 44.]

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[725] *The 21st March, 1898.*

PRESENT:

MR. JUSTICE O'KINEALY AND MR. JUSTICE RAMPINI.

Bhugwati Kuweri Chowdhrani...... .....Plaintiff

versus

Chutterput Singh............Defendant

Cess Act (Bengal Act IX of 1880), s. 34 and s. 35—Preparation and publication of valuation roll Liability to pay cess.

In the case of rent-paying lands the publication of the valuation rolls under s. 35 of the Cess Act (Bengal Act IX of 1880) is not a condition precedent to the attaching of liability to pay road cess in accordance with the valuation rolls. *Ishanullah Khan* v. *Trilochan Bagchi,* (1886) I. L. R., 13 Cal., 197 distinguished.

THE plaintiff instituted this suit for recovery of arrears of rent and cesses against the defendants, who held a *patni* tenure under him. The plaintiff was held liable by the Collector to pay road cess upon the basis of some valuation rolls prepared in 1892 under s. 34 of the Cess Act. The defendant, who was, previous to the suit, paying the cess at the same rate as the plaintiff was paying to the Collector, objected to pay at that rate any longer on the ground that the valuation rolls were not published under s. 35 of the Cess Act, but was willing to pay according to the previous valuation of 1889. The Subordinate Judge decided in favour of the defendant, holding that publication was necessary before liability to pay cess would arise.

Sir *Griffith Evans* and Mr. *C. Gregory* on behalf of the Appellants.

* Appeal from Original Decree No. 348 of 1896, against the decree of Babu Hari Krishna Chatterjee, Subordinate Judge of Purneah, dated the 14th of July 1896.

Dr. *Rash Behari Ghose*, Babu *Digumbur Chatterjee*, Babu *Dwarka Nath Chakravarti* and Babu *Joy Gopal Ghose* on behalf of the Respondents.

The **judgment** of the High Court **(O'Kinealy and Rampini, JJ.)** is as follows :—

The only point raised in this appeal is as to whether the defendant is liable to pay road cess to the plaintiff at the same rate as **[726]** that at which the plaintiff has been held bound to pay road cess to the Collector.

The plaintiff is the holder of an estate in which the defendant holds a patni tenure, and the plaintiff has been held liable by the Collector to pay road cess upon the basis of certain valuation rolls of 1892. The defendant has been paying road cess for some years at the rate specified in these papers, but in this suit he contends that he is not liable to pay road cess at that rate any longer, in consequence of the valuation roll not having been published under s. 35 of the Cess Act, and that he is liable to pay according to the previous valuation of 1889.

The Subordinate Judge has found in favour of the defendant, being of opinion that the publication of the valuation rolls under s. 35 of the Cess Act is a condition precedent to any liability attaching to the defendant to pay road cess in accordance with these valuation rolls. The plaintiff now appeals to this Court. We are of opinion that the learned Subordinate Judge is incorrect in the view which he takes of the law. He relies upon the ruling in the case of *Ashanullah Khan* v. *Trilochan Bagchi*, (1886) I. L. R., 13 Cal., 197, in which it was held that when under the Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that liability has been incurred to prove that the things prescribed in the Act have been actually done, and he appears to think that this ruling lays down the general principle that the publication of the valuation rolls under the Cess Act is a condition precedent to the attaching of any liability to pay road cess. We are, however, of opinion that this ruling [(1886) I. L. R., 13 Cal., 197] is no authority for the defendant being held not liable to pay the road cess in the case The ruling cited by the learned Subordinate Judge refers to the publication of valuation rolls under section 52 of the Cess Act, which relates to payment of road cess for rent-free lands; and it appears from s. 56 of the Act that owners of rent-free land are not bound to pay road cess before the publication of the valuation rolls under section 52. The present case, however, does not relate to the road cess **[727]** of rent-free lands; it relates to road cess of rent-paying lands, and the publication of the valuation rolls of such lands has to be made, not under s. 52, but under s. 35 of the Act. Then, there is no provision in the Act relating to rent-paying lands corresponding to s. 56 of the Act. On the contrary, it would appear from the provisions of ss. 36 and 41 of the Act that the publication of valuation rolls is not a condition precedent to the attaching of liability to pay road cess for rent-paying lands. Section 36 prescribes that "except as otherwise in this part" (that is Part II) expressly provided, "every valuation and revaluation made under this chapter shall remain in force for the term of five years;" and s. 41 lays down that "except as otherwise in this Act provided, every holder of a tenure shall yearly pay road cess to the holder of the estate or tenure within which the land held by him is included." There is, therefore, no provision prescribing that the publication of the valuation rolls is necessary before any liability attaches to the tenure-holder. On the contrary, it would seem that "except as otherwise provided," he is bound to pay the road cess on the preparation of the valuation rolls, and there is no provision in the Act which exempts him from, or limits his, liability.

For these reasons we think the view taken under s. 35 by the learned Subordinate Judge is incorrect, and we accordingly decree the appeal with costs in this Court and with proportionate costs in the Court below.

S. C. B.

NOTES.

[This was followed in (1900) 28 Cal., 109.]

[25 Cal. 727]

CRIMINAL REVISION.

The 16th November, 1897.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE WILKINS.

The Legal Remembrancer

versus

Bhairab Chandra Chuckerbutty and others.*

Transfer of Criminal case—Criminal Procedure Code (Act X of 1882), s. 526, cl. (e)—Expression of belief by the District Magistrate—Fairness and impartiality of the jury—Jury an important part of the tribunal.

When two such officers, as the District Magistrate and the Sessions Judge, emphatically express their belief that it will be next to impossible [728] to obtain a fair and impartial trial if the case be heard before a jury chosen from a particular district, the bare expression of such belief, quite apart from the foundations thereof, must shake the confidence of the parties interested and of the public in the fairness and impartiality of the particular jury to try the case. An order for transfer in such cases is expedient for the ends of justice under s. 526, cl. (e) of the Criminal Procedure Code. The importance of securing the confidence of parties in the fairness and impartiality of the tribunal is next only to the importance of securing a fair and impartial tribunal. *Dupeyron* v. *Driver*, (1896) I L. R., 28 Cal., 495, followed.

The jury in a case triable by jury constitute a part and an important part of the tribunal. It is not quite reasonable to say, where doubt is entertained as to the fairness and impartiality of the jury, that the trial should, nevertheless, go on before such a jury, because an erroneous verdict may, in the end, be set right by the High Court. *Empress* v. *Nobo Gopal Bose*, (1880) I. L. R., 6 Cal., 491, distinguished.

THIS was an application by the Deputy Legal Remembrancer for the transfer from the Sessions Court at Burdwan of a case under s. 526 of the Criminal Procedure Code (Act X of 1882). In support of the application the District Magistrate of Burdwan made an affidavit in which he, amongst other things stated:—

"That in his letter marked C, the Sessions Judge says that, not only stories of all sorts are afloat about it, but even the merits of the case appear to have been discussed and various conclusions arrived at, and under the circumstances it will be very difficult to get a jury with a quite unbiassed and open mind."

"That I firmly believe that it would be next to impossible to obtain a fair and impartial trial if the case be heard before a jury chosen from this district; such a course would, I believe, prejudice both the prosecution and the defence."

The rule was granted calling upon the accused to show cause why the case should not be transferred to the Sessions Court of some other district on the grounds: (1) That a fair and impartial trial cannot be had in the Sessions

* Criminal Miscellaneous Revision No. 84 of 1897.

Court at Burdwan, and (2) that the transfer is expedient for the ends of justice, having regard chiefly to the above statements.

[729] The *Officiating Deputy Legal Remembrancer* (Mr. *Abdur Rahim*) for the Crown.

Mr. *P. L. Roy*, Babu *Debendro Chundro Mullick* and Babu *Dwarka Nath Mitter* for the Accused.

The **judgment** of the High Court (**Banerjee** and **Wilkins, JJ.**) is as follows :--

This is a rule granted on the application of the Deputy Legal Remembrancer, calling upon the accused to show cause why the case against them now pending in the Sessions Court of Burdwan should not be transferred to the Sessions Court of Alipur or to the Sessions Court of any other district, on the grounds : (1) That a fair and impartial trial cannot be had in the Sessions Court of Burdwan before a Burdwan jury, and (2) that the transfer is expedient for the ends of justice.

In support of these two grounds two affidavits have been filed, one by Mr. Fisher. Magistrate of the district, and the other by Sheikh Bistu, brother of one of the two persons, said to have been murdered by the accused.

The material statements contained in the District Magistrate's affidavit are to the effect that the accused are sons and "near relations of men of influence and position," that the Magistrate who has been at Burdwan for about a year and-a-half and has come to know many people of the district is aware, from his "personal knowledge," "that various kinds of rumours, both true and false, are being circulated among all classes of the community all over the district" about the facts of this case ; that the Magistrate is credibly informed from various sources, including the Sessions Judge's letter to him (which is filed with the affidavit and marked C), "that this case has caused a profound sensation throughout the district among all classes of people;" that the Magistrate firmly believes "that it will be next to impossible to obtain a fair and impartial trial" if the case be heard before a jury chosen from the district of Burdwan ; and that it is necessary in the interests of justice that the case should be transferred from Burdwan.

The affidavit further states that this case "has created an [730] extremely" bitter feeling among the Mahomedan population of the town, that they "are an excitable people" and "have not much patience," that it is therefore necessary that the case should be tried under such circumstances as will give the Mahomedans every confidence, and that "this will not be the case if it be tried at Burdwan"

The affidavit of Sheikh Bistu contains statements nearly to the same effect.

The accused in shewing cause have filed six affidavits, three of which are by the fathers of the three accused, one by a pleader of the Burdwan Court engaged for the defence, and two by two Mahomedans residing at Burdwan, who, however, do not say anything as to what their position in life is, nor any thing as to what their means of knowledge are, beyond stating that they have been living in Burdwan for many years.

These affidavits more or less deny most of the allegations contained in the affidavits filed on behalf of the petitioner ; and they further state that the case should not be transferred from Burdwan, as a local inspection of the alleged place of occurrence by the jury may be necessary, and that transfer of the case would cause inconvenience to the accused and their witnesses, and would involve expense which it would be difficult for two of the accused, and impossible for the third, to bear.

It is unnecessary for our present purpose, and it is undesirable at the present stage of the case, to enter into a detailed examination of all the various statements contained in these affidavits and counter, affidavits. We shall confine our attention to such of them as relate to matters coming within the scope of s. 526 of the Criminal Procedure Code and are relevant to the present purpose, and exclude from consideration those that are irrelevant and likely to misguide the judgment.

We may add that under this latter description come those statements which speak of the Mahomedans being "an excitable people" who "have not much patience," and which hint at the necessity of allaying their irritation to prevent possible serious consequences. Those are considerations which do not come within the scope of s. 526 of the Code of Criminal Procedure, and which **[731]** should not, therefore, influence our judgment. The only clause of the section which may possibly be referred to in this connection is clause (*e*); but that clause refers to expediency for the ends of justice and not to expediency from any political point of view. In dealing with an application like the present, it is, no doubt, the duty of this Court to have all due regard for the importance of securing the confidence of the public generally, and of every section of the community interested in the result, in particular, in the fairness and impartiality of the trial that is going to be held; but it is equally its duty to see that no undue regard is shown to the abnormal susceptibilities of any section of the public, from an apprehension of ulterior consequences If that were done, it would result in the obvious injustice of showing greater consideration to the less peaceful than to the more peaceful. We regret that the Sessions Judge, and following him the District Magistrate, should have referred to matters which ought not to be taken into account in this case.

We should further add that it was improper for the District Magistrate, as representing the prosecution, to have consulted in this matter the Sessions Judge in whose Court this case was pending, and still more so for the Sessions Judge to have addressed the District Magistrate the communication marked as Exhibit C. While making these remarks, however, we fully appreciate the object they had in view, which was to secure a fair and impartial trial in this case, and peace and harmony in their district.

Coming now to the consideration of those statements in the affidavits and counter affidavits which relate to matters lying within the scope of s. 526 of the Code of Criminal Procedure, we find that while the statements relied upon by the petitioner seek to bring the case under clauses (*a*) and (*e*) of the section, those relied upon by the opposite side seek, not only to contradict those allegations, but also to show that clauses (*c*) and (*d*) operate against the applications for transfer. That is to say, while the affidavits of the District Magistrate and Sheikh Bistu state that a transfer of the case is necessary for a fair and impartial trial and is otherwise expedient for the ends of justice, the affidavits relied upon on behalf of the accused affirm that a transfer is not neces-**[732]**sary for a fair and impartial trial, nor otherwise expedient for the ends of justice; that the allegations to the contrary are not well founded; and that the trial ought to be held in Burdwan, because a view of the place in which the offence is said to have been committed is necessary for the satisfactory trial of the same, and because the accused and their witnesses would otherwise be greatly inconvenienced. Thus there are conflicting statements giving rise to conflicting considerations, and the questions for determination are: *first*, which of these conflicting statements should be accepted; and, *second*, which of the conflicting considerations arising upon the statements to be accepted should prevail.

With reference to the first question Mr. *Roy* for the accused contends that the statements in the District Magistrate's affidavit are indefinite, and therefore insufficient to form the basis of a decision, while those in the affidavits filed on behalf of the accused are definite and point to specific sources of information; and he relied upon the case of *The Empress* v. *Nobo Gopal Bose*, (1880) I.L.R., 6 Cal., 491, as showing that a somewhat similar affidavit by the District Magistrate was considered insufficient by this Court. But the facts of that case were different from those of the present in several respects. In the first place, there the District Magistrate who made the affidavit had been in the district for about three months only, whereas in this case the Magistrate has been in the district for about a year and a half; and in the second place, in the case cited, the Magistrate did not state his sources of information, or the ground of his belief, whereas in the case before us he gives the sources of his information and states that he is aware of certain facts from personal knowledge. But though that is so, and though we are quite willing to accept the District Magistrate's statements in preference to counter statements in the affidavits on the other side, we must say that some of those statements which give reasons for the Magistrate's belief are vague and general; and having regard to the facts stated in the counter affidavits that there are on the jury list of Burdwan as many as 471 names, of which 22 are the names of Mahomedans and 28 of Europeans, we find it difficult to hold that a [733] fair and impartial trial *cannot* be had by a jury at Burdwan. The facts stated, therefore, are not quite sufficient to bring the case under clause (*a*) of s. 526 of the Code of Criminal Procedure.

The statements in the District Magistrate's affidavits are, however, in our opinion sufficient to bring the case under clause (*c*) of the section. The statements to which we refer are those contained in paragraphs 8 and 9 of the affidavit, which are to the effect that the Sessions Judge thinks that "it will be very difficult to get a jury with a quite unbiassed and open mind," and that the Magistrate firmly believes "that it will be next to impossible to obtain a fair and impartial trial if the case be heard before a jury chosen from this district," *i.e.*, Burdwan.

These statements, as statements of belief, stand practically uncontradicted, though the grounds of such belief are challenged in the counter affidavits. But when two such officers as the District Magistrate and the Sessions Judge, whose honesty of purpose cannot be called in question, and who are the persons responsible for the administration of criminal justice in the district, have so emphatically expressed their belief on the subject, the bare expression of such belief, quite apart from the foundations thereof, must shake the confidence of the parties interested, and of the public, in the fairness and impartiality of the Burdwan jury to try this case, and create in their minds a reasonable apprehension that a fair and impartial trial cannot be had, if the case is tried in Burdwan. And when that is the case, an order for transfer must be held to be expedient for the ends of justice, the importance of securing the confidence of parties in the fairness and impartiality of the tribunal being next only to the importance of securing a fair and impartial tribunal. The view we take is in accordance with that taken by this Court in *Dupeyron* v. *Driver*, (1896) I.L.R., 23 Cal., 495.

It was contended by Mr. *Roy* for the accused that the considerations which influenced the Court in the case just referred to, apply only to cases where the confidence of either party in the fairness of the presiding Judge or Magistrate is shaken, and that [734] where, as in this case, the fairness and impartiality of the Sessions Judge is not doubted, the mere possibility of the jury being biassed should not form a ground for transfer, when the law provides a remedy against

a wrong verdict by authorizing the Sessions Judge to refer the case to this Court; and in support of this contention the case of *Queen* v. *Ameer Khan*, (1871) 7 B. L. R., 240; 15 W. R. Cr., 69, and *Empress* v. *Nobo Gopal Bose*, (1880) I. L. R., 6 Cal., 491, were relied upon.

We are unable to accept this contention as sound. The jury, in a case triable by jury, constitute a part and an important part of the tribunal; and this Court, on a reference by the Sessions Judge under s. 307 of the Code of Criminal Procedure, is required to determine the case upon the entire evidence after giving due weight to the opinions of the Judge and the jury. It would not, therefore, be quite reasonable to say where doubt is entertained as to the fairness and impartiality of the jury, that the trial should nevertheless go on before such a jury, because an erroneous verdict may, in the end, be set right by the High Court. As for the cases cited, that of *Queen* v. *Ameer Khan*, (1871) 7 B. L. R., 240; 15 W. R. Cr., 69, is not quite in point, the trial there being not by jury but with the aid of assessors. The case of *Empress* v. *Nobo Gopal Bose*, (1880) I.L.R., 6 Cal., 491, is no doubt in point; but the learned Judges in that case do not hold as a matter of law that a case triable by jury is not to be transferred on the ground of the fairness and impartiality of the jury being questioned, because there are safeguards against miscarriage of justice; all that they decide is that it would require very strong grounds to justify a transfer in such a case.

The statements in the Magistrate's affidavit, in our opinion, therefore, bring the case under clause (*e*) of s. 526 of the Code of Criminal procedure.

The statements in the affidavits filed on behalf of the accused, on the other hand, show that a view of the place where the offence is said to have been committed may be necessary for a satisfactory trial; and that a transfer of the case will cause [736] inconvenience to the accused and their witnesses, and these statements we see no reason to reject as unfounded.

There are thus conflicting considerations arising upon the statements which we accept; and this brings us to the second question stated above, namely, which of these considerations should prevail?

Now the importance of having a fair and impartial jury ranks very much higher than the convenience of parties and witnesses, and the convenience of the Court in having a local inspection. If a local inspection is deemed necessary, the Judge and the jury at Alipur may have such an inspection, though not as conveniently as the Judge and jury at Burdwan might have had it; and the cost of such inspection will have to be paid by the Government The same remark applies with reference to the expenses of the witnesses (see s. 544 of the Code of Criminal Procedure).

The matter, which pressed most upon us against the transfer of the case, was the statement in the affidavit of the father of one of the three accused who says that, if the case is transferred, he has not means enough to pay for legal assistance, whereas if the trial is held in Burdwan where he has a few friends amongst the members of the local bar, he may succeed in inducing one of them to defend his son. There is no provision in the Code of Criminal Procedure for meeting this difficulty; and the only consideration which has relieved our minds to a certain extent is this, namely, that the accused, who will be tried with two others whose means are not so limited, may have the benefit of the legal aid which they will be able to secure.

After weighing the conflicting considerations arising in this case, the conclusion we come to is that the balance of reason is in favour of allowing the

application for transfer, which we think is expedient for the ends of justice; and we accordingly order that this case be transferred to the Sessions Court of 24-Pergunnahs.

S.C.B.

NOTES.

[See also 28 Cal., 709; 25 Bom., 179.]

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[736] APPELLATE CRIMINAL.

The 5th April, 1898.

PRESENT:

MR. JUSTICE AMEER ALI AND MR. JUSTICE HENDERSON.

Abbas Peada and another............Appellants

versus

Queen-Empress............Respondent.*

Misdirection—Charge to the jury—Explaining the law—Evidence Act (I of 1872), s. 126—Communications to Mukhtears privileged—Admission of inadmissible evidence.

In charging a jury it is incumbent on the Judge to explain the law to them in order to assist them in applying the law to the facts of the case. Mere reference to sections of the Penal Code defining the offences is not sufficient.

The restrictions imposed by s. 126 of the Evidence Act in respect of what are known as privileged communications extend also to communications made to *mukhtears* when acting as pleaders for their clients.

In cases tried by jury it is the duty of the Judge to prevent the production of inadmissible evidence whether it is or is not objected to by the parties.

Evidence relating to proposals of compromise ought not, in the exercise of a proper discretion, to be allowed to go in as evidence of guilty knowledge against the accused.

THE facts of the case appear sufficiently from the judgment.

Babu *Dasarathi Sanyal* appeared on behalf of the Appellants.

The *Deputy Legal Remembrancer* (Mr. *Gordon Leith*) appeared on behalf of the Crown.

The **judgment** of the High Court (**Ameer Ali** and **Henderson, JJ.**) is as follows:—

In this case the petitioners, Abbas Peada and Chhirru *alias* Shibu Gain were tried by the Additional Sessions Judge of the 24-Pergunnahs with a jury, who convicted the former under ss. 365 and 346, and the latter under ss. 365 and 346 read with s. 109 of the Indian Penal Code; and the Judge has sentenced them to four years' and three years' rigorous imprisonment, respectively.

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* Criminal Appeal No. 155 of 1898, against the order passed by C. P. Caspersz, Esq., Additional Sessions Judge of 24-Pergunnahs, dated 17th December 1897.

[737] The grounds upon which we admitted the appeal were of a twofold character, namely, *first*, that the Judge had misdirected the jury in his charge with reference to certain evidence, which was not legally admissible against the accused; and, *secondly*, that there was no sufficient explanation of the law in the charge.

The case has been argued by the learned pleader for the appellants on one side and the learned *Deputy Legal Remembrancer* for the Crown on the other. The appellants' pleader has taken three principal grounds upon which he impugns the verdict of the jury; and he asks that we should set aside that verdict and either acquit the petitioner or direct a retrial of the case. He contends, as he contended at the time of the admission of the appeal, that, having regard to the character of the offence charged against the accused, the learned Sessions Judge ought to have given a sufficient explanation of the law on the subject in order to assist the jury in the consideration of the facts of the case; that not having done so, he has failed to comply with the provisions of s. 279 of the Code of Criminal Procedure, and that his clients have been prejudiced by the omission. He contends further that the learned Judge ought not to have admitted in evidence certain statements alleged to have been made by the petitioners to a *mukhtear*, named Kedar Nath Chakravarti, who had acted as legal adviser and representative for one of the accused in a previous case; and, that the learned Judge was also in error in asking the jury to draw any inference of guilty knowledge from a compromise spoken of by the clerk of their present *mukhtear* Hem Chundra; and, *thirdly*, he has contended that the trial had relation to the detention of the woman Lakhi at several places, and had reference to more than one individual, and that consequently the appellants were prejudiced in their defence.

We shall first refer to the law on the subject before dealing with the learned Sessions Judge's charge to the jury.

Section 297 of the Code of Criminal Procedure provides that, "in a case tried by jury when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury summing up the evidence for the prosecution and defence and laying down the law by which the jury are to [738] be guided." And s. 367 declares "that in trials by jury the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury."

It has been repeatedly held in this Court that it is incumbent on the Sessions Judge to explain the law relating to the particular offence with which the accused is charged before him, in order to enable the jury to apply the law to the special facts of the case; and that although the Judge is not bound to record a judgment, yet he should give sufficient indication in his charge that he has complied with the law, so as to enable the Appellate Court to form an opinion whether he has acted in accordance with the provisions of the section or not. No doubt in this case the Sessions Judge has in different parts of his charge mentioned the sections of the Penal Code we have referred to; but we regret there is very little indication to suggest that any explanation, such as is contemplated by section 297 of the Code of Criminal Procedure, as has been laid down in the different cases already decided, was given to the jury. Mere references to sections, unless the jurors are trained men, cannot be of much assistance to them to apply the law to the facts; and we think, therefore, it is always desirable in charges to juries that the law should be sufficiently explained in order that the jury may be assisted in the consideration of the case. That in this particular case the jury were not assisted in the consideration o

the case by an explanation of the law is sufficiently clear from the manner in which they appear to have given their verdict which is recorded as follows :—

" *Q.*—Are you unanimous ?

Ans.—We are.

Q.—What is your verdict ?

Ans.—Abbas and Chhirru are guilty. Charan is not guilty.

Q.—Is Luckmi under sixteen years of age ?

Ans.—Yes, under sixteen.

Q.—Under what charge do you convict Abbas and Chhirru ?

Ans.—We convict as regards the road occurrences. Ss. 147, 365, 363.

[739] *Q.*—What is your verdict as regards the charges under ss. 346 and 346-109 (The jury retired again to consider)." * * *

We think we may take that as an indication that the jury were not quite clear in their minds about the application of the law to the facts of the case, and that their confusion or want of clearness on the subject was due, in some measure, to the omission of a sufficient explanation of the law on the subject.

The Sessions Judge's charge begins thus: "The charges relate to four occurrences: –

(*a*) *On the Road*, ss. 363, 365, 147 of the Indian Penal Code.

(*b*) *At Abbasbari*, s. 342 of the Indian Penal Code.

(*c*) *At Jampabaria*, ss. 346 and 346-109 of the Indian Penal Code.

(*d*) *At Kalikapala*, s. 346 of the Indian Penal Code.

Then it goes on: "All the accused are charged in respect of (*a*) and (*c*) and accused Abbas only is charged in respect of (*b*) and (*d*)," and so forth.

We are inclined to attach some weight to the argument of the learned pleader for the appellants that the mode in which the matter was placed before the jury was a little confusing and one likely to have prejudiced the accused at the trial.

But the matter does not rest here. The occurrence is alleged to have taken place on the 29th of August. On the 30th August the accused went to the *mukhtear* Kedarnath, who was at the time defending the appellant Chhirru in another case of abduction in respect of the same girl, and stated that another false case was likely to be brought against them, and that he must appear in it for them and on their behalf. The learned Sessions Judge refers to the evidence of Kedarnath in the following terms:—

"Then the evidence of Kedar Babu (witness No. 3) who acted as accused's *mukhtear* is very important." And he goes on to add, "because, he says, accused Abbas and Chhirru came to him at 5 or 6 A. M. on the day after the night attack on Naba's party. This conduct of these accused, I think, you will agree with me, and the statements they made to Kedar Babu, indicate guilty knowledge."

[740] It does not appear that when Kedar was being examined regarding this matter, any objection was taken by the accused to his making the statements in question.

Section 298, however, provides "that in cases tried by jury it is the duty of the Judge to decide all questions of law arising in the course of the trial, and specially all questions as to the relevancy of the facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and in his discretion to prevent the production of

inadmissible evidence, whether it is or is not objected to by the parties." If one may venture to say so, this is a wise provision of the law, because in many of these cases tried in the Sessions Court by a jury sometimes the prisoners are not defended at all, and sometimes defended by persons not fully qualified for their work. It is, therefore, the duty of the Judge to see that evidence, which is not admissible in itself, should not be allowed to go in to the prejudice of the accused. The pleader for the appellants contends that the statements made by the accused to the *mukhtear* Kedarnath were privileged, and that, without the consent of the accused, Kedarnath ought not to have deposed to those statements in Court; and reliance is placed on s. 126 of the Indian Evidence Act, which declares that "no barrister, attorney, pleader, or vakil shall at any time be permitted, unless with the client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course of such employment."

The cognate section in Act II of 1855, s. 24, declared that "a barrister, attorney or vakil shall not, without the consent of his client, disclose any communication made by the client to him in the course of his professional employment or any advice given by him professionally to his client, the knowledge of which he shall have acquired in the course of his professional employment. The privilege, however, is that of the client to disclose [741] any such matter." It will be noticed that there are two important additions in s. 126, which differentiate it from s. 24 of Act II of 1855, namely, the addition of the word "pleader" and of the word "express" before the word "consent," which make it specially stringent in favour of the privilege. Now, there is no suggestion in this case that the accused expressly consented to Kedar disclosing in Court the statement or statements made to him by the accused. The question that was raised here was this: That inasmuch as he was a *mukhtear* he did not come within the purview of s. 126, and that consequently the statements made by the accused were not privileged; and we have been referred to the case of *Queen* v. *Chandra Kant*, (1868) 1 B. L. R., App. Cr., 8, which proceeded upon Act II of 1855. As we have already pointed out, s. 24 of the old Act is different from the section in the present Act.

The Procedure Codes (Act XXV of 1861 and Act X of 1872) did not contain any definition of the term "pleader." Act X of 1882 for the first time defines the word as follows: "Pleader," used with reference to any proceeding in any Court, means a pleader authorized under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court so authorized; and (2) any *mukhtears* or other person appointed with the permission of the Court to act in such proceeding."

The result of that definition, therefore, is this that all persons who appear in a Court in any legal proceeding as representing parties for the purpose of pleading in any particular case come within the category of pleaders, and s. 126 must, we take it, be construed as applying to all persons who come within the category of pleaders as defined in the Criminal Procedure Code. It would indeed be a strange anomaly if *mukhtears* who act in certain Courts as pleaders were excluded from the provisions of s. 126 of the Indian Evidence Act, and statements made to them by their clients were not regarded as privileged, whilst in the case of all persons who hold a recognized position as barristers, attorneys or vakils, they should be privileged. We may say that the provision

which was contained in Act II of 1885, and [742] which was subsequently amplified by s. 126 of the present Evidence Act, embodies one of the wisest principles of the English law; and that although in England there is no analogue to a *mukhtear*, the Indian Legislature, having regard to the conditions of this country, has properly included in the term "pleader" all persons who plead for clients in any legal proceeding in a Court of Justice.

We think, therefore, that the learned Sessions Judge was in error in allowing the statements which the accused had made to Kedarnath (who was at the time acting for one of them as his *mukhtear* and legal adviser, and to whom certain matters were mentioned with the object that he should appear for them in Court) to be given in evidence against the accused, and we also think that he was in error in asking the jury to agree with him in drawing an inference of guilty knowledge from those statements, even if those statements were admissible in evidence. The statement which the accused made to Kedarnath was that a false charge was going to be brought against them. We are inclined to think an inference of guilty knowledge was hardly warranted from that circumstance, and we have little doubt that the jurors were more or less influenced to the prejudice of the accused by the distinct direction given by the Sessions Judge in this behalf. Then, again, as regards the compromise, which was "discussed and effectuated at a later stage," it appears that the complainant and his party with another person went to the *mukhtear* who represented the accused in Court with the object of compromising the charge, and a paper was written out and apparently filed in Court. The learned Sessions Judge deals with the subject in this way: "Then you have the evidence of witnesses 4, 12 and 16 with regard to the compromise discussed and effectuated at a later stage." He had already mentioned that there was evidence indirectly bearing against the accused, and we may take it that his mention of the compromise at this stage and under the sixth head of his charge was intended to draw the attention of the jury to what he considered to bear indirectly on the case against the accused. In the first place it seems to us the evidence relating to the compromise ought not, in the exercise of [743] a proper discretion, to have been allowed to go in as evidence of guilty knowledge against the accused; in the second place the statements relating to the compromise were made to the clerk of the *mukhtear*, who was acting as the pleader of the accused, and under s. 127 statements made to the clerks are as privileged as those made to their employers.

Other objections have been taken to the charge to the jury. But we do not think it necessary to deal with them, as it seems to us the verdict must be set aside on the grounds already referred to.

With reference to the third ground taken by the appellants' pleader we may mention he relies upon the statement contained at the beginning of the charge in order to show that the offences were not so connected with each other as to warrant the accused being tried together under s. 245 of the Code of Criminal Procedure, and he contends that the charges relate to separate offences alleged to have been committed by separate individuals at separate places. The learned *Deputy Legal Remembrancer*, on the other hand, argued that the section justifies the procedure adopted in this case. Looking at the statement at the beginning of the charge, we are not prepared to say the learned pleader's contention is without some force. But it is unnecessary to express any definite opinion on the point, as we think that when the case is retried the learned Sessions Judge will see that the trial is conducted in a manner which will not be likely to prejudice the accused or confuse the jury in any way in dealing with the facts.

On the whole, therefore, we have come to the conclusion that the verdict of the jury ought to be set aside in this case, and we accordingly set it aside and direct that the case be retried.

S. C. B.

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[744] FULL BENCH.

The 2nd February, 1898.

PRESENT:

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN, MR. JUSTICE GHOSE, AND MR. JUSTICE AMEER ALI.

Dulhin Golab Koer............Plaintiff

versus

Balla Kurmi and others............Defendants.*

Bengal Tenancy Act (VIII of 1885), s. 50 Record of rights—Presumption from twenty years' uniform payment of rent—Raiyats holding at fixed rates.

In a proceeding for record of rights under Chapter X of the Bengal Tenancy Act (VIII of 1885), it having been found that certain raiyats were holding their lands at rates which had not been changed during twenty years before the institution of the proceeding, the Settlement Officer recorded them as "raiyats holding at fixed rates." In second appeal,

Held, that under s. 50 of the Bengal Tenancy Act, the Settlement Officer was right in giving effect to the presumption that the raiyats were holding at fixed rates of rent and in recording them as "raiyats holding at fixed rates."

Bansi Das v. *Jagdip Narain Chowdhry*, (1896) I. L. R., 24 Cal., 152, dissented from.

THIS case arose out of proceedings under Chapter X of the Bengal Tenancy Act (VIII of 1885). The defendants, respondents, who are raiyats, were recorded by the Assistant Settlement Officer as "raiyats holding at fixed rates." The landlord, plaintiff, objected to the entry and applied for its correction under s. 106 of the Act, alleging that the defendants were not raiyats at fixed rates, but only occupancy raiyats. The application was rejected by the Settlement Officer, and on appeal to the Special Judge, the order of the Settlement Officer was confirmed on the ground that the raiyats had been holding their lands at an uniform rent for twenty years, and the presumption arose that this rent was fixed in perpetuity.

The plaintiff preferred a second appeal to the High Court.

The appeal was first heard by a Division Bench consisting of two Judges (Mr. Justice BEVERLEY and Mr. Justice AMEER ALI), who having differed in opinion on a question of law referred it to [745] a third Judge, Mr. Justice

* Reference to a Full Bench in Appeal from Appellate Decree, No. 626 of 1894.

JENKINS, who agreed with Mr. Justice AMEER ALI, but referred the case to a Full Bench, as the case of *Bansi Das* v. *Jagdip Narain Chowdhry*, (1896) I. L. R., 24 Cal., 152), appeared to be in conflict with his view. As, however, it was decided in a previous case before the Full Bench that there could not be a valid reference from a single Judge to a Full Bench, a special Bench was constituted in this case.

The **judgments** of Mr. Justice BEVERLEY and Mr. Justice AMEER ALI were as follows :—

Beverley, J.—As I adhere to the opinion I expressed in Special Appeal No. 844 of 1895, and in another case which I cannot now trace, the papers must be laid before the Chief Justice in order that he may refer the hearing of the appeal to one or more of the other Judges of this Court under the provisions of s. 575 of the Code.

The point of law upon which Mr. Justice AMEER ALI and I differ is shortly this.

In making a record of rights under Chapter X of the Bengal Tenancy Act, the Settlement Officer entered the respondents as belonging to the class of raiyats holding at fixed rates (*shara muaiyin*). The landlords objected to the entry under s. 106 of the Act; but their objection was disallowed, and on appeal the Special Judge has held that " the raiyats having proved their holdings for twenty years " (I assume that he means at a rent which has not been changed during that period) the presumption arises that their rent was fixed in perpetuity.

My opinion is that no such presumption arises upon the correct reading of either s. 50 or any other section of the Bengal Tenancy Act. The presumption which is created by s. 50, sub-section (2) is a presumption that the tenant has held at the same rent or rate of rent from the time of the Permanent Settlement. But that is a wholly different thing from a presumption that the tenant is a raiyat holding at fixed rates, as defined in s. 4 of the Act.

It is quite true that under sub-section (1) of s. 50 the rent of a tenure or holding, which has not been changed from the [746] time of the Permanent Settlement, is declared to be not liable to be increased except on the ground of an alteration in the area of the tenure or holding.

Section 6 of the Act also provides that when a tenure has been held from the time of the Permanent Settlement, its rent shall not be enhanced except under certain circumstances. But nowhere, so far as I am aware, does the Act say that such a tenure or holding is to be presumed to be held at a fixed rent or at a fixed rate of rent.

" Raiyats holding at fixed rates " constitute one of the classes of tenants mentioned in s. 4, and the expression is there defined to mean " raiyats holding either at a rent fixed in perpetuity or at a rate of rent fixed in perpetuity." By this expression I understand that the class of raiyats holding at fixed rates are those whose rent or rate of rent was " fixed " in perpetuity at the time of the creation of the tenancy—not raiyats whose rent cannot be increased, except in ceratin circumstances, by reason of the presumption created by s. 50, sub-section (2). A raiyat with a right of occupancy may, by virtue of that presumption, be entitled to hold at a rent which is not liable to be enhanced ; but he does not thereby become a raiyat holding at fixed rates. By s. 18 certain incidents attach to the status of raiyats holding at fixed rates. Their holdings are for many purposes put on the same footing as permanent tenures. For instance, by s. 11 they are capable of being transferred or bequeathed like other immoveable property. But the holding of an occupancy raiyat is

only transferable by custom, and the incidents of occupancy rights are set out and defined in different sections of the Act (ss. 23—26).

I hold, therefore, that a finding that a raiyat has held at the same rent for twenty years will not under s. 50 (2) raise any presumption that he belongs to the class of "raiyats holding at fixed rates."

Ameer Ali, J.—The question involved in this second appeal is one of great importance, and I regret therefore I cannot agree with Mr. Justice BEVERLEY in the construction of s. 50 of the Bengal Tenancy Act.

[747] It appears that in the course of settlement proceedings in connection with the estate of the appellant, the respondents who are the raiyats of Mouzah Bishenpur were entered in the *khatian* as raiyats at fixed rents. The appellant thereupon presented a petition under s. 106 of the Bengal Tenancy Act to have the entry corrected, alleging that the respondents were not raiyats at fixed rents, but only occupancy raiyats. The respondents, on the other hand, pleaded that they were raiyats at fixed rents. The Settlement Officer of Hajipur rejected her petition, and the Judge on appeal has confirmed that order holding, as I understand his judgment, that, inasmuch as it has been proved that the tenants have been in possession of their lands without any alteration in their rents for the last twenty years, they must be presumed under s. 50 of the Tenancy Act to be raiyats at fixed rates of rent. In special appeal it is contended that s. 50, upon which the Lower Appellate Court has proceeded, does not apply to raiyats whose rents are fixed in perpetuity; that it only protects, under certain circumstances, occupancy raiyats from the enhancement of their rents, but that it does not relate to fixity of rent, and that therefore the District Judge was wrong in holding that the respondents were raiyats at fixed rents.

In order to consider whether this contention is well founded, I shall refer for a moment to the provisions of the different chapters before dealing with the meaning of s. 50 as I understand it.

Chapter II gives the various classes of tenants and defines the expressions "tenure-holder" and "raiyats."

Chapter III deals with the enhancement of rent of tenure-holders and with other incidents of their tenures.

Chapter IV deals with the incidents of holdings at fixed rents or rates of rent, but does not lay down any rule as to the ascertainment of such holding.

Chapter V deals with occupancy raiyats; Chapter VI with non-occupancy raiyats and Chapter VII with under-raiyats. We then come to Chapter VIII which is headed thus: "General provisions as to rent, rules and presumptions as to amount of **[748]** rent." Section 50 which comes in this Chapter lays down in general terms the rules and presumptions as to fixity of rent. Sub-section 1 declares that "where a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, the rent or rate of rent shall not be liable to be increased except on the ground of an alteration in the area of the tenure or holding." But in the majority of cases it would be impossible to establish that a tenure or holding has been possessed at an uniform rent or rate of rent from the time of the Permanent Settlement. To meet such cases the Legislature provides in sub-section 2 that "if it is proved in any suit or other proceedings under this Act that either a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held

at that rent or rate of rent from the time of the Permanent Settlement." It is clear, therefore, that those two sub-sections deal with two different cases : (1) where the raiyat (I am omitting the tenure-holder) is able to prove that he and his predecessors in interest (the use of the word "predecessor in interest" is of importance) have been in possession of the holding at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, it declares absolutely that his rent shall not be liable to be increased except on the ground of an alteration in the area of the holding (a provision applicable to all classes of tenants, see s. 52); (2) where the raiyat is able to show that he and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, the law declares it shall be presumed until the contrary is shown that the raiyats had held from the time of the Permanont Settlement. In other words unless the presumption is robutted "his rent or rate of rent" shall not be liable to be increased except on the ground common to all tenants, viz., alteration in the area. The Permanent Settlement is regarded as the starting point, and the result is that where it is found, either upon evidence or upon the basis of the statutory presumption provided in sub-section 2, that [749] the rent of the tenure or holding has not altered from its inception, it cannot be altered on any ground other than that provided in s. 52. If the rent of a holding has not altered since its inception, and it is not liable to enhancement except on certain grounds, it must necessarily follow that the rent is fixed in perpetuity. As already mentioned occupancy raiyats are dealt with in Chapter V; and s. 27 and the following sections lay down the rules relating to the enhancement of the rents of occupancy holdings. A reference to ss. 19 and 20 will show that occupancy raiyats are a class wholly apart. Section 19 runs as follows:—

"Every raiyat who immediately before the commencement of this Act has, by the operation of any enactment by custom or otherwise, a right of occupancy in any land, shall, when this Act comes into force, have a right of occupancy in that land."

Section 20 defines "a settled raiyat" and provides in sub-section 7 for a presumption in his favour. This presumption, it is unnecessary to observe, is wholly different from that provided for in s. 50. Nor does it contain any exclusive reference to an occupancy raiyat. The general term "raiyat" is used as defined in s. 5, and therefore to construe it correctly, one will have to read it thus: where a tenure-holder or a person who has acquired a right to hold land, etc. Any raiyat, therefore, by whatever name he may be called, if he pleads and proves the particular state of facts provided in s. 50, is entitled to its benefit.

As already observed, Chapter IV, which declares the incidents of tenancies held at fixed rents or rates of rent, lays down no rule for the ascertainment of such tenancies. Without expressing any opinion on the question whether such tenancies can be created now (since the passing of the Act) by contract, it seems to me that s. 18 must be read with s. 50. In my opinion the latter section lays down the circumstances under which tenancies at a fixed rent or rate of rent will be taken to exist, whilst s. 18 declares the incidents that will attach to them under the law. In considering whether s. 50 is applicable to raiyats holding at fixed rents or rates of rent, or whether it is only intended for the protection against enhancement of a certain class of occupancy raiyats, it is necessary to bear in mind another fact. A tenure-holder under the Tenancy Act has the right of transferring [750] his tenure by sale, gift or testamentary devise. In connection with a tenure-holder, therefore, the expression "predecessor in interest" includes a person from whom the holder for the time being derives his title as well by purchase, gift or will as by

inheritance. A raiyat holding at fixed rent or rate of rent has the same right as a tenure-holder. Now in s. 50 the term "predecessor in interest" is used in respect of both tenure-holder and raiyat. In the construction of the section the collocation of the words is of importance, and it seems to me that it would be against all principle of right reasoning to suppose that the Legislature intended the words "predecessor in interest" in connection with a raiyat in a different sense from that in connection with a tenure-holder.

As a matter of fact, the Act itself supplies an index to the meaning of the Legislature. For with reference to occupancy raiyats who do not (apart from custom) possess the right of transferring their holding, and whose interest can therefore only devolve by inheritance, it uses a totally different expression, carefully abstaining from the use of the words "predecessor in interest." Sub-section 3 to s. 20 declares that "a person shall be deemed for the purpose of this section to have held as a raiyat any land held as a raiyat by a person whose heir he is." The difference in the phraseology here is most marked, that s. 50 applies to class (*a*) of raiyats mentioned in s. 4, and the incidents of whose tenancies are described in s. 18 will be apparent from the proviso which runs thus: "Provided that if it is required by or under any enactment that in any local area tenancies or any classes of tenancies at fixed rents or rates of rent shall be registered as such on or before a date specified by or under the enactment the foregoing presumption shall not after that date apply to any tenancy or, as the case may be, to any tenancy of that class in that local area unless the tenancy has been so registered" It shows clearly that the presumption provided for [by ?] sub-section 2, and the scope of which is limited by the proviso, relates to "tenancies at fixed rents or rates of rents." Upon the evidence, the sufficiency of which it is not open to us to consider in special appeal, the District Judge has found that the tenants have been holding their lands at rents which have not altered for the last twenty years. I am of opinion [751] that under s. 50 he was right in giving effect to the presumption that they are holding at fixed rents or rates of rents. I am not inclined to interfere with this judgment.

Mr. Justice JENKINS to whom the case was referred made the following ORDER OF REFERENCE to a Full Bench :—

This case, in consequence of a difference of opinion on the part of the two learned Judges before whom it came in the first instance, has been referred to me, under s. 575 of the Code of Civil Procedure, in order that I may deliver my opinion thereon; and as the case has been argued fully and ably by the learned Vakils who appeared, and the view I hold will necessitate a reference to a Full Bench, no object will be attained by my reserving judgment or elaborating my reasons.

The point for decision is, whether the Assistant Settlement Officer was right in recording the defendants as raiyats holding at fixed rates.

The facts of the case are fully set forth in the judgments of BEVERLEY and AMEER ALI, JJ., and it is not necessary that I should recapitulate them now, but I would state that on the part of the appellant it has been conceded before me that the facts proved *do* give rise to the presumption contained in the 2nd sub-section of s. 50 of the Bengal Tenancy Act. Now that Act is stated to be one passed for the purpose of amending and consolidating certain enactments relating to the law of landlord and tenant within the territories under the administration of the Lieutenant-Governor of Bengal; and by s. 4 a description, rather than a definition, is given of the classes of tenants to

whom the Act is applicable, among them being raiyats who are divided into the following classes:—

(a) "Raiyats holding at fixed rates."
(b) "Occupancy raiyats."
(c) "Non-occupancy raiyats."

The same section defines "raiyats holding at fixed rates" by providing that the expression means "raiyats holding either at a rent fixed in perpetuity or at a rate of rent fixed in perpetuity."

[752] The next section to which I may refer is the 18th, which describes the incidents of holding at fixed rates, and then I come to s. 50 upon which the present case turns, and whereby it is provided that —

1. "Where a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, the rent or rate of rent shall not be liable to be increased except on the ground of an alteration in the area of the tenure or holding.

2. "If it is proved in any suit or other proceeding under this Act that either a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement.

"Provided that if it is required by or under any enactment that in any local area tenancies, or any classes of tenancies, at fixed rents or rates of rent shall be registered as such on or before a date specified by or under the enactment, the foregoing presumption shall not after that date apply to any tenancy or, as the case may be, to any tenancy of that class in that local area unless the tenancy has been so registered."

The expression "predecessors in interest," it is argued on the part of the defendants, is a strong indication in favour of the view they support. But I am unable to attach much importance to its use except to the extent that it is consistent with the construction for which they contend. But I think it is clear from the proviso to the second sub-section that it was in the contemplation of the Legislature that a tenancy to which the presumption would be applicable should be capable of registration under a system which provided for the registration of tenancies, or classes of tenancies, at fixed rents or rates of rent; and the inference I draw from that is that a tenancy to which the presumption is applicable may be aptly described as one held at fixed rates.

The matter, however, does not rest there, for under s. 102, provision is made as to the particulars to be recorded in records of rights and settlements of rent. By sub-section (b) it is provided that the particulars to be recorded shall include "the class to which the tenant belongs, that is to say, whether he is a [753] tenure-holder, raiyat holding at fixed rates, occupancy-raiyat, non-occupancy-raiyat or under-raiyat, and if he is a tenure-holder, whether he is a permanent-tenure-holder or not, and whether his rent is liable to enhancement during the continuance of his tenancy."

It would seem that non-liability to enhancement was regarded for obvious reasons as a matter proper to be recorded; but there is no provision which requires or permits such a record in the case of a raiyat unless it be by the entry in the record of the fact that he is a raiyat holding at fixed rates, and it appears to me to be the intention of the sub-section that the immunity from enhancement arising under section 50 should be recorded by the statement that the tenant was a raiyat, holding at fixed rates. In connection with this section I may refer to s. 115, which provides that "when the particulars mentioned in s. 102, clause (b) have been recorded under this chapter in

respect of any tenancy, the presumption under s. 50 shall not thereafter apply to that tenancy," for it appears to me that this section also points to the same conclusion.

Further looking outside the Bengal Tenancy Act, 1885, one finds that the expression "raiyats holding at fixed rates" was one in use before that Act came into operation, for it appears both in Act X of 1859 and also in the Bengal Council Act VIII of 1869. I may particularly refer to ss. 3, 4 and 5 of both those Acts. Sections 3 and 4 correspond closely with sub-sections 1 and 2 to s. 50 of the Bengal Tenancy Act of 1885, and it will be seen from s. 5 of those Acts that the raiyat in whose favour the presumption operated would be properly described as one holding at fixed rates. My own opinion, therefore, apart from authority, would be that upon the construction of the Act the record of the Assistant Settlement Officer was properly made.

I have, however, been referred to a prior decision of this Court where the same question arose, and it was there said in the course of the judgment:

"We entertain grave doubts whether this class of raiyat [that is raiyat holding at fixed rates] can be created by the operation of s. 50. All that that section says is that a raiyat who has held [754] at the same rent or rate of rent since the time of the Permanent Settlement shall not be liable to have his rent increased except on the ground of an alteration in the area of the holding. It does not say that such a raiyat is a raiyat holding at fixed rates, or that the tenancy shall be subject to the incidents of a holding at fixed rates as prescribed by s. 18 of the Act."

The learned Judges there appear to have arrived at their decision not without "grave doubts," but still it is a decision which clearly covers the present case, and it will, therefore, be necessary to refer the matter to a Full Bench. The question referred is whether, having regard to the case cited, the Assistant Settlement Officer was right in recording the defendants as raiyats holding at fixed rates.

Babu *Raghunandan Prosad* (for Babu *Umakali Mukerjee*) contended on behalf of the appellant that the raiyats were not entitled to the status of a raiyat at a fixed rate by merely showing that they paid uniformly for twenty years. The case of *Bansi Das v. Jagdip Narain Chowdhry*, (1896) I. L. R., 24 Cal., 152, is in my favour, and that is a case referred to in the order of reference.

Macpherson, J.—Supposing the raiyat proved uniform payment for twenty years and was entitled to the presumption that he held from the Permanent Settlement at that rate, would any Court be justified in holding as a matter of fact that he does not hold at fixed rates?

Trevelyan, J.—Is it not a natural inference of fact?

Ghose, J.—Your case, I suppose, is that there must be an agreement?

Yes.—The tenant does not plead any agreement to hold at a fixed rate. Mere uniform payment for twenty years does not make him a "raiyat at fixed rent." Section 21 does not confer the right, and there is no other section conferring it. The statute should not be interpreted to confer a right which has not been expressly [755] given. The case of *Norendra Nath Sircar* v. *Kamal Basini Dasi*, (1896) I. L. R., 23 Cal., 563, lays down the rule.

Babu *Horendra Narayan Mitra* (for Babu *Satis Chandra Ghose*) who appeared for the respondent was not called upon.

The **judgments** of the High Court (MACLEAN, C.J., and MACPHERSON, TREVELYAN, GHOSE, and AMEER ALI, JJ.) were as follow :—

Maclean, C.J.—The question we have to decide is whether the Assistant Settlement Officer was right in recording the defendants as raiyats holding at fixed rates. There was a difference of opinion between Mr. Justice BEVERLEY and Mr. Justice AMEER ALI upon the point, and the case was referred to Mr. Justice JENKINS, who took the same view as Mr. Justice AMEER ALI, and referred the case to a Full Bench. As, however, it has been decided that a Judge of the High Court, sitting alone, has no power to refer a case to a Full Bench, the case has to be dealt with by the present Court, which has been specially constituted to hear it. For my part I think that the conclusion at which Mr. Justice AMEER ALI and Mr. Justice JENKINS arrived is the correct one, and I do not think I can usefully add anything to what they have said in their judgments. In my opinion the Assistant Settlement Officer was right in recording the defendants as raiyats holding at fixed rates and the present appeal must be dismissed with costs. There will be no costs of the abortive reference.

Macpherson, J.—I also think that the view taken by Mr. Justice AMEER ALI and Mr. Justice JENKINS is correct, when the question is whether a raiyat holds at a fixed rent, that is to say, whether the rent or rate of rent was fixed in perpetuity, and the raiyat proves that he had held the land at an uniform unchanged rent or rate of rent for, say, a hundred years, the Court would, I think, be justified in presuming, apart from any statutory enactment, that the rent was fixed in perpetuity. In sub-section 2 of s. 50 of the Bengal Tenancy Act the Legislature apparently recognise the diffi-**[756]**culty a raiyat might have in proving that the rent was unchanged for any such length of time, and it provides on proof of certain facts for the presumption which might in my opinion be made if in fact the finding of the Court was that the rent had been unchanged since the time of the Permanent Settlement.

Trevelyan, J—I agree in thinking that the Assistant Settlement Officer was right in recording the defendants as raiyats holding at fixed rates, and I prefer to place my decision entirely upon the terms of clause 2 of s. 50 of the Bengal Tenancy Act It having been proved in this case that these raiyats held at a rate of rent which had not been changed during the twenty years immediately before the institution of the suit or proceeding, it ought to be presumed, in accordance with the provision of that clause, that they have held at that rent or rate of rent from the time of the Permanent Settlement. It seems to me, as Mr. Justice MACPHERSON pointed out, that the fact that they held at that rent or rate of rent, raises in fact the presumption, apart from the Act, that the original contract was a contract to hold at fixed rates, and it would be evidence from which any judge of fact could reasonably presume that there had been such a contract. That is what has been done in this case. I, therefore, agree in thinking that the Settlement Officer was right in what he did.

Ghose, J.— I agree in thinking that the question referred to us should be answered in the affirmative.

Ameer Ali, J.—I gave my reasons very fully on the previous occasion for holding that the Assistant Settlement Officer was right in recording the defendants as raiyats holding at fixed rates, and I have nothing more to add.

Maclean, C.J.—The appeal will be dismissed with costs, including the costs of all the hearings in this Court.

S. C. C. *Appeal dismissed.*

NOTES.

[This was followed in (1902) 7 C.W N., 182. See also (1906) 33 Cal, 1219. 10 C.W.N., 1083.]

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[757] FULL BENCH REFERENCE

The 16th March, 1898

PRESENT

SIR FRANCIS W. MACLEAN, K C I E, CHIEF JUSTICE, AND MR JUSTICE MACPHERSON, MR. JUSTICE TREVLLYAN, MR JUSTICE BANERJEE AND MR. JUSTICE JENKINS

Mahomed Wahiduddin .... .Petitioner

versus

Hakiman *alias* Hakku .... Opposite Party *

Civil Procedure Code (Act XIV of 1882), ss 525 and 526—Arbitration—Award—Denial of reference to arbitration—Jurisdiction of Court to determine the factum of reference—Appeal.

Held, by a majority of the Full Bench (MACPHERSON, J, dissenting) that when an application has been made under s 525 of the Code of Civil Procedure and notice has been given to the parties to the alleged arbitration, the jurisdiction of the Court to order the award to be filed and to allow proceedings to be taken under it is not taken away by a mere denial of the reference to arbitration on an objection to the validity of that reference.

Amrit Ram v *Dasrat Ram*, (1894) I L R, 17 All, 21, followed

Held, also, that an order under s 525 determining that there has been no valid reference to arbitration and rejecting the application is a "decree" within the meaning of s. 2 and an appeal lies from such order

Kali Prosanno Ghose v *Rajani Kant Chatterjee*, (1897) I L R, 25 Cal, 141, followed.

THE petitioner in this case applied to the Court of the Subordinate Judge of Patna under s. 525 of the Civil Procedure Code for filing an award alleged to have been made on a reference to the arbitration without the intervention of a Court of Justice. Notices were issued to the parties to the arbitration other than the applicant, the opposite party, Bibi Hakiman, appeared and objected to the award being filed in Court on the ground that there was no reference to arbitration by her, and that the deed of reference had been fraudulently caused to be signed by her without the purport of the document being explained to her. The Subordinate Judge rejected the application of the petitioner upon the objection of the opposite party without determining the factum of the objection and without taking any evidence [758] of the truth of the allegation made therein. The petitioner moved the High Court under s 622 of the Civil Procedure Code, and the present rule was issued by that Court.

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* Reference to the Full Bench in Rule No 1187 of 1897 issued by the High Court, against an order of Babu Upendra Chunder Mullick, Subordinate Judge of Patna, dated 27th March 1897.

Upon the hearing of the rule before a Division Bench (Mr. Justice TREVELYAN and Mr. Justice STEVENS) the case was referred to a Full Bench for final decision. The order of reference was as follows:—

"The question to be determined in this case is whether, when an application has been made under section 525 of the Civil Procedure Code, and notice has been given to the parties to the alleged arbitration other than the applicant, the jurisdiction of the Court to order the award to be filed and to allow proceedings to be taken under it is taken away by a mere denial of the reference to arbitration on an objection to the validity of that reference.

"The learned Judge in the Court below held that he had no jurisdiction to deal with the matter in the case of a denial of the existence or validity of the reference. His decision follows the decision of a Division Bench of this Court in the case of *Bijadhur Bhugut* v. *Monohur Bhugut*, (1883) I. L. R., 10 Cal., 11. The view which the Judge of this Court took in that case is supported by the judgment of three of the Judges of the Full Bench in the case of *Surjan Raot* v. *Bhikari Raot*, (1893) I. L. R., 21 Cal., 213, but the opinions there expressed have no reference to the question referred to the Full Bench. Speaking with all respect for those opinions, we think that we are not obliged to treat them as of the same force as if they had been directly in point. We are unable to see why the Court cannot determine the factum or validity of a reference to arbitration in the same way as it can determine any disputed question in a suit, and we feel reluctant to accept an argument which places the jurisdiction of the Court in the power of the defendant.

"The other cases which have been cited before us are: the case of *Rung Lall* v. *Hem Narain Gir*, (1885) I. L. R., 11 Cal., 166; the case of *Amrit Ram* v. *Dasarat Ram*, (1894) I. L. R., 17 All. 21; the case of *Tejpur* v. *Mahomed Jamal*, (1896) I. L. R., 20 Bom., 596; and the case of *Husananna* v. *Linganna*, (1894) I. L. R., 18 Mad., 423.

"We refer this matter for the final decision of a Full Bench."

The rule came on for hearing before the Full Bench on the 25th January 1898.

[759] Dr. *Asutosh Mukerjeee* (with him Moulvi *M. Mustafa Khan*) for the petitioner contended that the jurisdiction of the Court was not ousted by the bare denial of the existence or validity of the reference. When the factum of the reference is denied the case comes under section 520, cl. (*a*). *Amrit Ram* v. *Dasrat Ram*, (1894) I.L.R., 17 All., 21. Section 526 is not exclusive, and does not fix the limits of the inquiry to be held under s. 525; under that section the jurisdiction of the Court is dependent upon certain matters, and if any of these be disputed, the Court is bound to inquire. *Amrit Ram* v. *Dasrat Ram*, (1894) I.L.R., 17 All., 21. See also *Tejpur* v. *Mahomed Jamal*, (1896) I.L.R., 20 Bom., 596; see p. 603. *Micharaya Guruvu* v. *Sadasiva Parama Guruvu*, (1881) I. L. R., 4 Mad., 319; *Husananna* v. *Linganna*, (1894) I. L. R., 18 Mad., 423. The dicta in *Pijadhur Bhugut* v. *Monohur Bhugut*, (1883) I.L.R., 10 Cal., 11, and *Surjan Raot* v. *Bhikari Raot*, (1893) I. L. R., 21 Cal., 213, ought not to be followed.

Moulvi *Mahomed Yusuf* (with him *M. Syed Shumsul Huda*) showed cause.—Section 526 is exclusive and prohibits the Court from inquiring into objections not falling within the terms of ss. 520 and 521. Section 525 prescribes only a summary inquiry, as there is no appeal from an order rejecting an application under that section. *Chintaman Singh* v. *Ruppa Koer*, (1866) 6 W. R., Mis., 83 F. B. Complicated questions cannot therefore be gone into. [JENKINS, J.—Section 526 describes the proceedings as a suit.] It is not a suit for all purposes. *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee*, (1871) 8 B. L. R., 315: 15 W. R., F. B., 9; *Sree Ram Chowdhry* v. *Dinobundhoo Chowdhry*, (1881) I. L. R., 7 Cal., 490. Sections 331, 523 and 529 also show that the proceedings under s. 525 are not a suit. The language of section 327 of Act VIII of 1859 was wider, and a narrower construction should be put

upon the new section. The English cases referred to by PAUL, J., in [760] Sashti Charan Chatterjee's case support my contention. The earlier cases in the Allahabad High Court took the same view. If the contention of the other side prevails the consequence will be serious; there being no appeal, the decision in the summary proceeding will operate as *res judicata*.

Dr. *Asutosh Mukerjee* in reply.—The effect of taking s. 526 to be exclusive and construing it strictly is to shut out all inquiry into the objection raised by the opposite party, but it is an elementary principle that when the jurisdiction of a Court is disputed, the Court must adjudicate upon the question. Besides the cases already cited see *Huree Persad Malee* v. *Koonjo Behary Shaha*, (1862) W. R., F. B., 29: Marsh, 99; *Chunder Koomar Mundul* v. *Bakur Ali Khan*, (1868) 9 W. R., 598; *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee*, (1871) 8 B. L. R., 315; see 324; *Mayor of London* v. *Cox*, (1866) L. R., 2 H. L., 239; see 261, 263. That the question is one of jurisdiction appears from *Nusserwanjee Pestonjee* v. *Mynoodeen Khan*, (1855) 6 Moore's I. A., 134; see 155; *Pestonjee Nusserwanjee* v. *Maneckjee & Co.*, (1868) 12 Moore's I. A., 112. The case of *Bindessuri Pershad Singh* v. *Jankee Pershad Singh*, (1889) I. L. R., 16 Cal., 482 (see 486) clearly supports this argument. *Wright* v. *Graham*, (1848) 18 L. J., Exch. 29, and *Barton* v. *Ranson*. (1838) 3 M. & W., 322, are distinguishable and would not now be followed in England under the Arbitration Act, s. 12. See also *Lord* v. *Lord*, (1855) 26 L. J., Q. B., 34, and Russell on Arbitrators (7th edition, 593). There is nothing to show that the inquiry is to be a summary one. As to the meaning of the word "suit" see the judgment of PETHERAM, C.J., in *Surjan Raot* v. *Bhikari Raot*, (1893) I. L. R., 21 Cal., 213; see 221. The question of validity of the reference cannot be more complicated than the questions which arise under ss. 520 and 521. [761] A similar argument found no favour in *Brojodurlabh Sinha* v. *Ramanath Ghose*, (1897) I. L. R., 24 Cal., 908. As to the question of appeal, if the award is ordered to be filed, there will be an appeal from the final decree. See *Kali Prosanno Ghose* v. *Rajani Kant Chatterjee*, (1897) I. L. R., 25 Cal., 141, where the earlier cases are discussed. If the application is rejected the order does not operate as *res-judicata* - see *Mahommed Nawaz Khan* v. *Alam Khan*, (1891) L. R., 18 I. A., 73; see 76, which shows at any rate that the validity of the reference may be put in issue under s. 525. The mischief of a contrary decision is forcibly put by PRINSEP, J., in *Surjan Raot* v. *Bhikari Raot*, (1893) I. L. R., 21 Cal., 213; see 224. If there is an appeal from the order of the lower Court the present petition under s. 622 may be regarded as a memorandum of appeal, a deficient Court-fee being levied from the petitioner.

The following **judgments** were delivered by the Full Bench :—

Maclean, C. J.—The question referred for the decision of the Full Bench in this case, is, whether when an application has been made under s. 525 of the Code of Civil Procedure, and notice has been given to the parties to the alleged arbitration (other than the applicant), the jurisdiction of the Court to order the award to be filed and to allow proceedings to be taken under it, is taken away by a mere denial of the reference to the arbitration on an objection to the validity of that reference. The affirmative of the proposition involved in the reference has no doubt been decided by more than one Division Bench of this Court, and it further has the support of the opinion expressed, though unnecessarily for the purposes of their decision, by certain members of a Full Bench Court in the case of *Surjan Raot* v. *Bhikari Raot*, (1893) I. L. R., 21 Cal., 213; see 224. There is, however, no authority on the point by which

we are bound, so that it is open to us to consider the question on the words of the Code itself, apart from previous decision. The sections of the Code more directly governing the present case are ss. 525 and 526, which are in these terms :—

[762] SECTION 525 —" When any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court.

" The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

" The Court shall direct notice to be given to the parties to the arbitration other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed."

SECTION 526.—" If no ground, such as is mentioned or referred to in s. 520 or s. 521, be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter."

Now, according to a literal reading of s. 525, two conditions are requisite to warrant an application that an award be filed in Court: *first*, the matter must have been referred to arbitration without the intervention of a Court of Justice, *second*, an award must have been made thereon. It would, therefore, seem, on general principles, that the existence or non-existence of each of those conditions is a matter for enquiry and adjudication. It is difficult to see how the Court can ascertain whether or not such an award as is mentioned in the section has been actually made, without first ascertaining, if the matter be disputed, whether or not there has been such a reference as is mentioned in the section. It is urged that the section presupposes the existence of a submission or reference to arbitration, and that if this be disputed, the Court cannot go into the matter, but must leave the parties to have the factum or otherwise of reference decided in an independent suit The practical effect of such contention, if sound, would be that any party to a reference against whom an adverse award has been made, has only to allege that there was no reference, and he can throw the matter over and paralyze the operation of ss. 525 and 526 of the Code. [763] I can scarcely think this was the intention of the Legislature, nor do I think the language of the section warrants such a contention. It is difficult to see why the Court, on an application under s. 525, can go into the delicate questions indicated in ss. 520 and 521, and yet is unable to go into that of whether or not there were any reference to arbitration, which is the substratum of the whole matter, and upon which the summary jurisdiction under s. 525 is based. It seems a rather odd conclusion that the Court may go into questions which may result in the award being set aside, and yet cannot go into the question of whether or not there has been any valid reference to arbitration. It has however been urged before us that this literal interpretation of this section must be discarded, because, it is contended, there would be no right of appeal from an adjudication on the factum of reference. This by itself, even were the contention well founded, would not be sufficient reason for withholding from clear and unequivocal language its ordinary meaning, for the function of the Court is to expound the Act as it stands according to the plain sense of the words used. Moreover, any argument drawn from the alleged absence of any right to appeal loses its force, in view of the fact that the same consideration would apply to the adjudication as to the existence of an agreement to refer on an application under s. 523, and also as to those

matters of far greater difficulty and intricacy indicated in s. 521, and referentially incorporated into s. 526, though undoubtedly they would have to be investigated and determined. But in fact the whole basis of this argument, in my opinion, has no existence, for I think the right of appeal exists. In the recent case of *Kali Prosanno Ghose* v. *Rajani Kant Chatterjee*, (1897) I.L.R., 25 Cal., 141, a Division Bench of this Court has held that an appeal will lie against a decree given in accordance with an award under s. 522 of the Code, when the award upon which the decree is based is not a valid and legal award. An award cannot be a valid or legal award if there has been no submission to arbitration, and how then can the Court go into the question of whether or not it is valid or legal if it cannot go into the question of whether or not there were a submission to arbitration. I do not think [764] that s. 522 contemplates there should be no appeal where the validity of the award is challenged. Another argument addressed to the Court on behalf of the opposite party was, that the question of whether or not there had been any submission to arbitration could not be determined, on the grouud that under ss. 525 and 526 the Court could only investigate such matters as are indicated in ss. 520 and 521. This is a somewhat dangerous argument, for, if it were to prevail, the result would be that the existence and validity of the agreement to refer cannot be questioned, and the order to file the award would be a matter of course. It will be noticed that under s 526 it is compulsory on the Court to file the award, unless some such ground as is mentioned in ss. 520 and 521 be shown against it. The result is that, in my opinion, the jurisdiction of the Court to order an award to be filed, and to allow proceedings thereunder, is not taken away by a mere denial of the reference to arbitration. This view is consistent with the decision of a Full Bench of the Allahabad High Court in the case of *Amrit Ram* v. *Dasrat Ram*, (1894) I. L. R., 17 All., 21.

I think, however, that this application must be treated as an appeal, the time for appealing not having expired, and not as an application under s. 622 of the Code, and the petitioner must undertake to pay any additional Court-fee there may be on the footing of its being an appeal.

Trevelyan, J.—I agree entirely with the view expressed by the learned Chief Justice.

Jenkins, J.—I am of opinion that the question referred to us must be answered in the way proposed by the Chief Justice, and for the reasons expressed in his judgment, and I agree with him as to the mode in which the case should be dealt with.

Macpherson, J.—I regret that I must in this case dissent from the decision of the other learned Judges of this Bench. In my opinion s. 525 of the Code presupposes that there has been a reference to arbitration and an award made thereon, and [765] the Court under s. 526 must deal with the award on that footing, if it can do so, having regard to the nature of the cause shown. If it cannot, if for instance the cause shown is that there was no submission and consequently no award, the Court must hold its hand and refuse the application.

Section 525 does not, it is true, refer to an admitted reference or an admitted award, but the Legislature might well refrain from using language which was too suggestive. If stress is to be laid on this circumstance, equal stress must be placed on the absence of any indication that when the question of submission is a question in dispute, the Court is to determine on evidence the fact of a submission. I may point out that an express provision to this effect is to be found in s. 531 when an alleged agreement to refer is filed by one of the parties.

Section 526 is silent as to the course to be adopted if, in showing cause, there is a denial of any submission, and I see nothing in that section or in s. 525 to prevent the Court from refusing the application on that ground without enquiring into and deciding the disputed fact. The cause to be shown under s. 526, and established according to the decision of the Full Bench in *Surjan Raot* v. *Bhikari Raot*, (1893) I.L R., 21 Cal., 213, is some cause as is mentioned or referred to in s. 520 or 521, but such cause could only be shown when there was an actual and not merely an alleged award. It would, moreover, be contrary to established practice and to all ideas of justice and fairness that when one party alleges and the other denies a submission, the burden of proof should be placed on the party denying. It is the party objecting who is to show cause, and this Court has held that to show cause means to establish cause.

The corresponding section (321) of the Code of 1859 enacted that if no sufficient cause was shown against the award, the award should be filed. The cases *Iswari Prosad* v. *Bir Bhanjan Tewari*, (1871) 8 B. L. R., 315 : 15 W. R. (F. B.) 9, and *Chowdhri Murtaza Hossein* v. *Mussamat Bibi Bechanissa*, (1876) L. R., 3 I. A., 209, show that there was a difference of opinion as to what those words [766] meant. The intended scope of the section has not been made very clear in the present Code, but the altered language of s. 526, coupled with the absence of any extending provisions, indicate to my mind that the Courts were intended to deal with actual and not with disputed award. Sections 525 and 526 must be read together, and so reading them they bear in my opinion the construction which I have put upon them. This construction is, moreover, consistent with what one may reasonably suppose to have been the intention of the Legislature that when the tribunal undisputedly chosen by the parties has made its award, the Court should determine in a summary way, without any right of appeal and having regard only to matters arising on the award on the conduct of the parties or the arbitrators in the making of it, whether effect should be given to the award. In determining the scope of these sections one cannot overlook the fact that finality is given to the decree which by the operation of ss. 526 and 522 is to follow on the filing of the award, except, in so far as the decree is in excess of or not in accordance with the award. No appeal is allowed against an order for the filing of the award, and when such an order is made, the award filed is to take effect as an award made under the provisions of Chapter XXVII. That is to say, the Court is to give judgment according to the award, which must of necessity be the award filed; upon that judgment a decree is to follow, and no appeal is to lie against that decree except in so far as it is in excess of or not in accordance with the award. When the decree is in strict accordance with the award filed, I fail to see that there is any right of appeal against the decree. If the Legislature intended that the Court of the lowest grade having jurisdiction in the matter should decide disputed questions of submission, I cannot believe that an appeal from the decision would have been disallowed. Possibly an appeal might lie on the ground that the Court had made a decree which it had no jurisdiction to make, but that would mean that the Court had decided matters which it was not competent to decide, and such an appeal would be very different from an appeal against the decree, on the ground that the decree was wrong by reason of an erroneous decision on a question of fact antecedent to the award with which alone the Courts can deal under ss. 525 and 526.

[767] A Full Bench of the Allahabad High Court held in *Amrit Ram* v. *Dasrat Ram*, (1894) I.L.R., 17 All., 21, that the words in s. 526 "if no ground

such as is mentioned or referred to in s. 520 or s. 521" covered all objections relating to the submission and the authority of the arbitrators to act. If this decision is right my view of the section is wrong. I must however with due respect dissent from the decision. It has been already dissented from by FARRAN, C.J., and STRACHEY, J.—in *Tejpur* v. *Mahomed Jammal*, (1896) I. L. R., 20 Bom., 596, and I cannot do better than adopt the reasons of those learned Judges for holding that s. 526 bears no such construction as that. It is argued, however, that as the application under s. 525 is to be registered and numbered as a suit between the applicant as plaintiff and the other parties as defendants, it must be dealt with as a suit, and that the Court has at the least an implied power to try and decide all matters arising on the application. I think no such implication rises from that direction standing alone and without the addition of further words such as are to be found in s. 331 and in s. 529 read with s. 531, and having regard to the language used it would, in my opinion, be going very far to hold that the provisions of the Procedure Code relating to suits apply to applications under s. 525, and that every such application is to be dealt with as a suit. If, moreover, the application is to be dealt with as a suit culminating in a decree one way or the other, one is driven to what seems to me to be an absurd conclusion. The Court makes an order refusing the application on one or other of the grounds referred to in s. 526 after adjudicating on the objections which come within that section. The order is a decree as defined in s. 9 [s. 2?] of the Code, for as it is an adjudication on a right claimed on a defence set up which, so far as regards the Court expressing it, decides the suit. An appeal would lie against the decree, an appeal not being prohibited by any provision of law. If, however, the Court after a similar adjudication overrules the objections coming under s. 526 and makes an order that the award should be filed, the order is not an appealable order, and it is not a decree because it does not finally dispose of the suit. Obviously also no appeal would lie against the decree which is [768] to follow on the filing of the award, if the decree was in accordance with the award.

It would follow, therefore, that if the application was refused on any ground set out in s. 521, the plaintiff would have a right of appeal, but if the application was allowed, the objections under that section being overruled, the defendants would have no right of an appeal. I am unable to believe that any such result as this was intended or contemplated and I must decline to put upon the sections a construction which would lead to it, the more especially as I think they bear a more reasonable construction by which such a result is avoided.

The consequence would, of course, be much more serious, if there was a dispute as to the submission. In that case, if the Court held there was no submission and refused the application on that ground, the plaintiff would have a right of appeal. If it held that there was a submission and made a decree in accordance with the award, the defendant, in the view which I take and have already expressed, would have no right of appeal.

The real objection to putting a limited construction on the two sections seems to be that the defendant by denying that there was any submission could prevent the operation of the sections. I presume that the applicant would have to support his application by affidavit on verified petition, and that the defendant when called on to show cause must show cause in the same sort of way. His denial, therefore, if false, would not be without risk to himself. Nor do I see that in my construction of the sections any serious hardship or inconvenience is involved. The refusal of the application on the

ground that there is a dispute as to the factum of a submission means only this, that the special and summary procedure provided by these sections is not applicable to the case. The applicant is not left without a remedy, he can bring a suit to enforce the award, and in that suit all questions upon which the parties are at issue would be tried in the ordinary way and with the ordinary right of appeal.

The cases in this Court seem to me to be all one way and in favour of the view I have expressed. I need only refer to [769] *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhri*, (1883) I L.R., 9 Cal., 557, decided by WILSON, J., and myself, and to *Bijadhur Bhugut* v. *Monohur Bhugut*, (1883) I. L. R., 10 Cal., 11, decided by MITTER and TOTTENHAM, JJ. The head-note in the former case does not seem to be quite accurate. WILSON, J., although he went further than I was disposed to go, says this: "There is an additional objection to the present order because the applicant when before the Subordinate Judge denied altogether that the submission was binding upon her, and s. 525 seems to me to have no application to a case in which the submission or its binding effect is in dispute." Then there is the opinion expressed by PRINSEP and PIGOT, JJ., and in which I concurred, in the Full Bench case *Surjan Raot* v *Bhikari Raot*, (1893) I. L. R., 21 Cal., 213. That case overrules some of the decisions of this Court in which other learned Judges had taken a still more restricted view of the powers of the Court in dealing with applications under s. 525, and although the opinion above referred to on the question now raised has not the force of a decision, it was deliberately formed and expressed in order to prevent the decision of the Full Bench being carried further than it was intended to go.

The Bombay High Court has practically adopted the same construction in *Samal Nathu* v. *Jaishankar Dulsukram*, (1884) I. L. R., 9 Bom., 254, and *Tejpur Dew Chand* v. *Mahomed Jammal*, (1896) I.L.R., 20 Bom., 596.

The decision of the Madras High Court in *Husananna* v. *Linganna*, (1894) I. L. R, 18 Mad., 423, when examined will be found to be no authority on the question now raised. On the other side there is the decision of the Allahabad High Court already referred to.

It follows from what I have said that I entirely dissent from the conclusion that an appeal lies in this case.

Banerjee, J.—The question for the determination of which this case has been referred to a Full Bench is—

[770] "Whether when an application has been made under s. 525 of the Civil Procedure Code, and notice has been given to the parties to the alleged arbitration other than the applicant, the jurisdiction of the Court to order the award to be filed, and to allow proceedings to be taken under it, is taken away by a mere denial of the reference to arbitration on an objection to the validity of the reference."

The facts of the case upon which this question arises are shortly these: The petitioner before us applied to the Court of the Subordinate Judge of Patna, under s. 525 of the Civil Procedure Code, for filing an award on the allegation that the same had been made on a reference to arbitration without the intervention of the Court. The opposite party appeared on notice being served on her, and objected to the award being filed in Court on the ground that there was no reference to arbitration by her, and that the *ekrar* or deed purporting to embody her assent to the reference had been fraudulently caused to be signed by her without the purport of the document being explained to her. And the Court below following the cases of *Bijadhur Bhugut* v. *Monohur Bhugut*,

(1883) I. L. R., 10 Cal., 11, and *Surjan Raot* v. *Bhikari Raot*, (1893) I. L. R., 21 Cal., 213, rejected the application without taking any evidence or making any enquiry into the truth of the allegations on either side. Aggrieved by the order rejecting the application, the petitioner moved this Court, and has obtained the rule which has given rise to this reference.

The answer to the question referred to us must depend upon the meaning of ss. 525 and 526 of the Code of Civil Procedure, and in ascertaining that meaning we must look not merely to the letter but also to the spirit of the law, and must also, as far as possible, have regard to the interpretation put by previous decisions upon these and other cognate provisions of the Code.

Section 525 says: "When any matter has been referred for arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may [771] apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court.

"The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

"The Court shall direct notice to be given to the parties to the arbitration other than the applicant, requiring them to show cause within a time specified why the award should not be filed."

An applicant under s. 525 must, therefore, allege that there has been a reference to arbitration without the intervention of a Court of Justice, and an award has been made thereon in which he is interested, and it must be competent to the party summoned to show cause to show, not only that the award is open to the objections referred to in s. 526, but also that the alleged reference to arbitration never took place Section 526, it is true, enacts that "if no ground, such as is mentioned in s. 520 or 521, be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter;" but that cannot be taken to imply that the party summoned to show cause can resist the application only if he can show that the award is open to one or more of the objections contemplated by ss. 520 and 521, and that he is precluded from urging that there was no actual or valid reference to arbitration. It was argued that the effect of s. 526, referring only to the objections under ss 520 and 521, is to make the absence of other objections such as that there was no actual or valid submission to arbitration, a necessary condition for the Courts entertaining an application under s. 525. But if that had been the intention of the Legislature, it would have been expressed, not in this obscure and indirect way, but more clearly and directly by making s. 525 run, not as it does, but somewhat to the following effect, namely, "when it is admitted by all the parties concerned that any matter has been referred to arbitration without the intervention of a Court of Justice, etc." Moreover, if this argument was well founded, that is, if the jurisdiction to entertain an application for filing a private arbitration award depended upon the admis-[772]sion of all the parties concerned that there was a valid reference to arbitration, it would make the section practically nugatory, it being always in the power of a recusant party to say that he does not admit the fact of a valid reference to arbitration having been made.

When s. 525 allows a party to apply to the Court for filing an award on the allegation that there was a private reference to arbitration and that the award was made upon such reference, and when it directs that the application shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants, and the other parties shall be summoned to show

cause why the award should not be filed, the Court must be held to have jurisdiction (unless it is expressly taken away, which is not the case) to enquire into and determine the question whether there has been a valid reference to arbitration, in the event of the parties summoned denying the reference. And the object of s. 526 is, in my opinion, not to limit the jurisdiction of the Court under s. 525 to cases in which the reference to arbitration is admitted, but simply to provide that the only grounds upon which the validity of a private arbitration award, made upon a reference to arbitration either admitted or proved, can be questioned are precisely those upon which an award made on a reference to arbitration in the course of a suit can be called in question; or, in other words, its object is to show that the validity of a private arbitration award cannot any more than that of an award made on a reference to arbitration in the course of a suit, be questioned on the ground of the award being erroneous in fact.

It was next argued that if it had been intended that the Court in a case under s. 525 should determine the question whether there has been any reference to arbitration when such question is raised, then the Legislature would have provided in s. 588 for an appeal against an order determining such question adversely to the applicant; and it would further have provided for an appeal against the decree based on the award when such question is decided in his favour, instead of making such decree final as the latter part of s. 526 by implication does.

[773] The answer to this argument is simple. An order under s. 525 determining on the objection of the party summoned to show cause that there has been no valid reference to arbitration and rejecting the application which is numbered and registered as a suit, is clearly a decree as defined in s. 2, and an appeal lies against it under s. 540. The case of *Baboo Chintaman Singh* v. *Umi Kunwar*, (1866) 6 W. R. Misc., 83: Sup. Vol. B. L. R., 505, was relied upon as showing that such an order is not appealable, but that was a case under the Civil Procedure Code of 1859, which contained no such definition of the term "decree" as is given in s. 2 of the present Code. Again, when the Court disallows the objection that there has been no reference to arbitration, and orders the award to be filed, and a decree is made in accordance with the award under the latter part of s. 526, which by implication makes s. 522 applicable to the case, though such decree, in so far as it is in accordance with the award, is under the last-mentioned section not open to appeal, yet that does not bar an appeal against the decree when the appeal raises the question whether there was any submission to arbitration and whether there was any valid award at all—See *Joy Prokash Lal* v. *Sheo Golam Singh*,* (1884) I. L. R., 11 Cal., 37; *Kali Prosunno Ghose* v. *Rajani Kant Chatterjee*, (1897) I. L. R., 25 Cal., 141; and *Suppu* v. *Govinda Charyar*, (1887) I. L. R., 11 Mad., 85; *Lachman Das* v. *Brijpal*, (1884) I. L. R., 6 All., 174. The finality that s. 522 contemplates attaches to a decree made in accordance with a valid award; the appeal that that section bars is an appeal against the award on the ground of the award being erroneous in fact on the merits.

It was then argued that though s. 525 requires that an application for filing a private arbitration award is to be numbered and registered as a suit, it does not, like ss. 331 and 531, say that the Court is to try the case in the event of opposition in the same manner as a suit, or that its order shall have the same force as a decree; and that a notice to the other parties to the award requiring them to show cause is not the same thing as [774] a summons to

them requiring them to defend a suit. I think this argument is fully met by the following answer:—

In the proceedings under the two sections referred to, namely s. 331 and s. 531, the matter in dispute between the parties is intended to be determined by the Court, and accordingly it is expressly provided in those sections that the matter shall be determined by the Court in the same manner as a suit, and the order of the Court shall have the same force as a decree. In the class of cases to which ss. 525 and 526 relate, the primary matters in dispute between the parties are, or are alleged to be, determined by the award of the arbitrators; the dispute, if any, that may arise is only as to certain secondary or subsidiary matters, that is, as to the fact or the validity of the award, or of the submission to arbitration or of both; and if on any ground (including a ground such as this, namely, that there was no real or valid submission to arbitration), the Court holds that the award cannot be filed, it is evidently not open to the parties to ask the Court to decide for itself the matters to which the award relates; so that any specific provision to the effect that the Court is to decide the case as a suit would have been wholly out of place. The absence of any such provision cannot therefore afford valid ground for any adverse argument.

Then as to the supposed distinction between a notice to show cause and a summons to defend a suit, I think it is sufficient to say that when upon a notice to show cause, the party served with notice must allege and prove cause, and the Court must fully and finally determine the validity of the cause shown so far as it relates to matters contemplated by ss. 520 and 521, as has been settled by the decision of the Full Bench in *Sujan* v. *Bhikari* (I. L. R., 21 Cal., 213), there can be no good ground for thinking that those words imply either that the Court is not to determine at all, or that it is to determine only summarily, and subject to a more complete determination by a suit, the cause shown, when the cause shown consists in a denial of any reference to arbitration.

It was lastly argued that as the procedure prescribed by s. 525 is a summary one, and the proceeding is instituted by an [775] application and not by a plaint on payment of a proper Court-fee, it is not likely that the Legislature intended that any difficult questions, such as those relating to the fact or validity of a reference to arbitration, should be enquired into by the Court under that section. But the simple answer to the argument is this, that the Court must under s. 526 enquire into and determine objections such as those referred to in ss. 520 and 521, which raise questions of far greater nicety and difficulty than those sought to be excluded from the Court's consideration, and there is no reason why the Court should not determine these last which lie at the threshold of the case, when it must enquire into the former.

Sections 523 and 524 to some extent favour the view I take. They provide that a party to a private agreement to refer to arbitration any matter in dispute may apply to have the agreement filed in Court; thereupon the application is to be numbered and registered as a suit between the applicant and the other parties to the agreement, and a notice is to be issued to them to show cause why the agreement should not be filed, and if no sufficient cause be shown the agreement will be filed, arbitrators appointed, and the case proceeded with in the same manner as if the reference to arbitration had been made in a pending suit. Now in such a case the cause shown can relate only to the fact, validity or subsistence of the agreement to submit to arbitration, and if the Court is to enquire into these matters in a proceeding instituted under s. 523, there is no good reason why it should not enquire into them in a case under s. 525. As I understand the sections included in Chapter XVII of the

Code of Civil Procedure, they are intended to provide for all cases of reference to arbitration, whether it be made, in the course of a suit, or privately without the intervention of a Court. The first group of sections, that is, ss. 506 to 522, provide for reference to arbitration in the course of a pending suit; the second group, that is ss. 523 and 524, relate to cases in which the parties have, or are alleged to have, before instituting any suit, privately come to an agreement to refer any matters in dispute to arbitration, but have proceeded no further, and the third group, that is ss. 525 and 526, to cases in which there has been, or is alleged to have been, a private submission to arbitration followed by an [776] award. In the first group of sections are given in detail the provisions applicable to the subject, while the other two groups concisely and by implication refer to such of the provisions of the first group as are respectively applicable to the classes of cases they contemplate, and it is their brevity which has given rise to the difficulty of construing them.

I may add that the view I take has the effect of preventing multiplicity of judicial proceedings by making the proceedings under s. 525 determine finally all the necessary questions that may arise in it, and it is in accordance with the view taken by the majority of the Full Bench in *Brojo Durlubh Sinha* v. *Roma Nath Ghose*, (1897) I. L. R., 24 Cal., 908, upon a somewhat analogous question arising upon the construction of s. 375.

It remains now to consider the cases cited.

Of these *Chintamoni Singh* v. *Rupa Koer*, (1866) 6 W. R., Misc., 83, (which has already been referred to above), and *Lala Iswar Prosad* v. *Bir Bhanjan Tewari*, (1871) 8 B L R., 315 15 W R. (F. B) 9, were decided under the Civil Procedure Code of 1859 under which the provisions relating to appeal were, as has been shown above, different from those under the present Code.

The cases of *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhri*, (1883) I. L. R., 9 Cal, 557, *Hurinath Chowdhry* v. *Nistarini Chowdhranee*, (1883) I. L. R, 10 Cal., 74, which not only favour the contention of the opposite party, but go a great deal further, have been dissented from by the Full Bench in *Surjan Raot* v. *Bhikari Raot*, (1893) I. L R, 21 Cal., 213.

The case of *Bijadhur Bhugut* v. *Monohur Bhugut*, (1883) I. L. R., 10 Cal., 11, is no doubt against the view I take The decision in that case is based upon the terms of s 526. MITTER, J, in delivering the judgment of the Court says: "It appears from s 526 that the Court has jurisdiction to adjudicate only upon the grounds of objection mentioned in ss. 520 and 521." For the reasons given above I [777] must respectfully dissent from this view. And the same remarks apply to the case of *Tejpur* v *Mahomed Jamal*, (1896) I. L. R., 20 Bom., 596.

The opinions of PRINSEP, PIGOT and MACPHERSON, JJ., in *Surjan Raot* v. *Bhikari Raot*, (1893) I. L. R, 21 Cal., 213, are also against the view I take. But those opinions were not necessary to be expressed for the determination of the question before the Court. The ground upon which those opinions are based is the absence of any reference in s. 526 to any objections other than those contemplated by ss 520 and 521. But this ground, as I have tried to show above, is not sufficient to support the inference that is based upon it.

The case of *Muhammed Nawaz Khan* v. *Alam Khan*, (1891) L. R., 18 I. A., 73, was referred to as showing that the Privy Council held that an order rejecting an application for filing an award under s. 525 would not operate as *res judicata* upon the question of the validity of the award, and thence it was argued that the jurisdiction of the Court under that section must be of a very limited character. I do not think that the case cited lays down any

such broad rule or supports any such inference. Their Lordships overruled the plea of *res judicata*, not upon the ground of the jurisdiction of the Court under s. 525 being limited in any way, but solely upon the ground of the question as to the validity of the award not having been raised and decided in the former proceeding.

On the other hand the cases of *Amrit Ram* v. *Dasrat Ram*, (1894) I. L. R., 17 All., 21, and *Husananna* v. *Linganna*, (1894) I. L. R., 18 Mad., 423, support the view I take.

For the foregoing reasons I would answer the question referred to us in the negative.

But here an important point arises for consideration. As in the view I take the order of the Court below rejecting the application is open to appeal, is it competent to the petitioner to invoke our interference under s. 622 of the Code of Civil [778] Procedure? The question I think must be answered in the negative. But as, regard being had to the value of the subject-matter to which the award relates, the appeal lies to this Court, and as the application under s. 622 was made before the expiry of the time allowed for an appeal, I would treat the application as an appeal (provided the applicant puts in the proper Court-fee) and I would decree the appeal, set aside the order of the Court below, and remand the case to that Court for a decision on the merits.

Maclean, C. J.—With this indication of our opinion we remit the case to the Division Bench which referred it to us. We fix three gold mohurs as the hearing fee for the hearing before the Full Bench.

S. C. C. *Appeal allowed; case remanded.*

NOTES.

[I. APPEAL—

1. The Civil Procedure Code, 1908, sec 104 provides for appeals from orders filing or refusing to file an agreement to refer to arbitration—(*d*) under Sch. II, para. 17; and from orders filing or refusing to file an award in an arbitration without the intervention of the Court—(*f*) under Sch. II, para. 21. The decree in accordance with the award after it is filed is made final.

The above provisions set at rest the conflict of case-law previous thereto.

2. The leading case on the subject is the Privy Council decision in *Ghulam Jilani Khan* v. *Muhammad Hussain* **(1901) 29 Cal., 167.**

3. In the following cases, it was held that an order refusing to file an award was an appealable decree:—(1905) 2 C. L. J., 80, **(1905) 10 C. W. N., 601: 2 C. L. J., 153**; (1908) 7 C. L. J., 486; (1908) 4 Lower Burma, 130; (1907) P. R., 100, (1910) 38 Cal., 143; (1903) 27 Mad., 255 F. B.

4. In (1906) 33 Cal., 757 F. B., it was held that an appeal lay from an *order directing the filing* of the award.

5. As regards the finality *when* the award is *filed* and a decree *is drawn* in accordance therewith, this decision, it was pointed out in **(1905) 10 C. W.N., 601 2 C. L. J., 153**, must be deemed to have been overruled by the Privy Council decision in *Ghulam Jilani*'s case. In the following cases, it was held that the decree was final.—(1905) 2 C. L. J., 153; (1902) 2 C. L. J., 142; (1906) 33 Cal., 899; (1906) 11 C. W. N., 1152; (1907) 29 All., 457, (1910) 21 M. L. J., 263; (1908) 35 Cal., 648; *contra* (1905) 28 All, 21; (1905) 2 A. L J., 477

II. JURISDICTION TO ENQUIRE INTO FACTS OF REFERENCE AND AWARD—

The Civil Procedure Code, 1908, Sch. II, para. 21, expressly provides for inquiry into the facts of reference and of award by using these additional words, "Where the Court *is satisfied* that the matter has been referred to arbitration, and that an award has been made thereon," etc. This supersedes (1896) 20 Bom., 596 and is in accordance with (1896) 25 Cal., 757; (1897) 20 Mad., 89; (1895) 17 All., 21; (1906) 28 All., 621; (1901) P. R., 84; (1905) 2 C. L. J., 153: 10 C. W. N., 601; (1905) 29 Bom., 621; (1903) 28 Bom., 287; (1909) 11 C. L. J., 181.

See also (1901) P.R., 84; (1904) 31 Cal., 516; (1907) 1 Sind L. R., 149; (1905) 2 C.L.J., 431; (1899) 23 Mad., 101.

As regards the general proposition that the Court has inherent powers to inquire into the investitive facts of jurisdiction, see (1909) 36 Cal., 713: 9 C. L. J., 563: 13 C. W. N., 654.

III. PROCEDURE—

Revision petition may be treated as a memorandum of appeal when in time:—(1911) 13 C. L. J., 467; (1911) 13 C. L. J., 677.]

[25 Cal. 778]

APPELLATE CIVIL.

The 25th February, 1898.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE STEVENS.

Brahmadeo Narayan............Plaintiff

versus

Harjan Singh and others...........Defendants.*

Transfer of Property Act (IV of 1882), s. 6, clause (a)—Reversionary right—Assignment of the interest of a Hindu reversioner.

The interest of a Hindu reversioner upon the death of a widow does not come within the terms of clause (a) of s. 6 of the Transfer of Property Act (IV of 1882), and an assignment of such interest is allowed by law.

MUSSUMMAT LALITA KOER, widow of one Lala Bhekdhari Lal, inherited from her husband an eight-anna share of Mouza Norowli Sen and other properties, and sold two annas out of her share to Birjlal Singh for alleged necessities on the 20th December 1868. The defendants (1st party) are the heirs and assignees of Birjlal in possession of the said two annas. The defendant (2nd party) who is the nearest sapinda and heir of Lala Bhekdhari Lal, sold his reversionary right in respect of the said two annas and [779] other property during the lifetime of Lalita Koer to the plaintiff on the 7th November 1882. Lalita died in 1884, and the present suit was brought by the plaintiff for recovering possession of the said two annas on the ground that the sale to Birjlal was without any legal necessity, and became "an absolute nullity" on the death of Lalita Koer. Various objections were raised by the different parties, defendants, and issues joined thereon, but the Court below dismissed the suit, on the ground that the transfer of the reversionary interest to the plaintiff under the deed of 7th November 1882 was invalid under section 6 of the Transfer of Property Act (IV of 1882).

The plaintiff appealed to the High Court.

Dr. *Rash Behari Ghose*, Babu *Saligram Singh*, and Babu *Lakshmi Narayan Singh* for the Appellant.

Babu *Tarak Nath Palit* and Babu *Umakali Mukerjee* for the Respondents.

The **judgment** of the High Court **(Trevelyan** and **Stevens, JJ.)** was as follows:—

In this case the assignee from a reversioner is seeking to question a sale made by a Hindu widow. The widow is now dead. The assignment was made to the plaintiff during her lifetime.

The learned Subordinate Judge has held that no effect can be given to that assignment, having regard to the terms of section 6 of the Transfer of Property Act.

In that section the following property is stated not to be capable of transfer, namely, "the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature." The question before us is whether the right of a Hindu reversioner during the life-time of the widow is included within this expression. It is not, we are confident, possible to include it within the expression "The chance of an heir-apparent succeeding to an estate." The words "heir-apparent" are always used with reference to the

* Appeal from Original Decree No. 200 of 1896, against the decree of Babu Juggut Durlabh Majumdar, Subordinate Judge of Tirhoot, dated 25th of March 1896.

relation between a living person and his successor. It is not quite certain exactly what was meant by the expression "heir-apparent." It is an expression which is very rarely used, except with regard to [780] the heir to the throne. As far as we can see, the provisions of section 6 are only intended to apply to cases of a mere hope or chance of succession which may be defeated by the act of some person having the present disposal of the property. It can scarcely be said that the right of a Hindu reversioner is a mere possibility. It is an interest contingent upon the reversioner surviving the widow, and also upon the non-intervention of a full heir. This is a contingency dependent on no man's will, but upon the happening of uncertain events. It is an interest which is capable of being protected by the Court. The reversioner can sue to restrain waste; he can, on making out a proper case, obtain a receiver; and he can contest alienations made by the widow. It is an interest which may at any time cease to be contingent by the widow giving up her estate. The reversioner with the widow can make a complete title to the property. A transfer of this interest is, in our opinion, not within the letter of the law, and, moreover, it is not within the mischief which the section was intended to counteract. Mere possibilities of succession are wholly incapable of valuation, whereas with the aid of an actuary it is not difficult to put a money value upon the interest of a reversioner.

The decisions under the Civil Procedure Code as to what is attachable can be of no assistance to us in this case. Much which, under the law, cannot be sold in execution is capable of being dealt with by voluntary transfer, and we think that it would be wholly unsafe to apply to the Transfer of Property Act decisions which have been given with regard to the Civil Procedure Code. In our opinion there is nothing in the law to prevent the assignment to the plaintiff. An argument was addressed to us with reference to section 43 of the Transfer of Property Act, but having regard to our view of the construction of section 6 of the same Act, it is unnecessary for us to consider that argument. The decree of the lower Court must be set aside, and the case remanded for determination on its merits.

The plaintiff is entitled to his costs of this appeal as against defendants 1 and 3 to 8.

S. C. C. *Appeal allowed : case remanded.*

NOTES.

[I. A Hindu Reversioner's right of succession is a bare possibility which cannot be transferred:—**(1902) 29 Cal., 365** which overruled this decision: **21 All., 71 P. C.** See also 31 Bom., 165; 9 C. L. J., 50; 10 C. L. J., 263.

II. As regards evaluation of reversionary interests, see (1905) 30 Bom., 304.]

[781] *The 31st January, 1898.*
PRESENT :
MR. JUSTICE GHOSE AND MR. JUSTICE WILKINS.

Mothura Mohun Lahiri and others............Plaintiffs.
versus
Mati Sarkar and others ....Defendants.*

Bengal Tenancy Act (VIII of 1885), ss. 27 and 29—Landlord and Tenant—Suit for rent—Enhancement of rent—Enhancement of rent by a registered kabuliat *within 15 years from a previous oral agreement to pay enhancement of rent, Effect of.*

By an oral agreement in the year 1885 the tenant defendant agreed to pay an enhancement of rent, and he paid rent at that rate until subsequently he executed in the year 1893 a registered *kabuliat*, by which he agreed to pay a further enhancement of rent which was more than two-annas in the rupee. Upon a suit for rent by the landlord based on the registered *kabuliat* :

Held, that, inasmuch as the enhancement of rent, in s. 29 of the Bengal Tenancy Act, refers to enhancement after the promulgation of the Act, if in this case the enhancement which was made in the year 1885 was before the Act came into force, it would not bar an enhancement during the period of fifteen years from the date thereof as contemplated by cl. (3) of s. 29. But if the said enhancement was made after the Act came into force, it would also not bar a subsequent enhancement within fifteen years from the date thereof, as the previous contract was only an oral one, and was not effectual and binding upon the defendant.

Held, also, that having regard to cl. (b) of s. 29, as the enhancement was more than two-annas in the rupee, the registered *kabuliat* was bad in law, if the rent then agreed to be paid was an enhanced rent. The *kabuliat* would also be bad in law, if the rent agreed to be paid is partly enhanced and partly increased rent.

Held, further, that having regard to proviso (1) of s. 29, as also the provisions of s. 27, the plaintiff would at any rate (*i.e.*, failing the *kabuliat*) be entitled to recover rent at the rate paid by the defendant for more than three years.

THE facts of the case, so far as they are necessary for the purposes of this report, are sufficiently stated in the judgment of the High Court.

Babu *Saroda Churn Mitter*, with him Babu *Mukund Nath Roy*, for the Appellant.

[782] Babu *Mohiny Mohun Chuckerbutty* for the Respondent.

The **judgment** of the High Court (**Ghose** and **Wilkins, JJ.**) was as follows :—

This appeal arises out of a suit for rent at the rate of Rs. 103 per year, upon a *kabuliat* executed by the defendant in the year 1893. The defendant pleaded that the *kabuliat* was not a *bona fide* transaction, but was the result of coercion exercised by the plaintiff and that the rent payable was Rs. 39-3 a year.

The Munsif, among other issues, laid down the following :—

(1) Whether the *kabuliat* was illegally and forcibly extorted from the defendant ?

(2) At what rate should the plaintiff recover rent ?

It transpired in the course of the trial that the rent of the defendant's holding had been once enhanced in the year 1292 (B. S.) ; and that there was

* Appeal from Appellate Decree No. 1082 of 1896, against the decree of K. N. Roy, Esq., Officiating District Judge of Pubna and Bogra, dated 19th of March 1896, reversing the decree of Babu Amar Chundra Mukerjee, Munsif of that district, dated the 9th of September 1895.

a further enhancement in the year 1893 by the *kabuliat* executed by the defendant. The defendant, however, admitted in his deposition that he had been paying for some years at the rate of Rs. 50.

We should here mention that, in the course of argument before the Munsif, the plaintiff stated that the increased *jumma* mentioned in the *kabuliat* was due to increased area found in the occupation of the defendant, and urged that, inasmuch as the defendant in his written statement did not raise any defence as to alteration of rate of rent and area, he, the plaintiff, did not place before the Court all the evidence which was available explaining the circumstances under which the defendant, agreed to pay the rent as mentioned in the *kabuliat*. The Munsif, however, disallowed this plea upon the ground that the issue having been raised as to what *jumma* the plaintiff was entitled to recover, he should determine upon the evidence adduced whether the enhanced *jumma*, as mentioned in the *kabuliat*, was really due to increased area, or increased rate, or both.

The Munsif held that the *kabuliat* had not been extorted from the defendant as it was pleaded, and that the rent agreed to be paid under the *kabuliat* was partly increased rent on account of the excess area found in the occupation of the [783] defendant, and partly enhanced rent, and in excess of the rent then payable by the defendant. He accordingly gave a decree for such increased rent *plus* the rent then payable by the defendant, *i.e.*, Rs. 50 with an enhancement upon it at the rate of two-annas in the rupee.

On appeal by the defendant, the District Judge has held that there having been an enhancement in the year 1292, the plaintiff is not entitled to any enhancement within fifteen years from that time; that the Munsif was not, therefore, right in allowing an enhancement at the rate of two-annas upon the rupee; and that the case does not fall within the proviso (i) to section 29 of the Bengal Tenancy Act. He has further held that it is not proved that the enhancement as mentioned in the *kabuliat* was increased rent owing to increase of area. He has accordingly given the plaintiff a decree at the rate admitted by the defendant in his written statement.

Against this decree the plaintiff has preferred this second appeal.

The first question that has been raised before us for consideration is, what may be the legal effect of the enhancement in the year 1292 (B.S.) as bearing upon the *kabuliat* executed by the defendant in 1893.

It is not clear upon this record whether the enhancement in the year 1292 (B.S.) was before or after the promulgation of the Bengal Tenancy Act. Assuming, in the first instance, that it was before the Act came into operation let us examine how does the matter stand.

Section 29 of that Act provides (omitting the 2nd and 3rd provisos which have no bearing in this case): "The money rent of an occupancy *raiyat* may be enhanced by contract, subject to the following conditions: (*a*) the contract must be in writing and registered; (*b*) the rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the *raiyat*; (*c*) the rent fixed by the contract shall not be liable to enhancement during a term of fifteen years from the date of the contract.

[784] "Provided as follows: (*i*) Nothing in clause (*a*) shall prevent a landlord from recovering rent at the rate at which it has been actually paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed."

When the section says that the money rent may be enhanced by contract in writing and registered, it evidently means to refer to enhancement after the

promulgation of the Bengal Tenancy Act : it does not refer to any enhancement which has already taken place. Under the old law, it was not necessary that the contract should be "in writing and registered"; it could be made orally. The contract by which rent was enhanced in the year 1292 (B.S.) does not, therefore, fall within s. 29; and it follows that *that* contract was no bar to an enhancement during the period of fifteen years from the date thereof, as contemplated by cl. (*c*) of the section.

In this view of the matter, it seems to us that the contract (as evidenced by the *kabuliat*) under which the defendant agreed to a further enhancement, though it is a contract falling within s. 29 of the Act (it having been entered into after the Bengal Tenancy Act came into force), could not be rejected upon the ground adopted by the District Judge. But then cl. (*b*) of the section enjoins that the rent payable by a *raiyat* must not be enhanced so as to exceed by more than two annas in the rupee. The rent agreed to be paid under the *kabuliat* of 1893 was certainly more than the limit prescribed by the section; and it, therefore, follows that the *kabuliat* is bad in law, *if the rent then agreed to be paid was enhanced rent.*

But supposing, on the other hand, that the enhancement of 1292 (B.S.) was effected after the Bengal Tenancy Act came into operation, let us examine what may be the relative rights of the parties.

What s. 29 of the Act evidently contemplates is that when the rent of an occupancy *raiyat* is enhanced after the promulgation thereof it must be, in order to make the contract effectual and binding, in writing; and the document must be registered. The contract by which the rent was enhanced in [785] 1292 B.S, if it was after the Act came into force, and being only an oral contract, was not and is not effectual and binding upon the defendant. It may, therefore, be left out of consideration. If it be so left out, the provisions of cl. (*c*) of s. 29 would not operate so as to debar the plaintiff from claiming enhancement in the year 1893. But then, having regard to cl. (*b*) of the section, the rent could not be enhanced so as to exceed by more than two-annas in the rupee the rent previously payable. It is unquestioned that the enhancement made in the year 1893 was far above the limit prescribed by cl.(*b*) and that being so the *kabuliat* is bad in law *if the rent then agreed to be paid was enhanced rent.*

But it has been contended before us that, having regard to the defence raised in the written statement, the issue framed by the Munsif as to what the *jamma* was which the plaintiff was entitled to recover in this case, was not clear enough, so as to call upon the plaintiff to adduce evidence upon the question whether the rent mentioned in the *kabuliat* was enhanced rent, or it was but increased rent assessed upon the increased area found in the occupation of the defendant. We think that the contention of the appellant in this respect is correct. The Munsif practically admitted it to be so, but yet he examined the evidence such as it was upon the record, and found that the rent stated in the *kabuliat* was partly increased rent and partly enhanced rent. The learned Judge, however, has upon the same evidence arrived at a conclusion wholly adverse to the plaintiff.

In the view that we have just expressed, we think that the plaintiff is entitled to a remand for the purpose of enabling him to adduce evidence upon the question, whether the rent agreed to be paid under the *kabuliat* was increased rent with reference to the increased area in the occupation of the defendant. If this question be found against him, the claim for rent at the rate of Rs. 103 must be disallowed, otherwise it should be allowed.

We should here state that, supposing it be found that the said rent is partly enhanced and partly increased rent, as it was held by the Munsif, the

plaintiff would not be entitled to recover [786] the increased rent as was allowed by that officer; for the contract as evidenced by the *kabuliat* could not be divided into two parts, one part referable to a valid transaction, and the other part to an invalid transaction. See in this connection the case of *Kristo Dhone Ghose* v. *Brojo Govindo Roy*, (1897) I. L. R., 24 Cal., 895.

There is one other matter which arises in this appeal, and that is with reference to the admission of the defendant in his deposition as to the rent he has been paying for some years, *i.e.*, for more than three years. He admits this rent to be Rs. 50, and having regard to proviso (1) of s. 29, as also the provisions of s. 27 of the Act, we think that there is no reason why the plaintiff should not, at any rate, *i.e.*, failing the *kabuliat*, recover rent at the rate of Rs. 50 as admitted by the defendant.

We accordingly set aside the decrees of both the Courts below, and send the case back for retrial upon the question which we have already referred to, and with reference to the observations we have just made, costs to abide the result.

The judgment that we have just delivered will be applicable to appeals Nos. 1119, 1120, 1121 and 1124 of 1896.

No. 1116.—The judgment that we have delivered in appeal No. 1082 is also applicable to this appeal, with this exception, that the defendant in this case has made no admission in his deposition on oath that he had been paying any higher rent than that which is stated in his written statement, and, therefore, the observations that we have made in appeal No. 1082 as regards the effect of the admission of the defendant in that case are not applicable here. The case will, however, be remanded for retrial with reference to the other remarks that we have made in that case. The judgment in this appeal will be applicable to appeals Nos. 1117, 1118 and 1122 of 1896. These cases will also be remanded for retrial and the costs will abide the result.

Appeal allowed: case remanded.

S. C. G.

NOTES.

[This was overruled in (1905) 32 Cal., 395 : 9 C. W. N., 265 . 1 C. L. J., 10.]

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[787] *The 14th April, 1898.*

PRESENT:

MR. JUSTICE O'KINEALY AND MR. JUSTICE RAMPINI.

Nilmadhub Patra and others............Defendants

versus

Ishan Chandra Sinha Hikim and others....... ....Plaintiffs.*

Land Registration Act (Bengal Act VII of 1876), s. 78—Registration in regard to a share—Right to receive rent.

When some out of several proprietors of an estate, who collect the rent jointly, have registered their names under the Land Registration Act, all the proprietors are entitled to join in an action for the whole rent, but a decree will be made only in respect of the rent proportionate to the share registered. Under s. 78 of the Land Registration Act, the penalty of non-registration is the forfeiture, not of the whole rent, but of the rent of the share in regard to which the landlord is unregistered.

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* Appeal from Appellate Decree No. 990 of 1896, against the decree of B. G. Geidt, Esq., District Judge of Bankura, dated the 7th of April 1896, affirming the decree of Babu Upendra Nath Dutta, Munsif of Katra, dated the 15th of July 1895.

THE facts of the case, so far as they are necessary for the purposes of this report, are shortly as follows: The plaintiff sued to recover arrears of rent in respect of 14 annas share of a *jama* held by the defendants under them; some of the plaintiffs had registered their names under the Land Registration Act with regard to their respective shares amounting to 8½ annas; the shares of the other plaintiffs were not registered. It was found that the rent of the 14 annas was collected jointly. The Munsif dismissed the suit on the ground that the plaintiffs were not entitled to a decree for the entire rent under s. 78 of the Land Registration Act, nor were they entitled to a decree for the registered share, as that would amount to an apportionment of the rent. Upon appeal, the District Judge reversed this judgment, and decreed the claim proportionate to the share registered. The defendants appealed to the High Court.

Babu *Dwarkanath Chakravarty* for the Appellants.

Dr. *Asutosh Mookerjee* for the Respondent.

The **judgment** of the High Court **(O'Kinealy** and **Rampini, JJ.)**, was as follows: —

The plaintiffs in this suit sued for the rent of the years 1296 **[788]** up to the 12 annas kist of 1299. The plaintiffs are 14 annas co-sharers. The defendants Nos. 1 to 5 are tenants of the land. They are also the owners of the remaining 2 annas of the landlord's interest. The matter is, however, immaterial, as the plaintiffs have been found to have been hitherto in separate collection of their 14 annas share of the rent. The plaintiffs are registered under Bengal Act VII of 1876 to the extent of 8½ annas only. They are unregistered as to the remaining 5½ annas. The lower Courts have given them a decree for 8 annas share of the rent claimed by them, except as respects the rent of 1296, which has been held to be barred by limitation. It is not clear why the plaintiffs have not got a decree for the remaining ½ anna with regard to which they have been registered. But no question as to this arises in this appeal.

The defendants appeal and contend that the plaintiffs are not entitled to any rent at all, inasmuch as to give them a decree for 8 annas of the rent, it is said, is to apportion the rent to this extent, which they do not ask and are not entitled to ask should be done in this suit. We think there is no force in this contention. There cannot be held to be in this suit any apportionment of the rent, which has been found to be Rs. 74-10 per annum. The suit has been perfectly rightly framed for the whole of the rent due to the plaintiffs. All the co-sharers are parties to the suit. The plaintiffs' claim to the amount of rent not decreed to them has been dismissed. The defendants cannot be sued for it again, which is greatly to their advantage. The next time the plaintiffs sue for their rent, they will have to sue again for the rent of their 14 annas share. There is nothing in the decree in this suit which will justify them in suing in future for the 8 annas share for which they have got a decree. The decree must be regarded as in favour of all the plaintiffs and not in favour of those only who have been registered. It is true that the Munsif in calculating the amount due to the plaintiffs has specified the plaintiffs whose names have been registered and the extent of the shares for which they have been registered. But he has done so for arithmetical purposes only, and not for the purpose of apportioning the rent among the plaintiffs.

[789] To hold that the defendants are entitled to have the suit entirely dismissed because the plaintiffs have not registered their names for the whole of their 14 annas share would be to enable the former to evade the payment of

their just debts on a most technical plea. If this be the law, it will always be possible for a tenant to escape payment of the whole of his rent by showing that some fractional share of his landlord's interest is unregistered.

But it does not seem that Act VII of 1876 ever intended that such should be the case. On the contrary, the 2nd para of section 78 of Bengal Act VII of 1876 appears expressly to provide that a proprietor is entitled to recover his rent for the share for which he is registered, while being refused his rent only for the share for which he is unregistered. The 2nd para of section 78 runs thus: "No person being liable to pay rent to two or more such proprietors, managers or mortgagees holding in common tenancy shall be bound to pay to any one such proprietor, manager or mortgagee more than the amount which bears the same proportion to the whole of such rent as the extent of the interest in respect of which such proprietor, manager or mortgagee is registered bears to the entire estate or revenue free property." The penalty of non-registration is therefore the forfeiture, not of the whole rent, but of the rent of the share in regard to which the landlord is unregistered. For these reasons, we affirm the decree of the Lower Appellate Court and dismiss the appeal with costs.

S. C. B. *Appeal dismissed.*

NOTES.

[See also (1900) 5 C. W. N., 360 ; (1909) 13 C. W. N., 509.]

[25 Cal. 789]

The 30th March, 1898.

PRESENT :

MR. JUSTICE TREVELYAN AND MR. JUSTICE BANERJEE.

Gunessar Singh............Defendant

versus

Gonesh Das............Plaintiff.*

Public Demands Recovery Act (Bengal Act VII of 1880), s. 2—Revenue Court—Sale under Certificate—Jurisdiction—Limitation—Appeal to Commissioner for setting aside sale—Suit to set aside sale—Order of Revenue Court setting aside sale—Powers of the Civil Court.

A sale was held on the 9th September 1893, in execution of a certificate under the Public Demands Recovery Act (Bengal Act VII of 1880). On the [790] 2nd January 1894, an appeal was preferred to the Commissioner under s. 2 of Act VII of 1868 for setting aside the sale after the expiry of sixty days prescribed for appeal. The Commissioner ordered an inquiry into the question whether the appellants before him were prevented from taking steps in consequence of fraud. The purchaser complained against this order before the Board of Revenue, who acting under their powers of revision set aside the certificate, and the Commissioner subsequently set aside the sale without hearing the purchaser.

* Appeal from Original Decree No. 163 of 1896, against the decree of Babu Chundi Charan Sen, Officiating Subordinate Judge of Tirhoot, dated the 15th of April 1896.

In a suit brought in the Civil Court for the same object during the pendency of the appeal before the Commissioner, and decided by the lower Court after the orders of the Board and the Commissioner setting aside the certificate and sale were passed, *Held*, by the High Court on appeal :—

(1). The plaintiff was entitled to proceed simultaneously in the Civil Court and in the Revenue Court. If the sale be validly set aside by the Revenue Courts, a decree must follow in the suit.

(2). Section 2 of the Public Demands Recovery Act (Bengal Act VII of 1868) applied to a sale under the Certificate Act (Bengal Act VII of 1880), and the appeal to the Commissioner was rightly made under that section. *Sadhusaran Singh* v. *Punchdeo Lall*, (1886) I. L. R., 14 Cal., 1, followed.

(3). As regards the contention that the Commissioner had no jurisdiction to entertain the appeal as it was barred by limitation, the question of limitation cannot be held to be one of jurisdiction, and the grounds of the Commissioner's finding on that point cannot be discussed in the High Court. *Mahomed Hossain* v. *Purundur Mahto*, (1885) I. L. R., 11 Cal., 287, and *Mungul Pershad Dichit* v. *Grija Kant Lahiri*, (1881) I. L. R., 8 Cal., 51 : L. R., 8 I. A., 123 : 11 C. L. R., 113, referred to.

(4). The Civil Court has no authority to reverse the order of a Revenue Court, which sets aside a sale.

(5). The reason for overruling the objection on the ground of limitation applied to the objection that the Commissioner had not heard the purchaser, and that objection also could not be entertained.

THIS was a suit to set aside a sale held in execution of a certificate made under s. 5 of the Public Demands Recovery Act (Bengal Act VII of 1880). The facts were these: The Road Cess Deputy Collector of Darbhanga called upon the plaintiff in this case to furnish jammabandi papers in respect of mouzah Subhankerpur, of which plaintiff was the proprietor. The papers were not furnished, and a daily fine was imposed, which amounted to more than Rs. 400 in the course of several months. A [791] certificate was then made for the realization of the fine on the 23rd June 1893, and in execution of that certificate, mouzah Subhankerpur was sold on the 9th September 1893, and purchased by the defendant. The delivery of possession to the purchaser was made on the 5th of December 1893. The plaintiff thereupon, on the 2nd January 1894, preferred an appeal to the Commissioner of the Patna Division for setting aside the sale on the grounds, among others, that all the proceedings had been held without his knowledge; that the mouzah in question was not liable to pay road cess, as it was included within a Municipality and as it was also exempted from liability to pay cess under a Government notification; and that the proceedings were fraudulent and collusive.

While this appeal to the Commissioner was pending, the plaintiff instituted the present suit in the Civil Court on 4th December 1894.

On the 12th December 1894, the Commissioner passed an order directing the Collector to enquire into the question of fraud; the purchaser appealed to the Board of Revenue against that order, and the Board on the 9th May 1895, in the exercise of its revisional power, set aside the certificates in execution of which the sale was held. The Commissioner, also, by his order dated the 4th February 1896, set aside the sale.

Nine issues were originally raised in this suit, of which it is necessary to mention the following:—

"*1st*. Whether the appeal to the Commissioner was filed within time? If not, is the suit barred?

"*2nd*. Whether the Civil Court has jurisdiction to entertain the suit?

"*3rd*. Whether the suit is barred by limitation? When did the plaintiff's cause of action arise?

"7th. Whether the present suit was maintainable before the disposal of the appeal by the Commissioner?" * * *

An additional issue was fixed after the order of the Board of Revenue, dated 9th May 1895, was received by the lower Court; that issue was as follows:—

[792] "Whether the order of the Board of Revenue, dated 9th May 1895, is valid, and how it affects the sale?"

The order of the Commissioner, dated 4th February 1896, setting aside the sale was also filed by the plaintiffs in the lower Court.

In the judgment of the lower Court, the Subordinate Judge held:—

"In this altered state of things brought about by the order of the Board of Revenue as well as that of the Divisional Commissioner, I find that defendant is not entitled to retain possession of the property purchased by him, and consequently plaintiff is entitled to a decree for possession after a declaration of his right to it as well as for mesne profits."

The defendant appealed to the High Court.

Sir *Charles Paul* (Advocate-General) and Babu *Tarak Nath Palit*, Babu *Ram Charan Mitra*, and Babu *Baldeo Singh* for the Appellant.

Babu *Lal Mohan Das*, and Babu *Nalini Ranjan Chatterjee*, for the Respondent.

The **judgment** of the High Court (**Trevelyan** and **Banerjee, JJ.**) was as follows:—

In this case the learned Subordinate Judge of Mozufferpore has set aside a sale held in execution of a certificate for the recovery of public demands given under s. 5 of the Public Demands Recovery Act.

The decree has been made on the ground that the Revenue authorities have set aside the certificate and sale since the institution of this suit. The only question argued before us, and the only question which arises in this appeal is, whether under the circumstances the Commissioner of Patna had authority so to do.

The following are the only facts to which it is necessary for us to refer. The certificate is dated the 23rd of June 1893.

On the 9th of September 1893 the sale was held.

On the 5th of December 1893 possession was given to the purchaser by the Revenue authorities.

[793] On the 2nd of January 1894 the proprietor preferred an appeal to the Commissioner of the Patna Division, alleging that he had no knowledge of any of the proceedings and asking him to set aside the sale.

On the 4th of December 1894 this suit was filed with the object of setting aside the sale.

On the 12th of December 1894 the additional Commissioner of Patna dealt with the appeal. The objection had been taken that the appeal was barred by limitation. This had been met by a charge of fraud. The Commissioner held that fraud would be an answer to such objection, and directed the Collector to enquire and report as to the charge of fraud.

The purchaser then applied to the Board of Revenue to reverse the order of the Additional Commissioner. Although his appeal was confined to a complaint against the action of the Commissioner, the Board of Revenue on the 9th of May 1895 set aside the certificate on the ground that the fine in respect of which it was issued was unjust.

On the 4th of February 1896, the Additional Commissioner set aside the sale. He held that the sale was brought about fraudulently and without legal justification, but curiously enough, although he came to this conclusion, he considered it unnecessary to hear the purchaser, who was the person against whom he was making the order. This order, whatever may be our conclusion as to its validity, violates the elementary principle which is binding upon all persons who exercise judicial or quasi-judicial powers, namely, that an order should not be made against a man's interest without there being given to him an opportunity of being heard. This really concludes the facts which are necessary for our decision.

On the 15th of April 1896, the learned Subordinate Judge decreed this suit on the footing of the action taken by the Revenue authorities. We have to determine whether the action of those authorities was within their powers.

The plaintiff was entitled to proceed simultaneously in the Civil Court and in the Revenue Courts. The more ample and easier remedy was available to him in the Revenue Courts. If the [794] sale be validly set aside by the Revenue Courts a decree must follow in the suit.

The first question arises as to whether the appeal to the Commissioner could have been entertained by that officer.

This appeal could only have been made under s. 2 of Act VII (B.C.) of 1868. It has been contended that *that* section has no application to sales under the Certificate Act, VII (B.C.) of 1880. This contention is concluded by the authority of the decision of a Division Bench of this Court in *Sadhusaran Singh* v. *Panchdeo Lall*, (1886) I.L.R., 14 Cal., 1, with which we see no reason to differ.

It has also been contended that Mr. Bolton had no jurisdiction to entertain the appeal as it was barred by limitation. In the view which we take of this question it is not necessary for us to determine whether the appeal was barred by limitation. If we had to determine it we would have great difficulty in holding that it was not barred. But although we might hold that Mr. Bolton ought to have refused to entertain the appeal, yet we cannot hold that the question is one of jurisdiction, and that we can discuss the grounds of his finding.

It was in our opinion for Mr. Bolton, and for him alone, to construe the section and to determine whether the appeal was barred by limitation. We are not a Court of Appeal or Revision from his decision except in cases where the law allows the Civil Court to interfere. The law allows the Civil Court to reverse a sale under certain circumstances, but there is nothing in the law authorising a Civil Court to reverse the order of a Revenue Court which sets aside a sale. We cannot question his decision on this question of limitation any more than it would be possible for us in a suit to determine that a decree made in another suit was barred by limitation, and that the decree was therefore without jurisdiction. If authority were required for this last proposition, we would refer to the decision of a Division Bench of this Court—*Mahomed Hossain* v. *Purundur Mahto*, (1885) I.L.R., 11 Cal., 287. The [795] well known case of *Mungul Pershad Dichit* v. *Grijakânt Lahiri*, (1881) I.L.R., 8 Cal., 51: L. R., 8 I. A., 123: 11 C. L. R., 113, also supports the proposition that an erroneous decision on a question of limitation cannot be treated as invalid unless it be set aside in a way provided by law.

A similar reasoning would prevent our entertaining any objection to the Commissioner's order on the ground that he had not heard the purchaser. If the purchaser was aggrieved on this account, there is no doubt that

he could have found an appropriate remedy in the procedure of the Revenue Court; but whether that be so or not, we cannot treat as invalid an order made by the tribunal to which the Legislature has entrusted the power of making such order. We have no power to enquire into the circumstances under which the order was made or into the propriety of the order.

Having given this case our most careful consideration we are unable to disagree with the view taken by the Court below, and accordingly we dismiss the appeal with costs.

S. C. C. *Appeal dismissed.*

NOTES

[This was **affirmed** by the Privy Council in **(1906) 33 Cal., 1178.** See also (1907) 6 C. L. J., 472.]

[25 Cal. 795]

The 2nd February, 1898.

PRESENT :

MR. JUSTICE TREVELYAN AND MR JUSTICE BANERJEE.

Ganjessar Koer and another............Appellants

versus

The Collector of Patna............Respondent.*

Letters of Administration—Court of Wards—"Person."

The Court of Wards is not a "person," and letters of administration cannot under the law be granted to it.

THE facts of this case, so far as they are material for the purpose of this report, are given in the judgment of the High Court. There were two applications for letters of administration before the District Court, one by the Court of Wards and another by Ganjessar Koer and Mohan Koer, and the applicants in one case were objectors in the other. The District Court decreed the application of the Court of Wards and dismissed that of **[796]** Ganjessar Koer and Mohan Koer, who preferred two appeals to the High Court, Nos. 27 and 28 respectively, against the orders of the lower Court.

Mr. *W. C. Bonnerjee*, and Babu *Basant Kumar Bose* and Babu *Saligram Singh* for the appellants.

Sir *Charles Paul* (*Advocate-General*) and Babu *Ram Charan Mitra*, Babu *Lal Mohan Das* and Babu *Karuna Sindhu Mukerjee* for the Respondent.

The **judgment** of the High Court **(Trevelyan** and **Banerjee, JJ.)** was as follows:—

These two appeals arise out of an order made by the learned District Judge of Patna.

The facts, so far as they are material for the purpose of these cases, are very shortly these: A man named Mahadeo Pershad died in December 1894 leaving a will, probate of which was given to his widow, who died on the 29th August 1896. Mahadeo Pershad left a son who was then and is still a

* Appeals from Original Decree Nos. 27 and 28 of 1897, against the decree of J. Knox-Wight, Esq., District Judge of Patna, dated the 5th of December 1896.

minor. The Court of Wards has obtained possession of the estate under the powers given to it by the Court of Wards' Act. At one time it seems that the Collector on behalf of the Court of Wards obtained an order appointing him Manager of the Estate under Act VIII of 1890. But under s. 42 of that Act he was subsequently discharged, so the matter is at present quite free from the effect of that order. The Collector has now applied to the Judge for letters of administration. An application has also been made by two ladies, Ganjessar Koer and Mohan Koer, who claim to be relations of the minor, and as such entitled to administer the estate of which the minor is the heir, namely, the estate of his father.

The learned District Judge has granted letters of administration to the Court of Wards and dismissed the application made by the ladies.

It is admitted by the learned Advocate-General that the Court of Wards is not a person, and that letters of administration cannot under the law be granted to it. It is obvious that the powers of the Court of Wards are limited by the terms of the [797] Court of Wards Act. It is not necessary for us to go at any length into that question, as it has not been contested. It follows, therefore, that the order granting letters of administration to the Court of Wards cannot stand and must be set aside. The result is that the petition of the Collector must be dismissed with costs in both Courts.

With regard to the application made by the ladies, the learned Advocate-General suggests to us that there is no necessity for granting letters of administration at all, the property being in the hands of the Court of Wards. But we think that it is clear from the judgment of the learned District Judge that the ladies' application has not been considered independently and apart from the application of the Collector. It was only because the learned Judge thought that administration should be given to the Court of Wards that he dismissed the application of the ladies. Inasmuch as, in our opinion, the application of the Collector was a wrong one, the ladies are entitled to a consideration of their application. It may be that on such consideration being given to it, it might appear that there is nothing to administer, nothing but the interest of the heir, and that *that* interest is in the hands of the Court of Wards. But if there be anything to administer then the question arises who is to be appointed administrator. The ladies are entitled to be heard on that question. There is a provision in s. 31 of the Probate and Administration Act for granting of letters of administration with the will annexed where a minor is the sole residuary legatee. In that case letters may be granted to the legal guardian of such minor or to such other person as the Court shall think fit. The learned Judge will have to act under that section if he finds that there is property which ought to be administered according to law. It must be understood that in all that we have said we are not expressing any opinion as to whether it is possible for the Collector in any way to acquire a sufficient status to oppose the application of the ladies. With regard to costs in the case in which the ladies are the applicants, we think that the proper order is that the costs of the appeal to this Court do abide the result.

S. C. C. *Appeals allowed.*

NOTES.

[See also (1907) 35 Cal., 156.]

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[798] CRIMINAL REVISION.

The 3rd June, 1898.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Driver............Petitioner

versus

Queen-Empress............Opposite Party.*

Criminal Procedure Code (Act X of 1882), ss. 107 and 118—Wrongful act likely to occasion a breach of the peace—Practice—Rule issued upon the Magistrate—Right to appear of a party interested in the result.

The granting of leases to tenants of land not in one's possession does not constitute a wrongful act such as s. 107 of the Criminal Procedure Code (Act X of 1882) contemplates.

Where the notice directs a person to show cause why he should not be bound down to keep the peace, it is improper to make an order directing him to execute bonds for his good behaviour.

When a rule is issued upon the Magistrate to show cause, and the order sought to be set aside is one that is only intended to secure the peace of the district by binding down the petitioner, the Magistrate is the only party entitled to be heard. Any other party interested in the result of the order cannot appear.

THE petitioner is the Manager of the Estate of Rai Kashi Prasad Singh and his brothers, who are the proprietors of certain mouzas in Begusarai, of which twenty-six were held by the Manjoul Indigo Concern for a long period under divers leases, the last of which expired in September 1896. The petitioner, as Manager of the Estate, leased out the mouzas to other tenants, who gave *kabuliyats.* The District Magistrate in his judgment stated as follows: "I find that J. C. M. Driver (the petitioner) is doing and is likely to do wrongful acts, viz., the giving of leases of land not in his possession and thereby instigating the lessees to commit criminal trespass on the land, and otherwise wrongfully dispossess the rightful occupiers, and that these wrongful acts are in the highest degree likely to give rise to breaches of the peace in the village of Manjoul and the neighbouring villages, and I therefore order under s. 118 of the Criminal Procedure Code that he give a bond with sureties for the [799] amounts noted below for their [his?] good behaviour for one year." The petitioner moved before the High Court against the above order.

Mr. *Garth* and Mr. *P. L. Roy* for the Petitioner.

Mr. *Jackson* for the Opposite Party.

The **judgment** of the High Court (**Banerjee** and **Stevens, JJ.**) is as follows:—

This is a rule calling on the Magistrate of the District to show cause why the order of the Magistrate of Monghyr, dated the 15th February 1898, calling upon the petitioner to execute bonds with sureties, should not be set aside, on the following grounds, namely, *first*, that the order is not warranted by the finding arrived at by the Magistrate; *second*, that it is inconsistent with the notice which he was called upon to answer; and *third*, that it is not warranted by law, and is otherwise not a fit and proper order under the circumstances of the case.

* Criminal Revision Nos. 264 and 265 of 1898, against the order passed by F. Roe, Esq., District Magistrate of Monghyr, dated the 15th of February 1898.

The learned Magistrate has submitted a written explanation, and Mr. *Jackson* appeared to show cause on behalf of the Manjoul Factory between the proprietors of which and the petitioner the dispute that has given rise to these proceedings is said to exist.

As the rule is issued only upon the Magistrate to show cause, and as the order that is sought to be set aside is one that is only intended to secure the peace of the district by binding down the petitioner, and does not and cannot determine any question of disputed possession between the petitioner and any other party with whom he may have disputes, the Magistrate in our opinion is the only party entitled to be heard in a case like this; and we have accordingly held that Mr. *Jackson*, who appears only for the Manjoul Factory, is not entitled to be heard in this rule.

It is true that the learned Magistrate in the last paragraph of the explanation submitted by him says that the first party should be given an opportunity of showing cause against the rule, as they are very considerably interested in the result, and the Magistrate requests that a postponement be granted to admit of their doing so. But we can only express our regret that the learned District Magistrate should have taken this view of the **[800]** matter. He was called upon to show cause. He has submitted a written explanation which we have duly considered; and if he wished that cause should be shown on his behalf by any one appearing before us, it was quite competent to him to have instructed the Legal Remembrancer to appear and show cause before us. But he has gone a little out of the way in saying that the persons whom he calls the first party should have an opportunity given them of showing cause, because they have a very considerable interest in the result.

As we have said above, the party interested in the result is the Magistrate of the district. Proceedings under s. 107 of the Criminal Procedure Code are only intended for the security of the public peace, and not for the purpose of enabling one of two contending parties to help themselves in recovering or retaining possession of immoveable property, after having their adversary's hands tied down by an order under that section. If it was thought necessary that an order should be made relating to the possession of any immoveable property, which is the subject matter of dispute between contending parties, the proper course was to have instituted proceedings under section 145 of the Criminal Procedure Code, and then the parties would have had due notice of the case they had to meet, and each party could have put forward evidence to prove his possession of the land in dispute.

We were then referred to a permission granted by the Legal Remembrancer to Mr. MacNair, authorizing him to show cause in this case. We do not think that such permission is equivalent to instructing that gentleman to appear on behalf of the Magistrate; nor were we asked to allow the learned Counsel to appear on behalf of the Magistrate. We do not think that a mere permission of this sort by the Legal Remembrancer is equivalent to an authority to appear for the Magistrate or for the Crown.

That being so, now let us see how the case stands on the merits with reference to the first ground. We observe that what the learned Magistrate has found is that the petitioner before us is doing wrongful acts which may lead to a breach of the peace. To quote the learned Magistrate's own words, he says: "I find **[801]** therefore, on enquiry that J. C. M. Driver, Baiju Lal and Damri Lal, are doing, and are likely to do, wrongful acts, viz., the giving of leases of lands not in their possession and thereby instigating the lessees to commit criminal trespass on these lands, and otherwise wrongfully dispossess their rightful occupiers, and that these wrongful acts are in the

highest degree likely to give rise to breaches of the peace in the village of Manjoul and neighbouring villages, and I therefore order under s. 118 of the Criminal Procedure Code that they give each a bond, with sureties, for the amounts noted below for their good behaviour for one year."

Now this finding and the conclusion based thereon are, in our opinion, clearly wrong. In the first place the giving of leases to tenants by a party who is not in possession is not necessarily a wrongful act. If a party is rightfully entitled to immoveable property and has been wrongfully kept out of possession thereof, there is nothing wrong in his giving a lease of such property to another party. If the party taking the lease goes to take possession peaceably, there is nothing wrong in that act. It is only where a party goes to take possession by force that any wrong is done.

The mere fact, therefore, of the petitioner before us having given leases to parties of land, not in the possession of his employer, cannot in our opinion constitute a wrongful act such as s. 107 of the Code of Criminal Procedure contemplates, and if that is not a wrongful act, the whole foundation for the proceeding is gone. It may be that ryots taking leases from, or executing *kabuliats* in favour of, a lessor who is not in possession may feel induced to commit a breach of the peace in their attempt to take possession. If they attempt to do so, they may be bound down; but that can be done only if it is found that they are going to take wrongful measures to recover possession.

We may observe that the taking of *kabuliats* from tenants by a landlord who may not be in actual possession is by no means such an uncommon thing as to give rise to any apprehension such as the Magistrate in his judgment refers to.

[802] The learned Magistrate observes in his judgment that, as by law (s. 108 of the Transfer of Property Act) a lessor is bound on the lessee's request to put him in possession of the property, the fact of a lease being given by a party out of possession must be taken to amount to an instigation or an attempt on his part to take forcible measures for obtaining possession. We can only say that the reasoning is a far-fetched one, and that it does not follow that, because a lessee in such a case can ask the lessor to put him in possession, the lessor will necessarily go the length of resorting to force to put his lessee in possession.

The first ground, therefore, on which this rule has been issued, namely, that the facts found are not sufficient to warrant the order, ought, in our opinion, to succeed.

The second ground, namely, that the order made is inconsistent with the notice by which the petitioner was called upon to show cause, is also well founded; for whereas the notice directed him to show cause why he should not be bound down to keep the peace, the order is one directing him to execute bonds for his good behaviour under s. 118 of the Criminal Procedure Code.

The Magistrate says in his explanation that this must be a clerical error. Perhaps it is a clerical error as the terms of the bond subsequently taken would go to show.

We are also of opinion that the third ground, namely, that the order made in this case is not a fit and proper order, is well founded. The effect of the order, as we have already observed, is to bind down one of two contending parties whilst it leaves the other party free. That is hardly fair in any view of the case.

For all these reasons we are of opinion that this rule must be made absolute, and the order complained of set aside.

S. C. B.

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[803] CIVIL RULE.

The 2nd January, 1890.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE AMEER ALI.

Tilak Chandra Dass............Plaintiff

versus

Fatik Chandra Dass and others............Defendants.*

Decree—Possessory decree—Specific Relief Act (I of 1877), s. 9.

Where a decree was passed under s. 9 of Specific Relief Act (I of 1877) giving the plaintiff possession, and also directed that the costs of removing huts and filling up excavations should be paid by the defendant under this decree:

Held, that the latter portion of the decree was beyond the scope of a possessory decree under s. 9 of the Specific Relief Act and must be set aside.

THE facts of this case sufficiently appear from the following judgments.

Babu *Jadav Chandra Seal* and Babu *Chandra Kant Sen* for the Petitioner.

Babu *Baikanta Nath Dass* for the Opposite Party.

The judgment of Dinesh Chandra Roy, Munsif of Madaripur, Zillah Faridpur, was as follows: —

In this summary suit for possession of land the only points for decision are:—

1st. Whether the plaintiff was in actual possession of the land, and *2nd*, whether the defendants have taken possession of the land and thereby dispossessed plaintiff within six months before this suit.

From the depositions of the plaintiff and of five witnesses I find that the plaintiff was actually in possession of the eastern bank of the *dighi* (large tank) and the *challan* (*i.e.*, disputed land No. 1) by cutting and taking away trees, bamboos, etc.

From the depositions of these witnesses, and also a copy of the *fouzdari* complaint of the defendants, it appears that actually the plaintiff was in possession of those portions of the disputed land by cutting *Hijul* trees and canes in 1886. It does not appear at all that after the *fouzdari* complaint had become unsuccessful the defendant did ever take proper legal remedy to recover the trees and canes, &c., or their price from the [804] plaintiff, or to recover possession of the disputed land by suing in a Civil Court. The defendant has produced some witnesses, but I see that they are not worthy of belief against the strong evidence of the plaintiff. The witnesses do not appear independent and impartial. The defendant cannot show by good and reliable evidence that before the alleged time of dispossession, and after the defendant's *fouzdari* complaint the defendant was in actual possession of the land by taking trees, bamboos and canes, etc., or by doing any other act of possession. The witness (5) for the plaintiff proves that even in *Augran* last the plaintiff did cut the trees of the portion of the disputed land. After all I hold that the plaintiff was in possession of those portions of the disputed land before the alleged date of

* Civil Rule No. 1323 of 1889.

dispossession. There is no good evidence of the plaintiff's possession of half of the *dighi* or any other portion of the disputed lands.

2nd.—The plaintiff says that in last *Falgoon* the defendant took possession of the land by erecting new houses thereon and doing such other acts. The defendant in the last portion of his deposition admits that in *Falgoon* last he raised new huts and did such other acts on the disputed land. So it is ordered—

That this suit be thus decreed partly, that the plaintiff do get *khas* possession of the disputed land (No. 1), which is called *chatan* and shown in the maps of both parties as lying on the north-east of the *dighi* and also of the eastern bank of the *dighi*. The costs of taking *khas* possession by removing houses, etc., will be settled in execution of this decree. Each party will bear his own costs.

THE **judgment** of the High Court (**Tottenham** and **Ameer Ali, JJ.**) was as follows :—

This is a rule to show cause why the decree passed by the Munsif of Madaripur, ostensibly under s. 9 of the Specific Relief Act, should not be set aside. The grounds upon which the rule was obtained were that upon the face of the plaint it was clear that, although s. 9 of the Specific Relief Act was cited in the plaint as the law under which relief was sought, the prayers contained in the plaint clearly do not all come under that section ; and that the decree passed by the Munsif went beyond a mere possessory decree sanctioned by that section.

We think that this is so. The plaintiff sued to recover possession of a certain portion of land of which he said he was dispossessed by the defendants, and he went on to ask that the defendants might be ordered to pay over to him the cost of removing certain huts erected by them, and of filling up excava- **[805]** tions made. These prayers are beyond the scope of s. 9 of the Specific Relief Act; and the decree passed by the Munsif, providing that the costs of removing the huts and filling up excavations should be ascertained in execution of the decree and be made payable by the defendants, is also in our opinion beyond the scope of a decree under section 9.

It seems to us, therefore, that the decree of the Munsif must be set aside, and the case be remitted to him to be tried as a regular suit on title. It will, of course, be open to the plaintiff, either to amend his plaint or to file a written statement, disclosing what his title really is.

This rule is made absolute. The costs of this rule will abide the result. We fix the hearing fee at one gold-mohur.

Rule made absolute.

NOTES.

[See also 8 A.L.J., 910.]

[25 Cal. 805]
The 23rd June, 1898.
PRESENT :
MR. JUSTICE PRINSEP AND MR. JUSTICE STEVENS.

Sarat Chunder Roy Chowdhry and others (Defendants)...........Petitioners
versus
Chundra Kanta Roy (Plaintiff)...........Opposite Party.*

Legal Practitioners' Act (XVIII of 1879), ss. 27, 28, 29—Suit by a pleader to recover fee from his client—Contract Act, s. 70—Provincial Small Cause Courts Act, s. 25.

The Legal Practitioners' Act (Act XVIII of 1879), s. 28, debars a pleader from recovering a fee from his client when no contract in writing is made—*Rama* v. *Kunji*, (1886) I. L. R., 9 Mad., 375, and *Krishnasami* v. *Kesava*, (1890) I. L. R., 14 Mad., 63, dissented from.

A SMALL CAUSE COURT having decreed a suit brought by a pleader to recover from his client a fee claimed for the conduct of a criminal action on the ground that it was based on an oral agreement and for work and labour done, the High Court granted the petitioners a rule under s. 25 of the Provincial Small Cause Courts Act, calling upon the other side to show cause why the decree of the Small Cause Court of Rungpore in Suit No. 589 of 1898 should not be set aside.

[806] On the rule coming on for hearing, Babu *Rash Behari Ghose* (with him Babus *Girish Chunder Chowdhry*, *Mohini Mohan Chackravarti* and *Hara Chundra Chuckravarti*), submitted that the case came within the terms of s. 70 of the Indian Contract Act and the agreement need not have been in writing, and referred to *Rama* v. *Kunji*, (1886) I. L. R., 9 Mad., 375; *Krishnasami* v. *Kesav*, (1890) I. L. R., 14 Mad., 63 ; *Raziuddin* v. *Karimbakhsh*, (1890) I. L. R., 12 All., 169.

The *Advocate-General* (Sir *Charles Paul*) (with him Babu *Nalini Ranjan Chatterjee*) contended that the judgments of the High Court of Madras could not be followed, as they had lost sight of s. 28 of the Legal Practitioners' Act and considered only s. 70 of the Indian Contract Act.

The **judgment** of the High Court (PRINSEP and STEVENS, JJ.) was delivered by

Prinsep, J.—The plaintiff sued before the Subordinate Judge of Rungpore exercising the powers of a Small Cause Court for certain fees for appearing and acting as a pleader for the defendants.

There was no written agreement within the terms of s. 28 of the Legal Practitioners' Act, 1879, and the fees claimed are not within s. 27.

The Judge of the Small Cause Court has referred to two judgments in I. L. R., 9 Mad., 375, and I. L. R., 12 All., 169, and upon these he has held that the plaintiff's suit, without a written agreement, is maintainable notwithstanding s. 28 of the Legal Practitioners' Act.

It seems to us that the Allahabad case is decidedly against that view. The Act, as we read it, contemplates that legal practitioners shall be entitled to receive under s. 27 the amount payable under certain rules prepared within the terms of that section, and that they shall not be entitled to claim anything further, unless the terms of s. 28 are observed. Section 28 requires that there

* Civil Rules Nos. 1111, 1112, 1113 to 1118 of 1898, from the decision of the Judge of Small Cause Court of Rungpore.

should be a written agreement signed by the client and that it should be filed [807] within a certain specified time in a particular Court. The sections that follow all refer to s. 28, and, as we understand it, to nothing else, for they all refer to "*such* agreement," which is an agreement within the terms of s. 28. It seems to us that in enacting these provisions the Legislature deliberately intended in respect of agreements between such parties to provide definitively for them, and even to go so far as to rescind anything in the Contract Act or any previous legislation relating to the subject. We agree with the learned Judges of the Allahabad Court that the intention appears to be as stated by them in the judgment reported in I. L. R., 12 All., 169 (see page 174).

We have had cited to us several decisions of the Madras Court, in which that Court, notwithstanding the express terms of the Legal Practitioners' Act, has applied s. 70 of the Indian Contract Act. We are unable to follow those decisions for reasons already stated. The judgment of the Small Cause Court Judge, therefore, is, in our opinion, contrary to the terms of the Act and must be set aside.

This order will apply to Rule No. 1118. We make no order as to costs in either of these cases.

Nos. 1111, 1113 to 1117 and 1119. The learned *Advocate-General* who appears for petitioners abandons these Rules on its being shown that the fees given are only such as can be legally obtained under s. 27. These Rules will be discharged.

We make no order as to costs.

N. C. *Rules discharged.*

NOTES.

[See also (1905) 28 All., 761 ; (1903) 27 Mad., 512.]

[25 Cal. 807]

PRIVY COUNCIL.

The 21st and 22nd April, and 14th May, 1898.

PRESENT:

LORDS WATSON, HOBHOUSE, DAVEY, AND SIR R. COUCH.

Akikunnissa Bibi..............Defendant

versus

Rup Lal Das and another............Plaintiffs.

[On appeal from the High Court at Fort William in Bengal.]

Pardanashin *Lady—Execution of document by a* pardanashin *lady—Refusal of her application, as defendant, for the issue of a commission to take her evidence—Civil Procedure Code (Act XIV of 1882), sections 393, 390—Irregularity not affecting merits of case—Civil Procedure Code (Act XIV of 1882), section 578.*

The Court of First Instance rejected an application made under Chapter XXV of the Civil Procedure Code for the issue of a commission to take the [808] evidence of a Mahomedan *pardanashin* lady, the defendant in the suit, which was brought against her on a mortgage bond, the execution of which she had denied in her written statement. The Courts below concurred in finding that there was sufficient evidence of the execution of the document by the *pardanashin* with full knowledge of its contents. From their judgments it appeared that if the defendant had been examined on commission, and had given her testimony in support of her written statement, it would not have been believed, and in their Lordships' opinion it could not reasonably have prevailed.

Held, that the error alleged by the appellant to have occurred in the refusal of the Court to issue the commission (whether or not it would have been better to have issued it) was, at all events, no valid ground of appeal. The evidence taken on the commission could not have affected the merits of the case within section 578 of the Civil Procedure Code.

APPEAL from a decree (4th May 1894) of the High Court affirming a decree (26th May 1892) of the first Subordinate Judge of Dacca.

The appellant was a Mahomedan widow residing at Dacca. The respondents were *mahajuns* carrying on business there. They brought this suit against her on the 9th April 1891 to recover Rs. 30,000, and interest thereon at 11½ per cent. per annum, due on a registered mortgage bond purporting to have been executed by the appellant at Dacca on the 3rd February 1882. By her written statement, dated the 3rd July 1891, she denied receipt of the money and the execution of the alleged bond, stating that she lived in seclusion and was unable to conduct her affairs in person, entrusting her transactions to her son, Dewan Imdad Ali, who, joining one Reza Karim Meah in a fraud upon her, had fabricated the mortgage bond in question. She alleged that she was not in Dacca, but was at Gaghra in Maimensingh, at the time when the bond bore date, and that she was not in fact indebted to any of the persons whose names were mentioned in the bond as her creditors save to one of them, and that to him she had paid the debt due out of the income of her landed property.

On the 21st August 1891 the issue of two commissions under section 383 of the Civil Procedure Code was ordered by the Court for the examination of

witnesses named by the defendant; and on the 2nd April 1892 her application for the issue of a commission to take her own testimony in the district of Maimensingh was [809] rejected. Another petition to the same effect was rejected afterwards; as to which all the proceedings are stated in their Lordships' judgment.

The principal questions were, whether the first Court had materially erred in refusing to issue a commission to take the evidence of the defendant, then in another district and alleging herself to be too ill to travel; and also whether the defendant's position as a *pardanashin* had been sufficiently regarded by the Court in the requirement of proof of her having executed the document with knowledge. The Subordinate Judge found that the mortgage bond had been read and explained to her; that the whole consideration alleged in it, with the exception of Rs. 300, had been paid by the plaintiffs in accordance with her directions; that she was not absent from Dacca at the time of the alleged execution, and that she could not have been personated behind the *parda* without her having become aware of it. He pointed out that her execution of the document was seen, and attested, by a number of witnesses of whom three knew her personally, including her son Imdad Ali and two others, these three having before acted for her in business shown to have been transacted. He added: "The defendant cannot complain that she could not get competent advice; she executed the bond at her own house, amongst her servants, friends, and relatives, who were quite competent to advise her in the matter." He, therefore, decreed the claim less the said sum of Rs. 300, which he found to have been paid away without the consent of the defendant.

On an appeal by the defendant, the High Court (PETHERAM, C.J., and RAMPINI, J.) gave JUDGMENT as follows:—

"The defence made here is that the mortgage deed was not executed by this defendant at all, but that her name was forged by other people, and that she was not answerable. It is also suggested that, even if this is not shown, the plaintiff has not proved that the transaction was explained to her, so as to make her, under the circumstance of her being a *pardanashin* lady, answerable upon it; and Dr. *Rash Behary Ghose* further argues that, whether she is answerable for the principal or not, she is not answerable for compound interest, because there is no evidence that the meaning of compound interest was explained to her; and he asks that the case may be sent [810] back in order that she may be called as a witness and give her statement, she never having given her evidence in the case at all.

"The plaintiff's case is a straightforward one. His witnesses prove that his document was executed at the house where this lady lived, and it was registered on or about the same date. His account is, that the Rs. 30,000 was actually produced at the time the mortgage was executed, but that, at the request of the defendant herself, it was taken away by him and was paid by him from time to time to her son and another person, as it was required for the purpose of discharging old liabilities of this very defendant.

"The plaintiff has produced his books which are kept in a perfectly regular way, and which show, and show satisfactorily, that the whole of this Rs. 30,000 was paid by him to the persons who are named by the defendant, and that as to Rs. 24,000 and odd of it, it was applied in the actual payment of pre-existing debts of the defendant.

"Then it appears that the only person who was called to identify the defendant as the person who executed this mortgage was a person of the name of Reza Karim. Reza Karim says that he was present at the time, that he knew this lady, that he recognized her voice, and that she was the person whose hand he saw sign this document. On the other hand, it appears from his cross-examination that he was actively interested in the preparation of the defence; and another witness for the plaintiff says that on some occasion he said that this woman had not signed this document at all. That fact, taken with the fact that this lady was not called as a witness, raised a doubt in my mind as to whether we should not

comply with Dr. *Rash Behary Ghose's* request and allow her to be examined. Now, the Subordinate Judge was of opinion that she was keeping out of the way, and that the reasons given for her not being examined, when opportunities were afforded her, were untrue; and having heard the whole case discussed by the *Advocate-General*, I think the Subordinate Judge was right; and I think so more particularly for this reason, that this document is witnessed by her son Imdad Ali and her man of business Chundra Kishore, and execution was admitted for her before the Sub-Registrar by her cousin, the witness Reza Karim. It is said that the reason why Imdad Ali was not called by the defendant was, that he was the person who forged his mother's name and made away with the money, and therefore he was keeping out of the way. But that remark does not apply to Chunder Kishore; and if there had been anything in this point which is now taken, that this lady wished to give her evidence and was unable to do so, it appears to me that this person would have been called, and he would have shown that, though the document was signed by him, he being her man of business, the document was not properly explained to her or that she was not aware of its contents.

"Under these circumstances we cannot say that we think that the learned Subordinate Judge has not come to a proper conclusion upon the whole [811] case; and we do not think that the interests of justice would be served by our sending this case back in order to have this evidence taken, which no doubt would involve the parties in considerable further costs. On the whole, this appeal must be dismissed with costs."

From this decision the defendant appealed.

Mr. *J. D. Mayne*, for the appellant, argued that there was material error in the judgment of the High Court. The law relating to the execution of documents by *pardanashin* ladies had been declared many times; but this judgment proceeded as if it had been for the defendant to show that the document had not been explained to her. The burden of proof was on those who made claims against secluded women to show affirmatively that their execution of documents had not been obtained without due and sufficient explanation and competent advice given to them. There had also been material error in the refusal to issue a commission to take the defendant's evidence. The Code of Civil Procedure, in Chapter XXV, gave to the parties to a civil suit the right to have evidence taken on a commission to be issued by the Court upon grounds shown. The discretion to be exercised in the grant of a commission by the Court was not an arbitrary one, but a judicial one. Here the Judge's discretion had not been rightly exercised. The permissive words in section 383—"Any Court may in any suit issue a commission"—were designed to give effect to a right legally established, where, as in this case, there was evidence that the person, whose testimony was required, could not from illness, or other sufficient cause, attend the Court for the purpose. Enabling words were always compulsory when they were words to effectuate a legal right. Reference was made to *Julius* v. *The Bishop of Oxford*, (1880) L. R., 5 Ap. Ca., H. L., 214, and to some of the cases cited in the judgment in that case of the L. C. (Earl Cairns), and to *Haridas Baisakh* v. *Moazam Hossein*, (1871) 8 B. L. R., Ap., 16.

Mr. *J. H. A. Branson*, for the respondents, referred first to section 587 of the Civil Procedure Code, and contended that the ground of the present appeal was untenable, in regard to the merits of the case, which had not been affected by the refusal to issue the [812] commission. Next, he adverted to the direct concurrence of the two Courts below on the fact of intelligent execution by the *pardanashin*. At this stage, in regard to the burden of proof, the question was more as to what was the true effect of all the evidence that was before the Appellate Court than as to the adjustment of the burden at an earlier stage in the original Court. Although it had not been made out that

there had been any error there, it was enough to refer to the result of the whole body of evidence. The fact was apparent that, after all the evidence that had been given, the denial of the defendant would not have prevailed, with either Court, as against the evidence for the respondents. The only question relating to the refusal of the commission was whether, or not, injustice had been done by such refusal having excluded evidence that ought to have been before the Court, and that might (had it been before it) have altered its conclusion. Here that had not been the case. Reference was made to *Ross* v. *Woodford*, (1893) L. R, 1 Ch. D., 38, and to *Doucett* v. *Wise*, (1866) 1 Ind. Jur., 397

Mr. *J. D. Mayne* replied.

On the 14th May their Lordships' **judgment** was delivered by

Sir R. Couch.—The respondents in this appeal brought a suit against the appellant on a mortgage bond, dated a native date corresponding to the 3rd February 1882, and alleged to be executed by her to secure Rs. 30,000, money borrowed with interest at 15 annas per cent. per month (11¼ per cent. per annum) and compound interest on default to be paid at the end of three years. The appellant in her written statement denied the execution of the bond and the receipt of the consideration. She also said that she is a *pardanashin* Mahomedan lady of respectable family not able to manage and superintend all her affairs, and on many occasions her son Dewan Imdad Ali, *alias* Nawab Meah, transacts her business with her permission; that Imdad Ali and his intimate friend and relative Reza Karim Meah and others had previously created certain loans for their own purposes, and afterwards under the pretext of repaying them had fabricated the mortgage bond. The suit was heard before the Subordinate Judge of Dacca on the 21st April 1892. The mortgage bond [813] was produced and appeared to be signed by the appellant by mark, her name being written "By the pen of Imdad Ali." It was endorsed by the Sub-Registrar as presented for registration on the 4th February 1882 and the execution admitted by the appellant at her residence, she being identified by Reza Karim. There were eight witnesses to the execution, two of them being Chunder Kishore Roy and Imdad Ali. The first witness for the plaintiff was Reza Karim. He deposed that the defendant is his cousin, that he saw her and talked to her, and identified her before the Sub-Registrar for registration of the bond which was produced; he put his signature on the back of the bond, and the defendant having put a mark on it he wrote her name on the back on the bond by his own pen; that the defendant made the impression of the seal on the back in the presence of the Sub-Registrar, and admitted the execution of the bond and receipt of the money covered by it. He also said that Chunder Kishore is the mokhtar of the appellant and had been so more than ten years, and Hara Kishore Roy is her *dewan*. The next witness was Dwarka Nath Chuckerbutty who was in the service of the plaintiffs. He deposed that the bond was executed and registered in his presence; he presented it at the Registry office, the appellant put her seal on it and made her signature by mark, her name was written by her son Nawab Meah, he and Chunder Kishore fetched the Rs. 30,000 from the plaintiffs' house; it had been arranged that the money should remain in deposit with the plaintiffs, and after the execution of the bond it was taken back and kept in deposit on the appellant's account to pay her debts with it; that after that Nawab Meah and Chunder Kishore paid off her debts and got evidence thereof and gave them to the plaintiffs; that the appellant was behind a *parda* at first when he read over the bond to her from a little distance. She said: "I could not clearly understand it." Afterwards her son Nawab Meah read over the document to her and

explained it to her. The next witness was Mohini Mohun Basak, an attesting witness. He said he had known the appellant for 14 or 15 years or for a longer period; that he had talked to her and knew her voice; that he saw her put her seal and signature to the bond by mark; the money was fetched and shown to her; he was [814] seated in the room on the west of the room where she was seated; there was a *purda* on the door between the two rooms, when she executed the bond the *purda* was lifted a little on one side and he saw through that opening; the appellant had told him to procure a loan of the money and said that she would give him brokerage at 1 per cent.; he acted as a broker and procured the loan.

The appellant met this case by witnesses who deposed that at the time of the execution of the bond she was not at Dacca, and others who deposed that she was on bad terms with Imdad Ali. The Subordinate Judge disbelieved these witnesses and said there could not be any doubt Reza Karim's evidence was fully true. He accordingly made a decree that in default of the principal money and interest and costs being deposited in Court on or before a day named the mortgaged property, or a sufficient portion thereof, should be sold and the proceeds thereof applied in payment. The defendant appealed from this decree to the High Court at Calcutta which dismissed the appeal, but it is in her favour that they said not without a doubt.

Chunder Kishore Roy and Imdad Ali, who, it has been mentioned, are witnesses to the execution of the bond, were not called by the plaintiffs. The reason for this appears in the judgment of the Subordinate Judge and ought not to affect their case. He says that the plaintiffs did their best to produce them as witnesses but without success; that Chunder Kishore and Hara Kishore, who had been proved to have been present when the bond was executed, although not discharged from the defendant's service, had mysteriously disappeared some time after the institution of the suit, and it seemed to him "very likely that the defendant had screened them with the object that the plaintiffs might not avail themselves of their evidence. Imdad Ali, in spite of all the efforts of the plaintiffs, will not appear to give his evidence."

The reasons given for the present appeal in the appellant's case and in the argument before their Lordships are: (1) That the first Court committed a material error in refusing to allow the evidence of the defendant to be taken on commission; (2) [815] that the same Court misunderstood and misapplied the law relating to documents executed by *pardanashin* ladies.

The facts relating to the first reason can be briefly stated. The plaint was filed on the 9th April 1891 and the written statement on the 13th July 1891. On the 4th August 1891 the defendant applied that the evidence of certain witnesses in the list filed by her and her own evidence might be taken by commission; some of the witnesses being females and others residing beyond the jurisdiction of the Court. It appears on the order sheet of the Court in the record that on that day orders were made for commission to take the evidence of the female witnesses and the witnesses who were out of the jurisdiction. No order was made as to the defendant's evidence.

On the 2nd April 1892 the defendant applied to be examined by commission at her present residence at Itna in the district of Maimensingh beyond the jurisdiction of the Court, to which the plaintiffs objected that she should be examined at her permanent residence in the town of Dacca. The Judge refused to issue a commission for her examination at Itna saying that he was not satisfied that she was ill or in such state of health that she could not be removed to her own residence at Dacca without danger to her life. On the 6th May 1892, the defendant made another application to be examined at Itna supported

by an affidavit, which application was refused, the Judge saying that he had on previous occasions disbelieved the defendant's plea of illness and still adhered to that opinion; that he was further inclined to believe that the defendant did not mean to comply with the Court's order, but was simply trying to put off the disposal of the suit.

By section 578 of the Code of Civil Procedure (Act XIV of 1882) it is enacted that no decree shall be reversed or substantially varied nor shall any case be remanded on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit or otherwise not affecting the merits of the case or the jurisdiction of the Court. It is apparent in the judgment of the Subordinate Judge that if the defendant had been examined and had given evidence in support of her written **[816]** statement he would not have believed it, and in their Lordships' opinion it could not reasonably have prevailed against the evidence given by the plaintiffs. The High Court also appears to have thought so, for it says at the end of its judgment it does not think the interests of justice would be served by sending the case back to have the evidence taken. Whether the Subordinate Judge properly exercised his discretion when he refused to issue the commission need not be determined. Possibly it would have been prudent to issue it, but their Lordships are of opinion that the want of the defendant's evidence has certainly not affected the merits of the case.

As to the second ground of appeal they think the law has been neither misunderstood nor misapplied. They will humbly advise Her Majesty to dismiss the appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Lattey & Hart.*

C. B.

NOTES.

[See also (1900) 28 Cal., 37 where this was distinguished.]

[25 Cal. 816]

PRIVY COUNCIL.

The 18th February and 1st April, 1898.

PRESENT:

LORDS HOBHOUSE, MACNAGHTEN AND MORRIS, AND SIR R. COUCH.

Faiz Muhammad Khan............Plaintiff

versus

Muhammad Said Khan............Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Will—Construction of Will—Construction of the will of a talukhdar—Quantity of estate devised—Unlimited gift of share of profits in a talukhdari estate.

The will of a *talukhdar*, who left daughters, declared that in respect of his estate, in its entirety and without division, the engagement for the revenue should be in the name of his

eldest daughter's son and so continue. Besides this grandson, another, the son of his second daughter, as well as two other daughters of the testator, were to be equal sharers entitled to the profits of the estate. Of this estate the will said: "The profits may be divided equally among all the four persons."

The *talukh* had been included in the first and third of the lists reparod in conformity with the Oudh Estates' Act, 1869.

On a question whether under the will the son of the second daughter took a heritable interest, or only a life-estate, to which, it was argued, the gift was confined by reason of its being only of the profits:--

[817] *Held*, that, in order to show that an unlimited gift of the profits was less than a gift of the *corpus*, some evidence should be found in the context, or in the circumstances affecting the property, tending to show restriction of the interest given.

No such evidence having been found here, the interest given by the will was declared to be heritable in the case of the testator's grandson, who was the son of his second daughter. This grandson dying soon after the testator, had bequeathed his interest to the present appellant, his father.

APPEAL from a decree (3rd June 1892) of the Judicial Commissioner of Oudh, affirming a decree (9th October 1888) of the District Judge of Rae Bareli.

The plaintiff, appellant, brought this suit on the 14th January 1888, claiming title to a share in the profits of a *talukh*. This share had been bequeathed to him by his son, Sultan Khan, who died on the 4th July 1879. Sultan Khan's share in the profits of the *talukh* had been derived under the will, dated 21st February 1873, of his maternal grandfather Abdul Hakim Khan, who died on the 23rd February 1878, the *talukhdar* of one moiety of *talukh* Amawan in the Rae Baroli District. The plaintiff had married Abdul Hakim's second daughter, and Sultan Khan had been his son by this marriage.

In 1858, at the second summary settlement, Abdul Hakim obtained settlement with the Government in respect of his moiety of Amawan. Afterwards a *sanad* was granted to him, and his name was entered in the first and third of the lists prepared under the 8th section of the Oudh Estates' Act, 1869. In virtue of the latter entry the descent of the estate of the *sanad*-holding *talukhdar* was thereafter to be regulated by primogeniture.

This appeal related only to the claim of the father and devisee of Sultan Khan, deceased, in 1879, to a one-fourth share, on the ground of its having passed by the will of Abdul Hakim whom Sultan Khan had survived. Another claim had been at one time put forward in this suit to a fourth share, which Abdul Hakim had devised to his daughter Shabhan. This share, by reason of that daughter having died before the testator, had lapsed into the *talukhdari* estate. That claim, which had reference to rights under section 22 of the Oudh Estates' Act, 1869, depended on facts which both the Courts in India had concurred in negativing, [818] and was not further urged. The appellant's right, however, to the one-fouth share which had been Sultan's, depended on questions of law. These were, in effect, whether or not the will of Abdul Hakim conferred upon him a heritable interest in the profits of the *talukhdari* estate, or only an interest during his life.

Besides this will of 1873 Adbul Hakim had previously made three other testamentary documents, dated respectively the 29th January 1861, the 5th October 1861, and the 9th September 1870. The material contents of all appear in their Lordships' judgment.

Muhammad Said Khan, in whose name as *talukhdar*, on the death of Abdul Hakim, the estate was held, having been a minor in 1878, the Court of Wards had charge until 1887, when Said, on obtaining possession, refused to

recognize the claim of the plaintiff, who now sued for the share that had been devised to his son, and by his son to him.

The defence was that the interest conferred upon Sultan Khan by the will of his maternal grandfather was a personal right to maintenance, which came to an end on his death.

The District Judge held that no proprietary right in the share given by the will to Sultan Khan was conferred by it. There was a remedy prescribed by the will, in case Said should fail to distribute, that each co-sharer should thereupon have a part set aside for him. The present suit had been brought before the end of the first year from the time when Said attaining his majority had obtained possession. The will, directing that the whole estate should remain in the name of Said, entire and undivided, afforded no ground for this suit, which, as claiming a share of the profits, was premature. He dismissed the suit.

The Judicial Commissioner, on appeal, was of a different opinion. He considered that the bequest to Sultan Khan was absolute, and that the son's will in favour of the father must take effect, conveying to him all the rights to the four annas share bequeathed. Accordingly the suit was remanded, as regarded that part of the claim, for findings as to the amount of the profits in question, under section 566 of the Civil Procedure Code.

[819] On the return made by the District Judge the appeal came before a Court constituted under section 8 of Act XIV of 1891. Another Judicial Commissioner who had succeeded the former in office was of opinion that the gift made by the fourth will to Sultan Khan was merely a life-estate for his maintenance. No words of inheritance accompanied it. The gift was one to him personally, in which he had no power to bequeath any interest. On the other hand, the defendant took the *talukhdari* estate unrestricted by there having been to Sultan Khan a gift of a varying sum unaccompanied by any words of inheritance.

In this judgment the Additional Judicial Commissioner concurred. The appeal from the first decision of the District Judge was dismissed, and the dismissal of the suit affirmed.

The plaintiff appealed.

Mr. *J. D. Mayne*, for the Appellant, argued that the Courts were wrong in holding that the share given to Sultan Khan by the will of the 21st February 1873 was only a life-interest in the profits, terminating on his death. Under the will the interest given was not merely for maintenance. The interests of the four sharers were all equal and absolute. The special provision for Said only entitled him to be the sharer responsible to the Government in engagements for the revenue. The remedy given to the other sharers for enforcing their claims, should that course be necessary, was not inconsistent with the provision that the estate should remain in the name of Said entire and indivisible. If it would be inconsistent that certain portions of the estate should be set apart, where distribution might have been withheld, and yet that the estate should remain entire, this remedy might fail; but this would not invalidate the bequest. That the *talukh* should be possessed by one person, himself a sharer, with others equally with him entitled to share the profits, were provisions that could take effect, and they were not inconsistent with one another.

Mr. *Lawson Walton* and Mr. *C. W. Arathoon*, for the Respondent, contended that the *talukh* being held subject to the rule of primogeniture, the whole scheme of the will, according as it did with that rule, required that the

talukhdari estate should remain undivided and entire; the result being that the bequest [820] in favour of Sultan Khan would be a life-interest only. The words of the will of the 21st February 1873 had been rightly construed by the Appellate Court on this point. The gift, as limited to a share of the property, was a gift for maintenance for the life of the grantee and not an estate of inheritance of which Sultan Khan could dispose by his will. As a suit for the share of the profits the suit was premature. As to the general restriction on the power of a testator to give more than one-third of his property in legacies without the consent of the heirs, reference was made to Macnaghten's Mahomedan Law, chapter VI, para 2, and to the judgment in *Khajooroonissa* v. *Rowshan Jehan*, (1876) I. L. R., 2 Cal., 184 (198): L. R., 3 I. A., 291 (307).

Mr. *J. D. Mayne* replied.

On 1st April their Lordships' **judgment** was delivered by

Lord Hobhouse. -The sole question in this appeal is whether Sultan Khan, the grandson of Abdul Hakim Khan, took under the will of his grandfather a heritable interest in his grandfather's *talukhdari* estate. Sultan is dead, and the plaintiff, who is now appellant, claims to represent him. The estate is one of those which were entered in List III of Act I of 1869; which means that, not being one in which the custom of primogeniture had previously prevailed, the *talukhdar* elected that it should so descend in future. The defendant and respondent Said is another grandson of the testator.

The plaintiff claimed a further share in the estate, being that which was devised to Shabhan, a daughter of the testator, who died in his lifetime. That claim has been decided against him, and is not revived in this appeal. At the hearing the District Judge wholly dismissed the suit, holding that Sultan took no more than a life interest under his grandfather's will. The plaintiff appealed, when the Acting Judicial Commissioner, Mr. Dyson, held that Sultan took an absolute interest; and he remanded the suit for trial of the question (among others), to what share of profits is the plaintiff entitled in the 4-anna share of profits inherited by Sultan Khan.

On remand the District Judge found "that two persons have equal rights to this item; one of them is Mussammat Aziz-un-nissa, and the other is plaintiff as representative of Sultan Khan." [821] With that finding the appeal came again before the Judicial Commissioner's Court for final disposal. The Court then consisted of the Judicial Commissioner, Mr. Burkitt, and the Additional Judicial Commissioner Mr. Howell. Those learned Judges held that they were not bound by Mr. Dyson's decision; and, considering that Sultan took only a life-interest, dismissed the appeal with costs. That had the effect of affirming the District Judge's original decree which dismissed the suit with costs.

The testator was a Mahomedan gentleman who married two wives and had children by both of them. His will, which is now to be construed, takes notice that a daughter has just been born to him by his second wife and then proceeds—

"I do execute this will in modification of my will, dated 19th September 1870, and got the same duly registered, so that after my demise the engagement in respect of the *ilaka* (estate) in its entirety and without division may be made in the name of Muhammad Said Khan, son of Mussammat Shahzadi Bibi, my eldest daughter by my first wife, and that Muhammad Sultan Khan, son of Mussammat Umrao Bibi, my second daughter, by my first wife and Mussammat Moti Bibi, my third daughter by my first wife, and Mussammat Shabhan Bibi my fourth daughter from my second wife, may be as equal sharers (with him) entitled to appropriate profits, and that the profits of the said estate after deducting therefrom the Government revenue, *talukhdari*, and *ahl-i-biradri* (members of brotherhood) expenses may be divided equally among all the four persons.

"Let no one act contrary to this. Should any one do so, his act shall be null and void both before the authorities for the time being and the member of the brotherhood. If in case Muhammad Said Khan fail to distribute the profits, or raise a dispute over the distribution, each sharer shall be competent to have with the help of the Government set apart for him lands yielding his share of profits; but the estate shall continue in the name of Muhammad Said Khan entire and undivided."

This will was made on the 1st February 1873, and it is not now disputed that all former wills were revoked by it, or that it is the only instrument now to be construed. But it is not unimportant, especially with reference to the argument founded on the testator's preference of primogeniture for his *talukh*, to see how he had dealt with it by former wills, and what were his actual dispositions immediately before the will of 1873.

The Government of India thought it important for the quiet of titles in Oudh that *talukhdars* should be advised to make wills [822] and Abdul Hakim was so advised as early as October 1860. In January 1861 his only issue was three daughters by his first wife, and he provided that Shahzadi, his eldest daughter, should be *lumbardar* in his place, and that his daughters, Umrao and Morti, should be subordinate co-sharers in equal shares. In the course of that year Umrao gave birth to Sultan; and on the 5th October 1861 the testator made a second will giving the estate to Sultan according to the custom of primogeniture. He directed that his two other daughters, then childless, should get maintenance from Sultan; but with a proviso that if they should not remain on terms of peace and concord, his three daughters should be proprietors in equal shares, Sultan being only *lambardar*. When the eldest daughter Shahzadi gave birth to Said, the testator made a third will, dated 9th September 1870. By it he gave his estate to Sultan and Said in equal shares and made them joint *lumbardars*. Also he directed that his third daughter Moti should get maintenance. The fourth and last will was, as stated, made upon the birth of another daughter, Shabhan.

Their Lordships have heard no reason founded on the language of the will of 1873 for confining the interest of Sultan to a life-estate except that the gift is only of profits. But in order to show that an unlimited gift of profits is less than a gift of the *corpus* some evidence should be found in the context or in the circumstances affecting the property. It appears to their Lordships that the context, so far from favouring the restriction of the gift, bears the other way. The testator does not give the estate to Said, but directs that the engagement shall be made in his name. When he disposes of the surplus after deducting revenue and expenses, he puts all four takers on the same footing, equal shares of profits are given to each. Finally comes the provision that in case of dispute each sharer shall have land set apart for him, only the estate is to continue in the name of Said (clearly as *lumbardar*) entire and undivided. It may be that such a setting apart would be difficult, as the Court below observes; but the testator clearly contemplated it and it seems more consistent with a permanent than with a limited interest.

The will then, read alone, must be construed as giving a heritable interest to Sultan, and it is not shown from any of his [823] former dispositions that the testator was in the habit of using any of its expressions in any but their ordinary sense, or that he looked upon the gift of the *lumbardari* as carrying the whole beneficial interest, or that he leant in favour of the rule of primogeniture. On the contrary, in the will of January 1861, he gives the *lumbardari* according to primogeniture, and the surplus in equal shares. In the will of October 1861 he provides for equality of proprietorship in case of

dispute; and in the will of 1870 he gives the proprietorship, *lumbardari* and all, to his two grandsons equally.

Their Lordships' attention was called to the fact that the plaintiff is not entitled to the whole of Sultan's share. The District Judge found that Aziz-un-nissa is equally entitled. She is not a party to the suit, and would not be bound by any decree made in it. But their Lordships prefer to confine themselves to a construction of the will on the points argued in this appeal. The plaint, which is rather confused both in its statement and in its prayer, sues for possession of an 8-annas share in the *talukh*. A declaration of the nature of the devise to Sultan will enable the Courts to put him in enjoyment of so much of the share of Sultan as has devolved on him, in the mode appropriate to the circumstances of the *talukh*. Their Lordships think that the proper course will be to discharge the decrees of the Judicial Commissioner's Court and of the District Judge, to declare that according to the true construction of the will Sultan Khan took a heritable interest in 4-annas of the profits of the estate after deducting Government revenue, *talukhdari* and *ahl-i-biradri* expenses; to dismiss the suit so far as it seeks relief in respect of the share devised to Shabhan; and to order that neither party shall pay or receive costs either in the District Judge's Court or in that of the Judicial Commissioner; in both of which Courts the plaintiff was right as to one-half of his claim, and wrong as to the other half. They will therefore humbly advise Her Majesty to this effect. On this appeal the appellant is wholly right, and the respondent wholly wrong; therefore the respondent must pay the costs.

Appeal allowed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*
Solicitor for the Respondent: Mr. *J. F. Watkins.*
C. B.

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[824] *The 9th and 10th February and 5th March, 1898.*

PRESENT:

LORDS HOBHOUSE, MACNAGHTEN, AND MORRIS, AND SIR R. COUCH.

Rash Mohini Dasi............Appellant
versus
Umesh Chunder Biswas...........Respondent.

[On appeal from the High Court at Fort William in Bengal.]

Will—Execution of Will—Testamentary Capacity—Evidence—Burden of proof.

As to the testamentary capacity of a person who was alleged to have executed his will while suffering from paralysis and in his last illness, the Courts below had differed.

The proponent's case was that the will had been signed for the testator in his presence by another person authorized by him, and that he was of sound and disposing mind at the time, though unable to write his name. Against this, there was affirmative, oral evidence tending to show that he was not then capable of making a will. Other circumstances supported the latter view.

On the weight of the evidence the Judicial Committee decided that the proponent had not discharged the burden of proving him to have been capable.

The present case did not resemble one where a testator, near death, might, with the requisite degree of knowledge, have executed a disposition of his property, for which previously and while his mind was still in vigour, he might have given instructions.

APPEAL from a decree (19th August 1893) (I. L. R., 21 Cal., 279) of the High Court, reversing a decree (10th August 1892) of the District Judge of Nuddea, dismissing a suit which originated in an application for probate of a will under Act V of 1881.

On the 5th May 1891 Rash Mohini Dasi, the appellant, widow of Mohim Chunder Biswas of Babanipur, in Meherpur, Zilla Nuddea, who died on the 18th March 1891, petitioned under the Probate Act, 1881, for probate of his will dated the 25th Falgun 1297, corresponding to the 8th March 1891. Khettermohun Chowdhry, a cousin, and manager of the estate of the deceased, having joined in the petition, withdrew from it, on the 18th May following. The deceased left a minor daughter, and the next of kin after her were his two uncles, Tara Chand Biswas and Umesh Chunder Biswas. The latter of these entered a caveat on the 11th June 1891. The proceedings were then conducted as a suit.

[826] According to the case of the widow, proponent, Mohim Chunder having had a paralytic stroke, was unable to use his hand to sign his name, but directed Troilokya Nath Biswas to sign his name for him. Umesh Chunder filed a written statement, denying that the will had been duly executed, and averring that the deceased was not in a state of body or mind to be able to make it. An issue was framed to raise the question, and thereupon the Officiating District Judge found it to be substantially true that Mohim Chunder had had at the time consciousness enough to authorize Troilokya Nath to sign his name for him, and that he had made the will, which accordingly was admitted to probate.

The High Court (PIGOT and BANERJEE, JJ.), on the appeal of Umesh Chunder, after deciding that the issue of due execution raised the question of the alleged testator's testamentary capacity, found on the balance of the evidence that he had not possessed it; and that there had been no proof that he had known, and approved of, the contents of the will.

They reversed the decision of the Original Court, and refused to admit the will to probate.

The judgment of the High Court is reported at length in I. L. R., 21 Cal., 279.

On this appeal—

Mr. *A. Cohen*, Q.C., and Mr. *C. W. Arathoon*, argued that the decision of the first Court should be maintained. *Parker* v. *Felgate*, (1883) L. R., P. D., 171, was referred to, in which case it had been decided that, where a testatrix had previously given instructions for her will, and at the time of the execution recollected that she had given those instructions, and believed, as was the fact that the will accorded with them, that state of things was sufficient for probate to be allowed.

Mr. *J. D. Mayne*, for the Respondent, contended that the dispositions of the will could not have been originated with the alleged testator in the state in which he was. There was no evidence that the first draft emanated from him ; and there was a blank period between the time when the draft was made and the alleged execution of the will.

[826] Mr. *A. Cohen*, Q.C., replied.

Afterwards, on March 5th, their Lordships' **judgment** was delivered by

Lord Macnaghten.—In this case the appellant Rash Mohini Dasi propounded a document as the will of her late husband Mohim Chunder Biswas, who died on the 18th of March 1891. The District Judge of Nuddea admitted the document to probate. The High Court on appeal reversed his decision and dismissed the appellant's petition with costs.

The sole question in issue before the High Court was the testamentary capacity of the alleged testator.

After a very careful review of the evidence from which nothing is omitted, and in which nothing seems to have been unduly pressed, the learned Judges of the High Court state the result of their opinion as follows : "We think that the evidence of Dr. Bepin "—Dr. Bepin was a duly qualified doctor who attended Mohim during the latter part of his illness—" aided by the admissions of the plaintiff's witnesses, the history of the illness and the circumstances of suspicion which arise in the case, lead to the conclusion first that Mohim is not shown to have had due testamentary capacity ; secondly, that the balance of evidence in this difficult case is on the whole to the effect that he had not testamentary capacity; and that there is no adequate proof whatever that he knew or approved of the contents of the will."

Their Lordships agree so entirely with the conclusions at which the learned Judges have arrived and with their estimate of the evidence that it will not be necessary for them to go through the facts in any detail.

Mohim died at the age of 29. Besides his widow he left an infant daughter and two uncles, the younger of whom Umesh Chunder Biswas, the present respondent, opposed the grant of probate. Mohim had a paralytic stroke on the 24th of January 1891. A native doctor named Rakhal was called in and attended him for about five or six days. Then he was treated by a *kobiraj* or native practitioner whose name does not appear. On the 2nd of March he had another seizure. Two doctors were then called in, Dr. Bepin and a native practitioner called Jasoda. **[827]** They attended him constantly until his death. It seems to have been determined rather against the advice of the doctors that if possible Mohim should be moved to Calcutta on the 9th. However, as preparations were being made for his removal, and as he was being carried through the house he had another seizure, which after a few days proved fatal.

The story of the preparation of the will is told by Khetter Chowdry Khan, a cousin of Mohim and his manager and trusted adviser. He was the principal, if not the sole, actor in the drama.

It seems that Dr. Bepin, either on the first day of his attendance or a day or two afterwards, said something about a will. It is not very clear what was said. Khetter states that the doctor said that considering Mohim's state there should be a will made. Dr. Bepin himself asserts that what he said was that "considering Mohim's condition they should be ready to get a will executed in case he became at all better." Whatever it was that Dr. Bepin said Khetter acted on the hint and set about getting a will made at once. He says he told the patient " Bepin Babu is saying that you should make a will." . . .

. . . Mohim said : "Let a will be made and then I shall go to 'Calcutta.' " . . . I and Mohim consulted together that night. I drew out a list of the properties which were to be included in the will. No one was present there at that time. Neither his wife nor his mother-in-law was asked at the time about it. I did not tell him to ask either his wife or mother-in-law about it. He did not forbid me to speak of it to any one except his uncle and his enemies. I did not speak of it to Mohim's sister, and one of his aunts. I did not also tell his wife. I did not speak of it to Mohim's wife and family or any one else, but Mohim spoke of it to his sister and wife on the 24th and 25th Phalgoon (7th and 8th of March). There were five executors. I did not let them know before the will. I did not tell Umesh or his sons. They do not speak to me. I made a draft from the note. This was on the 21st or 22nd (4th or 5th of March) I have a draft. I handed over the list to Bhusan to keep it with the miscellaneous papers. I made the draft sitting in a corner of the cutchery. Mohim saw the draft on the morning of the 23rd (6th of March) after washing his mouth and his hands. [828] No one was present at the time. The doctor went daily from the 20th to the 25th. Jasoda and Bepin used not to go together. I did not tell Bepin Babu because Mohim forbade me. He forbade me from the 20th. He forbade me saying 'Let no one know.' On one occasion he named the doctors and told me not to tell them. He said to me 'I do not know whether what you have done will be according to law, go and get it revised by the pleader of Meherpur.' I sent it on the 24th through Taruck Biswas . . . . The draft came from Meherpur on the night of the 24th Phalgoon. It contained just an alteration here and there. What I wrote was there but two conditions were added. Besides Abinash Babu I tried to get a draft drawn up by Narahurri Babu also, I tried to do so by means of a letter purporting to have been written by Mohim Babu on the 21st or 22nd. In it I put down paragraphs of the will. Narahurri Babu's draft came by post a day or two after Mohim's will had been executed. It is with Bhusan. Narahurri Babu sent a letter. It is in the *serishta* . . . . After Mohim had determined who should be executors and said 'These persons are to be the executors' I did not say anything. He said that on the night of the 20th when we consulted together. Bepin doctor came that day. I do not remember whether I or Mohim spoke about the terms of the will. Mohim spoke about the terms. I gave my opinion. I did not myself suggest any of the terms . . . . It took ten or twelve minutes to read Mohim's will. That was on the night of the 24th. He read it to himself. He read it in a low voice." The story told on behalf of the petitioner further was that Khetter's draft was sent to Abinash the pleader at Meherpur on the morning of the 7th of March by the hand of Taruck, a *gomashta* in Mohim's employ. Taruck says that Khetter gave him a letter along with it addressed to Abinash. Then he adds "Mohim said 'Take this letter and get the draft corrected by Abinash Babu and bring it back.' . He said 'There are four executors and my wife will also be an executrix.' He further said 'Rs. 300 is set apart for my wife's pilgrimage, it has to be made Rs. 600.' He further told me to ask Abinash to keep this secret that there may be no row."

Putting aside for the moment this alleged conversation with [829] Taruck, and Khetter's statement that Mohim spoke of the will to his wife and sister on the 7th and 8th of March, it will be observed that up to this point no one was in the secret but Khetter. Everything took place between Khetter and Mohim alone. It is not very clear whether Taruck intended to represent that he had a conversation with Mohim in person or whether he was only

repeating what Khetter told him. Either way the story is incredible. When Khetter was sending written instructions to Abinash why should he have entrusted part of the testator's wishes verbally to a messenger? If we are to take it that Taruck had a conversation with Mohim about the will in Khetter's presence how is it that Khetter says nothing about it?

The will is said to have been executed on the following day, the 8th of March, between 4 and 5 P. M. There seems to be no doubt that on that day there was an assemblage of persons hastily collected by Khetter. All were servants of Mohim except Shama Churn, who was Khetter's brother-in-law, and Rakhal, the doctor who attended Mohim on the first attack. A person was stationed at the door to keep out "enemies" or to give warning of their approach. Mohim was propped up in bed. The will which had been copied out by one Troilkya was put into his left hand over which he still had some power. Troilkya signed for him. He touched the pen. Then Shama Churn signed and read the will aloud. The other witnesses signed and the ceremony was over. Khetter put the will in his own box. After Mohim's death "he made known the fact of the will having been made." He handed over the will to the appellant. The appellant and Mohim [sic] applied jointly for probate. But Khetter afterwards withdrew his application at the instance apparently of the appellant's maternal uncle. There were other reasons he said. He was forbidden to act by Umesh, the respondent.

The will itself is fairly simple and not very long. The testator begins by stating that Umesh and his son had not behaved well to him; they were behaving so that if he did not appoint any executor in respect of his estate his family would suffer for want of food. Then he gives his wife permission to adopt. He [830] appoints five executors, but no work was to be done otherwise than in accordance with the views of two of them. Then the testator directs that if a son is adopted his infant daughter and the adopted son should share his property between them, but until he or she came of age the estate was to remain in the hands of the executors. In default of an adoption the daughter was to take all. In the event of the daughter's death the entire estate was to go to the adopted son. In the absence of both adopted son and daughter the entire estate was to vest in his widow, and failing her in the testator's nephew or any full brothers that he might have. Then there were provisions for poor relatives of the testator and of his widow.

It is only fair to observe that under the will Khetter took no benefit directly. He had no interest except as executor. What his motive was it is difficult to see unless he hoped to secure his position as manager of the estate by becoming an executor. And it may be that he was anxious to exclude Umesh from all hope of succession. He and Umesh seem to have been on much worse terms than Mohim and Umesh. Umesh and his son did not even speak with Khetter. Umesh constantly visited Mohim during his illness, and Mohim according to Khetter was very anxious that his visits should not be discontinued.

The oral evidence as to Mohim's testamentary capacity may be summed up shortly. Putting aside the statements of Khetter and Taruck, to which attention has already been called, the witnesses for the appellant state generally that the testator was in full possession of his senses. "That," as the learned Judges of the High Court say, "is very unsatisfactory evidence of the patient's condition." "The question," they add, "is what mental state he was in in reference to the making of a will, his capacity for which is challenged by the defendant's evidence and is rendered at least a matter for careful inquiry from the facts of his illness in the plaintiff's evidence itself. Paralysis on

24th January, an increase of illness on 23rd February, another and severe fit on the 2nd March, indistinct speech as stated by all the witnesses, increased by the 8th March according to Shama Churn so greatly that according to Rakhal Kobiraj he had to be asked two or three times before his words could be [831] understood . . . The evidence of some of the plaintiffs just referred to would if read by itself convey the impression that Mohim's mind was quite alert and his speech practically free, although a little indistinct, and although he was physically weak and paralysed. If anything approaching this was the truth some proof of this might have been adduced apart from the story common to all those witnesses in which almost the same things are represented as said about the execution and about going to Calcutta, and nothing else whatever. The obvious comment on it is that they did not venture to leave this common ground, because they were not stating what they remembered, but what it had been agreed should be said—a short story containing some easily remembered incident of a kind which, if not closely inquired into by the defendant, would lead to a belief on the part of the Court trying the case in Mohim's capacity."

On the other hand, the witnesses on behalf of the respondent deposed clearly and positively to Mohim's incapacity. The most important witness of course is Dr. Bepin. He seems to be a person of some position. Khetter himself says "Bepin is regarded as a good doctor." He is positive that at no time during his attendance could Mohim have made a will. He says: "I used to go and visit him daily for 15 or 16 days. Before I went there Mohim was under the treatment of a *kobiraj* of Mankar. I sometimes used to stop at Mohim's house for 24 hours. When I went on the first day Mohim had but little consciousness. For the first day or two he replied to questions with great difficulty. After that he could not speak at all, but used to try and make sounds. He did not always try to do even this. After I had repeatedly shouted to him he used to try and make a sound. I saw Mohim on the morning of the day before that on which it was proposed to take him to Calcutta. I went in the morning of the day before that on which it was proposed to take him to Calcutta. As regards Mohim's senses on that day I only say this that he could taste food and he used to weep and again to wipe the tears from his eyes as he looked at people. He could take down the first part of each spoonful, and the latter part of it had to be withdrawn. I did not hear him speak, and he did not speak to me. He used to be made to sit up in order to [832] be fed. I came away at 10 or 11 that day. I was against his being taken to Calcutta. The reason was that the whole of the brain had become diseased, and if he received any shock the probability was that he would get apoplexy. The next day at 9 or 9½ in the morning I found the patient almost in a moribund condition."

As regards the testamentary capacity of the alleged testator their Lordships agree with the High Court in thinking that the oral evidence on behalf of the respondent outweighs the evidence on behalf of the appellant. And in this connection, it must be borne in mind that Mohim does not seem to have had any intention of making a will before his illness. It is not like a case in which a testator executes a disposition of his property for which instructions have been given or preparations made while the mind was in vigour.

Apart, however, from the oral evidence there are several matters which in their Lordships' opinion tell heavily against the appellant. What reason was there for keeping in the dark the two doctors who were in daily attendance on the patient? If it be true, as Khetter says, that Dr. Bepin suggested that a will should be made by Mohim in the state in which he was when he paid

his first visit, it would only have been natural that he should have been consulted. No doubt Khetter says that Mohim forbade him to tell the doctors. He looked upon them as people of the other party because they were friends with Umesh and attended his family. But then Shama Churn was on good terms with Umesh, and yet Khetter called him in to witness the will, and he was permitted to read it aloud. It is suggested that Mohim was afraid that something would happen if Umesh were told. But what is it that the testator is said to have been afraid of if Umesh had known of the will? Not that there would have been a row, as some of the witnesses said, but according to Khetter's evidence only this that Umesh would discontinue his visits. Then again why were not the wife and sister called to speak to Mohim's mental condition at the time the will was made? Khetter says that the testator himself told them about the will on the 7th and 8th of March. It is true that when the plaintiff's evidence was [833] closed the District Judge was asked to let them be examined, but then it was too late. Lastly, it is a very important fact that Khetter does not produce the draft which he says was sent to Abinash and returned by him, nor was Abinash himself called though he might have thrown some light upon the case.

On the whole, their Lordships are of opinion that the High Court came to a right conclusion. The making of the will from first to last was Khetter's doing, and there is no satisfactory evidence to show that the alleged testator understood the business in which Khetter engaged him. The burden of proof rests on the appellant and she has not discharged it.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Messrs. *Lattey & Hart.*

B. C.

NOTES.

[See also (1907) 11 C.W.N., 824; (1911) 12 I.C.; 393.]

[25 Cal. 833]

The 22nd April, and 14th May, 1898.

PRESENT:

LORDS WATSON, HOBHOUSE AND DAVEY, AND SIR R. COUCH.

Balkishen Das and others............Plaintiffs

versus

Simpson............Defendant.

[On appeal from the High Court at Fort William in Bengal.]

Act XI of 1859 (Bengal Revenue Sale Law), sections 3, 8, and 33—Bengal Excise Act (Bengal Act VII of 1868), section 2—Unauthorized sale by Collector—Jurisdiction of Civil Court—Res judicata—*Parties—Secretary of State for India.*

Act XI of 1859, the Bengal Revenue Sale Law, providing for the sale of estates in arrear of payment of revenue, does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of such payment. The whole clauses, in so far as they relate to sales, or to their challenge, as well as the provisions of Bengal Act VII of 1868, are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty.

A Collector had sold an estate, purporting to act under Act XI of 1859, for a supposed arrear of revenue. There was, however, only an erroneous debit in the Collectorate books against the estate, in excess of the revenue actually assessed upon it, chargeable against it, and due from it.

[834] *Held*, that the sale was without authority; that the Civil Court had jurisdiction to declare the sale void; and that the provisions of section 33 of Act XI of 1859, relating to an appeal to the Commissioner of Revenue, did not exclude that jurisdiction.

The enactment in section 8 had no application to such a case. This was not a question about a transfer from the account of one revenue-paying estate to that of another, nor was it a claim for remission or abatement, which had not been duly allowed by the Government. Section 8 has no application, except there be, (1) default in payment of the revenue, and (2) possession by the Collector of money of the defaulter not indisputably placed to his credit. But here there was no default. All moneys paid by the appellants were credited, and their alleged default was based upon erroneous debit entries to which they were not parties.

In this suit, in the Courts below, the Government had been made a co-defendant, but was not a respondent on this appeal; and the objection was taken, on the argument of this appeal, and by previous petition, that they should be made a party respondent.

Held, that it was a mistaken view that a decree annulling the sale in this suit would be *res judicata* in any future question or proceeding, as between the Government and the unsuccessful purchaser. The Secretary of State for India, therefore, was not a necessary respondent. His position was correctly explained in *Bal Mokoond Lal* v. *Jirjudhun Roy*, (1882) I. L.R., 9 Cal., 271, 276, in the judgment of MITTER, J.

APPEAL from a decree (19th July 1895) of the High Court, reversing a decree (27th July 1892) of the Subordinate Judge of Mozufferpore in Tirhoot.

The appellants, plaintiffs in the suit, were the owners of a *mehal* described in the books of the Collector of Tirhoot as the separate 5 annas share of the village Shazadpur Anderkilla, entered on the register of revenue-paying *mehals* or *tauzi*, under the number 3592. This share had been purchased by Balkishen Das, and a brother whom he had survived, in 1883, and belonged to the

appellants, the *jumma* having then been Rs. 89-8-7. Part of the plot having been taken up by the Government for a State purpose, the revenue payable was reduced to Rs. 82-14-9. From the beginning of the ownership of the appellants, down to March 1891, the payments which they made amounted to Rs .691-14-9, but the instalments due with the above abatement amounted only to Rs. 663-6-0; and there **[835]** should have been a credit entry, to the account of the *mehal* No. 3592, after payment of the March 1891 instalment of Rs. 44-15-3. By a mistake in the debit entries against that *mehal*, it was represented as in debt for revenue to the amount of Rs. 7-15-5 in March 1891 ; and for this arrear it was sold by order of the Collector on the 5th September 1891. The respondent on this appeal was the purchaser.

Against this an appeal by petition to the Commissioner of Revenue was preferred on the 25th February 1892, but having been filed after the period fixed by section 2 of Bengal Act VII of 1868 without any extension of that period having been ordered for the petitioners, the appeal was rejected.

The facts are stated in their Lordships' judgment : —

The main questions were: (1), whether section 33 of Act XI of 1859, and section 2, Bengal Act VII of 1868, did not exclude the present objection from the jurisdiction of the Civil Courts, in consequence of there not having been an appeal upon it to the Commissioner. (2), whether it had not been necessary for the plaintiffs, in order to rely on remission of revenue, to proceed in conformity with section 8 of Act XI of 1859, which enacts that the plea that money belonging to the defaulter sufficient to pay the revenue was in the Collector's hands shall not bar a sale unless, after application in due time made, the Collector shall have neglected to transfer the money in payment of the arrear of revenue due: (3), whether the Government should not have been made a respondent on this appeal, having been a successful defendant in the Court below.

The present suit was brought on the 27th July 1892, alleging that at the time of the sale there was nothing due to the Government in respect of the estate sold, and that the sale was contrary to law.

The Government, under their statutory style, were made defendants, as well as the purchaser Mr. C. F. R. Simpson. The defence filed by the Collector on behalf of the Secretary of State for India was first, that as no appeal under section 2 of Bengal Act VII of 1868 or section 33 of Act XI of 1859 had **[836]** been preferred to the Commissioner, the suit was not cognizable under the latter section : secondly, that the remission was not entered in favour of this estate in the Collectorate books. The defence filed by the other defendant was the same, but he expressed it that, as to the remission of revenue and the over-payment upon it, these matters did not affect the liability of the plaintiffs, as they had not taken steps in conformity with section 8 of Act XI of 1859 to have the abatement made effective.

The Subordinate Judge, Babu Jadu Nath Das, with regard to section 2 of Bengal Act VII of 1868, and to section 33 of Act XI of 1859, and to the fact that no appeal had been preferred in due time to the Commissioner of the Division, did not consider himself empowered to decide upon irregularities alleged to have taken place in the proceedings of sale. But that, in his opinion, was not the main ground on which this case rested. He found that on the true account of what had been paid as *jumma* for *mehal* No. 3592, more than was sufficient to cover the revenue due had been paid in March 1891; so that there was no arrear upon which a sale could be based. He therefore decreed that the sale was null and void, and that the plaintiffs were entitled to possession.

His judgment, and this decree, were reversed by the High Court on appeal. A summary of the reasons stated by the latter Court appears in their Lordships' judgment on this appeal.

Mr. *J. H. A. Branson*, for the appellants, argued that there was error in the judgment of the High Court. The Subordinate Judge was right in deciding that this sale was not authorized by the Revenue Sale Law of 1859, because there had been no arrear. The Collector had had no authority to sell the estate, as if for default in payment of the revenue, for default had not taken place. It was not denied that the appellants' payment into the Collectorate covered all existing demands at the time of commencing the process of sale for default. The estate had been put up to sale for an arrear which had no existence. The High Court had taken an erroneous view in considering this to be the case of a demand on the part of an owner of a revenue-paying estate to have an entry in account carried to the credit of his estate which would otherwise be in default. **[837]** For such a case the procedure under section 8 of Act XI of 1859 would have been necessary. But here there was no question that the money belonging to, or due and paid in respect of this very *mehal*, was in the Collectorate at the time. Neither section 8, nor any other part of that Act, had been called into operation. The fact that there was no arrear governed the question whether the omission to appeal to the Commissioner had the effect of barring the suit under section 32 of Act XI of 1859. The High Court had held the appellants precluded from taking objections not stated in such an appeal. But whatever application section 2 of Bengal Act VII of 1868 might have had to a suit relating to irregularities, or illegalities, in the sale proceedings, the plaintiffs' case had a foundation altogether different. These enactments one and all were inapplicable. For that reason there was an entire mistake in the High Court's observation that, "in order to comply with section 8 of the Revenue Sale Law of 1859, it was necessary for the plaintiffs to have made an application, before the revenue fell due, to have a transfer made to their credit of any amount to which they might be entitled by reason of the abatement ordered by Government, which had not been properly carried to their credit in the Collector's Register." For the proposition that there was no application of the Revenue Sale Law unless there was an actual arrear, reference was made to *Baijnath Sahu* v. *Sital Prasad*, (1869) 2 B. L. R., F. B., 1; *Sreemunt Lall Ghose* v. *Shama Soonduree Dasi*, (1869) 12 W. R., 276; and *Thakoor Churn Roy* v. *Collector of the 24-Pergunnahs*, (1870) 13 W. R., 336.

Mr. *A. Phillips*, for the respondent, contended that the appeal should not proceed without the Secretary of State, who was a defendant in the suit below, being made a party respondent. The present respondent was entitled to claim, under section 35 of Act XI of 1859 that, if the sale should be declared void, the Government should be ordered to refund to him the purchase-money, with interest. The Subordinate Judge had ordered that the defendant, now respondent, should jointly with the Government pay the plaintiffs' costs. If the High Court's judgment should be reversed, the plaintiffs would have that order in their favour; while, as regarded the Government, the decree of the High Court **[838]** would still remain, and would remain a final decree. It was submitted that the sale could not be set aside, or declared void unless it should also be declared void as against the Secretary of State. At present, whatever might be the result on this appeal, as things now stood, the decree which the present respondent supported, would remain final as regarded the Secretary of State; and it followed that the latter should be treated as a party necessary to any complete decree on this appeal.

In any view, however, it was submitted that the suit was not maintainable, inasmuch as no appeal in conformity with section 33 of Act XI of 1859, and section 2 of Bengal Act VII of 1868, had been duly preferred to the Commissioner. It was a matter of the due construction of the Revenue Regulations and Acts. For the purposes of sales in default, the Collectorate books were the guide; and there were special proceedings, by way of remedy, to secure proprietors. It was sufficient to support a sale that there was an arrear of revenue within the meaning of section 2 of Act XI of 1859. Credits to estates had to be entered in the books, and an abatement was not credited unless upon application made. This was apparent from the requirements of section 8 of Act XI of 1859. There had not been any such application in reference to estate No. 3592. The sale was made for arrears appearing due in the Collectorate books, and that appeared there with the acquiescence of the appellants; and it was valid so far as the purchaser at the auction sale, now respondent, could discover. Reference was made to *Baijnath Sahu* v. *Sital Prasad*, (1869) 2 B. L. R., F. B., 1; *Gobind Lal Roy* v. *Ramjanam Misser*, (1893) I. L. R., 21 Cal., 70: L. R., 20 I. A., 165; *Lala Gauri Sanker Lal* v. *Janki Pershad*, (1889) I. L. R., 17 Cal., 809: L. R., 17 I. A., 57; *Lala Mobaruck Lala* v. *Secretary of State for India*, (1885) I.L.R., 11 Cal., 200; and *Bal Mokoond Lala* v. *Jiriudhan Roy*, (1882) I. L. R., 9 Cal., 271 (276).

Mr. *J. H. A. Branson* was not heard in reply.

Afterwards, on the 14th May, their Lordships' **judgment** was delivered by

[839] Lord Watson.—The appellants, plaintiffs in the present suit, were, until the 5th September 1891, proprietors and in possession of a separate 5-annas share of the village of Shahzadpur Anderkilla, situate within the Collectorate of Mozufferpore.

Down to the year 1884, the *jumma* or annual revenue payable to the Government in respect of the said 5-annas share was Rs. 89-8-7. In the beginning of 1884, the Board of Revenue sanctioned a reduction of the revenue annually payable, to the extent of Rs. 6-9-10, thus fixing the *jumma* for the future at Rs. 82-14-9 instead of Rs. 89-8-7; and their decision to that effect was duly communicated to the Collector of Mozufferpore by a letter dated the 3rd March 1884. From that date until the year 1891 the owners for the time being of the 5-annas share continued to make yearly payments to the Collector to account of the *jumma*.

It now appears, and it is not disputed, that in 1884 the Collector, on receipt of the decision of the Board of Revenue, erroneously entered in his books the abatement of *jumma* which they had granted, as applicable to another estate in which the owners of the 5-annas share of Shahzadpur Anderkilla had and have no interest. The mistake which was thus committed by the Collector, or some of his staff, must have been due to their ignoring or disregarding the plain terms of the decision of the Board of Revenue which had been sent to them. It has been suggested, in both Courts below, that the error may have been induced by the fact that, in the letter which enclosed the decision of the Board, there was a clerical error in giving the *tauzi* number of the 5-annas share in question; but that explanation, if it be correct, can afford no excuse for failure to give effect to the decision itself.

The result of the mistake was that, during a period of eight years, from 1884 to 1891, whilst the proprietors of the 5-annas share were duly credited in the books of the Collector with the full amount of the payments annually made by them on account of revenue, they were wrongly debited in each year with Rs. 89-9-10, being the amount of the *jumma* before its reduction. In consequence of that error in the debit side of the account, the books of the Collector

showed a balance as due by the appellants, in March 1891, being the end of the revenue year 1890-91, in [840] respect of the revenue payable for the preceding year; whereas if the annual *jumma* had been charged at its reduced rate, in terms of the order of the Board of Revenue, the books would have shown a balance of Rs. 44-15-3 at their credit.

The Collector then proceeded to sell the 5-annas share in question, as for arrears of *jumma* due by the appellants, in supposed compliance with the provisions of Act XI of 1859. The property was sold by auction on the 5th September 1891, when it was purchased by Charles F. R. Simpson, who is the sole respondent in this appeal.

The appellants thereafter presented an appeal against the sale to the Commissioner of Tirhoot, under section 2 of Bengal Act VII of 1868, which was rejected by the Commissioner as being out of time. On the 27th July 1892, they brought this suit before the Subordinate Judge of Tirhoot, against the auction-purchaser, the respondent in this appeal, and also against the Collector of Mozufferpore, as representing the Secretary of State for India, praying to have the sale set aside, and other relief. The defendants appeared and lodged written statements, in both of which it was pleaded that the action was not cognizable by the Civil Court, by reason of the plaintiffs having failed to appeal in due time, under the provisions of section 2 of Bengal Act VII of 1868. The present respondent asserted that the suit was "based upon false allegations;" and the other defendant alleged that the plaintiffs had taken no steps to have the abatement taken into consideration, and had for several years continued to pay the original Government revenue. It has not been shown that there are any false allegations in the plaint or that the plaintiffs, after the abatement was granted, continued to pay the old *jumma* They made payments to account of revenue, which in the third of the eight years already mentioned was of the same amount as the old *jumma*, in three of them were in excess of it, and in four of them were below its amount. There is nothing to show that any of these payments were made on account of the old *jumma*, with the exception of the erroneous entries in the Collector's Books, for which he alone was responsible. It was not within the right, and it certainly was not the duty, of the appellants to examine and check these entries.

[841] The Subordinate Judge, on the 1st September 1893, held that the suit was not excluded by the failure of the plaintiffs to present an appeal within due time, under section 2 of Bengal Act VII of 1868; that in point of fact there was no arrear of revenue due by the appellants at the time when their property was sold; and that the sale was illegal and injurious to the appellants. He accordingly declared the sale to be inoperative, and decreed possession of the property sold to the plaintiffs, with costs.

The respondent in this appeal brought that judgment under the review of the High Court at Fort William, when two of the learned Judges, Sir HENRY PRINSEP and CHUNDER MADHUB GHOSE, JJ., reversed the decree of the Subordinate Judge and dismissed the appellants' suit, with costs to the present respondent in both Courts.

The following were the grounds assigned for their decision by the learned Judges of the High Court. They held, in the first place, that, inasmuch as there had been no adjudication by the Commissioner upon the objections stated to the sale by the appellants, these objections were excluded from the cognizance of the Civil Courts by section 33 of Act XI of 1859. If that course were permitted, the learned Judges observed that it would "permit a defaulter in the payment of Government revenue, who desired to set aside a sale for irregularity

with substantial injury resulting therefrom, practically to do so without any appeal to the Commissioner at all." In the second place, they held that the appellants were debarred, in the present suit, from obtaining "any re-adjustment of account," by reason of section 8 of the Revenue Sale Law of 1859, because, "in order to comply with that law, it was necessary for them to have a transfer made to their credit of any amount to which they might be entitled, by reason of the abatement ordered by Government and which had not been properly carried to their credit in the Collector's Register." They were accordingly of opinion that the appellants were without a remedy, although they indicated that the mistake was unfortunate, "and may also be said to be due to carelessness on the part of the office of the Collector."

[842] Their Lordships do not think that the decision of the learned Judges can be maintained upon either of these points, which they will proceed to notice separately.

Section 3 of the Act XI of 1859 provides that, in default of payment of revenue, within the time appointed for each district by the Board of Revenue, the "estates in arrear" in those districts "shall be sold at public auction to the highest bidder." The Act does not sanction, and by plain implication forbids, the sale of any estate which is not, at the time, in arrear of Government revenue. The whole clauses of the Act of 1859, in so far as these relate to sales, or to their challenge at the instance of the proprietor, as well as the provisions of section 2 of Bengal Act VII of 1868, are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty. The enactments of 1859 and of 1868 are obviously intended to apply to cases in which, if the irregularity or illegality of the sale proceedings alleged by the objector be negatived, the sale will remain valid. But the chief and substantial objection upon which the appellants' plaint is based is, that at the time when their 5-annas share of the village Shahzadpur Anderkilla was sold, there were no arrears of revenue due by them in respect of it. It does not appear to their Lordships to admit of dispute that the objection is founded in fact. In their opinion a stupid blunder made by the Collector or his staff in his own books cannot deprive the appellants of their right to claim, and have effect given to, the permanent abatement which was allowed by the Board of Revenue in March 1884. The result is that the whole proceedings of the Collector, with a view to the sale of the 5-annas share, were beyond his jurisdiction, and are not entitled to the protection given him by the Act in cases where sale is authorised, although it may be attended with some irregularity or illegality. Their Lordships are accordingly of opinion that it was rightly held by the Subordinate Judge that he had jurisdiction to entertain the objection to the sale to which he gave effect, although the point had not been considered and disposed of by the Commissioner.

The observations made by the learned Judges in regard to the second point upon which their decision is rested do not appear to their Lordships to be strictly accurate either in fact or law. There [843] is no question in this case about a transfer from the account kept by the Collector for the mehal 10,313, to the credit of the account kept by him for the 5-annas share of Shahzadpur Anderkilla. The only error in the latter account consists, as already stated, in annually entering Rs. 89-8-7, instead of Rs. 82-14-9, to the debit of the appellants. The payments made by the appellants are correctly credited. In that state of the facts their Lordships are unable to conceive what possible application the provision of section 8 of Act XI of 1859 can have to the present case. The clause contemplates two cases only. Appellants are not within the first of these which relates to a defaulter to revenue, who claims a remission or abatement

which has not "been allowed by the authority of the Government." In the second case, it is enacted that the Collector's possession of money belonging to the defaulter, shall afford no answer to the default, unless the money stood in the defaulter's name alone and without dispute, or the Collector has failed, after application by the defaulter, to impute his money towards payment of the revenue. The enactment has no application, except there be (1) default in payment of the revenue, and (2) possession by the Collector of money of the defaulter not indisputably placed to his credit. But the appellants were not in default. All monies paid by them have been correctly credited; and their alleged default, which is a pure fiction, is based upon erroneous debit entries, to which they were not parties.

Although the Secretary of State for India had been represented in the Courts below by the Collector of Mozufferpore, the appellants did not join him as a party to the present appeal. Upon that ground the respondent pleaded, *in limine*, that the appeal taken to this Board was incompetent; and at all events that the hearing of the appeal ought to be delayed until the Secretary of State for India had been made a party to it. Their Lordships rejected the contention, which was maintained upon the mistaken view that a decree obtained by the appellants in this suit against the Secretary of State would constitute *res judicata*, in any question or proceeding between that Minister and the respondent. In their opinion, the position of the Indian Secretary, in cases **[844]** like the present, is correctly explained by Mr. Justice MITTER in *Bai Mokoond Lal* v. *Jirjudhun Roy*, (1882) I. L. R., 9 Cal, 271 (276).

The appellants, with the view of obviating the preliminary objection stated by the respondent, presented an incidental petition for an order making the Secretary of State for India a party to the appeal. The application was opposed by Secretary of State, and was refused by this Board with costs. The respondent, notwithstanding, persisted in his preliminary objection at the hearing of the appeal.

Their Lordships will humbly advise Her Majesty to reverse the judgment of the High Court, to restore the decree of the Subordinate Judge of Tirhoot, and to order the respondent to pay to the appellants the costs incurred by them before the High Court. The respondent must pay to the appellants their costs of this appeal, including their costs of the incidental petition already referred to.

Appeal allowed

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Messrs. *Sanderson, Adkin & Lee.*

C. B.

NOTES.

[Where there is no arrear of revenue, the Collector has no jurisdiction to sell:—25 Cal., 833; 35 Cal., 636: 12 C.W.N., 640: 8 C.L.J., 41; 15 C.L.J., 54, 25 Cal., 876; 32 Cal., 111; 32 Cal., 229. 39 Cal., 981.

Acts of the Collector without jurisdiction are void:—37 Cal., 107: 13 C.W.N., 710: 11 C.L.J., 254; 20 I.C., 337 (Cal.); 18 Cal., 505; 15 C.L.J., 54: 13 I.C., 959; 34 Cal., 811: 11 C.W.N., 756; 5 C.L.J., 696.

See also (1911) 12 I.C., 627 (Mad.).

In (1903) 31 Cal., 159 it was held that the Secretary of State was a necessary party in a suit to set aside a sale under the Public Demands Recovery Act, 1895.

See also (1913) 26 M.L.J., 238.]

[25 Cal. 844]

The 9th February and 1st April, 1898.

PRESENT:

LORDS HOBHOUSE, MACNAGHTEN, AND MORRIS, AND SIR R. COUCH.

Sukhamoni Chowdhrani............Defendant

versus

Ishan Chunder Roy............Plaintiff.

[On appeal from the High Court at Fort William in Bengal.]

Contribution—Joint Debtors—Limitation Act (XV of 1877), Schedule II, sections 19 and 20, and Art. 61—Acknowledgment of Liability—Interest paid on debt.

By a payment into Court under an order on account of decrees for rent and revenue in arrear, due to the landlord zemindar from the joint owners of an under-tenure, their estate was saved from sale. In respect of a proportionate share of liability for money raised for this purpose one of the joint owners became liable to be sued by another of them for contribution; and a question arose as to the application of article 61* of Schedule II of the Limitation Act, 1877.

[845] More than three years before this suit all the joint owners had filed in Court a petition for the appointment of a Manager of their estate, who should, out of its profits, pay debts and interest to creditors from whom had been borrowed the money for the payment into Court.

Held, that this was an acknowledgment of the joint debt by the co-owner who had not contributed, within section 19 of the Limitation Act; whence had followed the legal consequences, one of which was her liability to be sued within due time for contribution.

Whilst the three years from the date of that acknowledgment were running, and at a date less than three years before this suit, interest on part of the money borrowed had been paid by the Manager whom the appellant, jointly with the other co-owners of the estate, had authorized, as her agent, to pay it.

Held, that this interest, being clearly a payment in exoneration, *pro tanto* of the plaintiff's liability, was such a payment as was contemplated by section 20, and gave a new departure for the period of limitation.

* [Art. 61 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For money payable to the plaintiff for money paid for the defendant.	Three years ...	When the money is paid.]

APPEAL from a decree (18th August 1893) of the High Court reversing a decree (28th March 1892) of the Subordinate Judge of Tippera on a preliminary point, and remanding the suit for trial on the merits.

The appellant was the widow of Tilak Chunder Roy, deceased, who, with his brothers Ishan Chunder Roy, the present respondent, and Abhoy Chunder Roy, also since deceased, formed a Hindu family owning a joint estate. Abhoy Chunder was represented by his widow Kalitara, a formal defendant, not appearing on this appeal.

The surviving brother, Ishan Chunder, and the widows were joint debtors for money borrowed to be paid into Court to prevent the sale of their joint estate, which was a *shikmi taluk* in Tippera, held under the superior zemindar, Nawab Khaja Ahsan Ulla Khan, through whom the Government revenue was paid.

This suit arose out of a claim for contribution between the co-owners in respect of a debt due for money raised to pay arrears of rent and other dues, the plaintiff respondent having paid the proportion due from the defendant, appellant.

The principal question was whether the suit was barred under article 61 of Schedule II of the Limitation Act, 1877. Two matters were in dispute on this appeal. One was, whether a [846] petition, in which the appellant had joined, stating joint indebtedness, was an acknowledgment within section 19 of that Act. The other was, whether payment within three years before suit brought, of interest on a loan taken by the parties jointly, had effect within section 20 to give a new starting point for limitation.

The zemindar landlord had in 1885 obtained four decrees against the joint owners for arrears amounting to about Rs. 80,000. The *taluk* was attached in execution, and the 2nd February 1885 was fixed for the sale of it, objections to the order for sale having been disallowed.

Ishan Chunder appealing to the High Court applied for a stay of execution, which was granted only upon condition that the judgment-debtors should deposit in Court Rs. 50,000. This sum Ishan Chunder, with the help of Kalitara, raised, and paid into Court on the 3rd February 1885, whence it was taken out by the zemindar on the 3rd April following. The whole amount of the decrees was afterwards paid. Ishan Chunder having executed a bond to Kalitara in respect of her contribution, on which bond she obtained a decree, now commenced this suit against Sukhamoni, claiming Rs. 20,999, for her proportion of the liability, on the 24th February 1891. The plaint stated that in 1885 when Ishan Chunder was about to sue Sukhamoni for her proportionate share of the money, she joined in executing, on the 18th March 1885, an *ikrarnama* referring it to arbitrators to ascertain the debts, and agreeing to the appointment of a Manager. This contained a recital of the borrowing of the Rs. 50,000 upon bonds, and declared that the Manager should pay the debts with interest. The plaint also stated that, on the 22nd July 1887, the three co-owners petitioned the Court to appoint such a Manager; that he was appointed, and that to him a *mukhtearnama* was executed on the 4th January 1888. That he remained in office till November 1888, during which period he made payments of interest on the debt.

On the defence of limitation the Subordinate Judge dismissed the suit. He found nothing to show that the liability for the contribution claimed by Ishan

Chunder was identical as a debt, with liability on the part of Sukhamoni to pay her share of the [847] joint-indebtedness of the co-owners as acknowledged by them in the petition of the 22nd July 1887. Also he was of opinion that the debt on which interest was paid in 1888, to creditors named, was not a debt acknowledged to be due to Ishan Chunder, and that payment of interest could not operate under section 20 to give a new starting point.

On an appeal by the plaintiff to the High Court, a Division Bench (NORRIS and BANERJEE, JJ.) was of opinion that there was not in the agreement of the 18th March 1885 any admission that the appellant was liable for any part of the joint debt, nor was there any promise by her to pay, nor could such promise be inferred from the proviso in the agreement that the Manager should pay off any debt of the appellants out of the income.

They were further of opinion that the suit was not one for compensation for breach of an agreement in writing and registered such as was provided for in article 116 of Act XV of 1877; but was a suit for money paid to the use of the defendant, and, therefore, under article 61, would have been barred, but for what followed, in three years from February 3rd, 1885, the date on which the money was paid. They also decided that the petition of the 22nd July 1887, with its accompanying schedule, was a clear acknowledgment of liability on the part of Sukhamoni for the money due to the plaintiff for which he sued. They referred to explanation 2 of section 19 of the Limitation Act, 1877, adding:

"Under the provisions of that section the plaintiff, therefore, got a fresh start from the date of this petition, and became entitled to bring his suit within three years from that date. The suit, however, was brought more than three years even from that date, and it becomes necessary to see whether there was any further acknowledgment of liability, or any payment of interest within three years from the date of this acknowledgment, and also within three years before the date of the suit. We find an entry, dated the 12th Sraban 1295, corresponding to the 26th July 1888, showing a payment of Rs. 200 on account of interest to the Tippera Loan Office, due on a bond of the 22nd Magh 1291, executed in favour of the Loan Office. The entry recites that the payment was made on the 31st Assar. This entry is corroborated by an endorsement on the bond of the 22nd Magh 1291 for Rs. 5,000, and by the deposition of Bipro Churn Das, the joint [848] manager, who says he paid the whole of the interest due on the bond for Rs. 50,000 to the Tippera Loan Office. The payment is entered in the books of the debtor-defendant No. 1, as one on account of interest, and it is shown to have been made by the joint manager of the plaintiff and the defendant who was expressly authorized by the petition of the 21st July 1887 to make payments on account of the debts contracted for raising the sum of Rs. 50,000 for satisfaction of the Nawab's decrees. That being so, we think it is a payment of interest within the meaning of section 20 of the Limitation Act, and it gave the plaintiff a fresh start; and reckoning from the 31st Assar 1295, that is, 14th July 1888, the suit was brought within three years.

"It might be said that this interest that was paid was paid, not as interest due to the plaintiff on account of his claim against the defendant Sukhamoni, but was paid as interest due to one of the creditors from whom money had been borrowed for raising the sum of Rs. 50,000 which formed the basis of the plaintiff's present claim. But seeing that the plaintiff's claim in this suit arises by reason of his having been compelled to borrow money and pay off the debt due, not only from himself, but also from the defendant, and seeing also that the interest which the plaintiff would be entitled to recover from the defendant would be the interest that he had to pay on the sums borrowed by him, the payment of any interest on account of the sums borrowed by him would in reality be payment of interest on account of his claim.

Under none of the bonds executed by the plaintiff could the defendant have been rendered liable directly, and payment by her of interest to the creditors of the plaintiff must be regarded as payment by her of interest to the plaintiff indirectly, through his creditors. That being so, we think the payment of interest in question is sufficient to save the claim from being barred by limitation.

"The decision of the learned Subordinate Judge in this case, that the suit is barred by limitation, must therefore be set aside; and as the Court below has not gone into the merits of the case the case must be remanded to that Court for trial on the merits."

On this appeal,—

Mr. *J. M. Paterson*, for the appellant, argued that the dismissal of the suit by the Subordinate Judge was right under article 61 of Schedule II of the Act of 1877. The principal contention was: *first*, that the High Court had been in error in deciding that the petition of the 21st July 1887 was an acknowledgment by the defendant within section 19, giving a fresh start to the three years' period of limitation. In that petition there was authority to the Manager, to be appointed, to apply surplus income "to the payment of the *ijmali* debts" of the three co-owners, with a schedule appended. But, though the [849] petition may have admitted the debt to the creditors, it contained no admission by the appellant that she owed her proportionate part to Ishan Chunder. It was a question whether his claim could be brought into this acknowledgment, as contained, or implied in it, or could be taken as referred to, without supplementing the writing by oral evidence as to the transaction. But it was clear that oral evidence for that purpose was inadmissible, as shown by the decision in *Lutchumanan Chetty* v. *Mutta Ibraki Marakkayer*, (1869) 5 Mad. H. C., 90.

Section 19 of the Act of 1877 intended an acknowledgment of an existing liability, or legal relation, to a certain person. A mere admission of indebtedness, that might not include the debt to the party suing to recover it, was insufficient. That section did not give its effect to an admission made without knowledge, and without specification, of what particular debt was admitted. And, to constitute an acknowledgment operating within the Act, the liability must be acknowledged as incurred to the person claiming. Reference was made to *Dharma Vithal* v. *Govind Sadvalkar*, (1883) I. L. R., 8 Bom., 99; *Mylapore Iyasawmy Vyapoory Moodliar* v. *Yeokay*, (1887) I. L. R., 14 Cal., 801, and *Venkata* v. *Partha Saradhi*, (1892) I. L. R., 16 Mad., 220.

The petition of 1887 was only an admission of liability to the creditors, without specifying a debt to Ishan Chunder; and, therefore, it gave no new starting point for limitation in this case:

Secondly, the payment of interest, Rs. 200 on the 26th July 1888 to the Tippera Loan Office, was not a payment of "interest on a debt as such," to the respondent, within section 20 of the Act of 1877. The authority to the Manager was to pay interest on debts due to the creditors named in the schedule: *Mahalakshmibai* v. *Nageshwar Parshotam*, (1885) I. L. R., 10 Bom., 71, showed that entry in the debtor's books was insufficient. *Ichha Dhanji* v. *Natha*, (1888) I. L. R., 13 Bom., 338, and *Kollipara Pullamma* v. *Maddula Tatayya*, (1896) I. L. R., 19 Mad., 340, were also cited. Even if this [850] payment of interest had been effective within the Act it could only be so as to the Rs. 5,000, the debt to the Bank that lent it; and it could not be taken to be a payment of interest on the one-third of Rs. 50,000, that one-third being the proportionate part owed by Sukhamoni. There was no evidence of appropriation of this payment by the debtor in respect of all the debts referred to in the petition.

Mr. *J. H. A. Branson*, for the respondent, mainly relied on the effect of the payment of interest on the 26th July 1888 by the appellant's authorized agent, the Manager, as giving a new starting point for limitation. That payment of interest had been made before the expiration of the period of three years then current in consequence of the filing of the petition of the 22nd July 1887. The High Court were correct in holding the suit on the 24th February 1891 to have been in time.

Mr. *J. M. Paterson*, in reply, referred to *Sunkur Pershad* v. *Goury Pershad*, (1880) I. L. R., 5 Cal., 321, as to liability in a joint family, for the debt of a managing member, barred by the Limitation Act IX of 1871; and to *Raman Lalji Maharaj* v. *Gopal Lalji Maharaj*, (1897) I. L. R., 19 All., 244, as to the application of article 61 of Schedule II of Act XV of 1877, to a suit for contribution.

Their Lordships' **judgment** was delivered on the 1st April 1898 by

Lord Hobhouse.—The appellant and respondent are two co-owners of lands subject to payment of rent. The owner of the rent obtained decrees for a large sum in arrear, and to save the estate from sale the respondent and another co-owner raised a sum of Rs. 50,000 by borrowing from various persons. That sum was deposited in Court, and on the 1st April 1885 was paid to the judgment-creditor. The respondent is plaintiff in the present suit and is suing the appellant for contribution to the extent of her share in the estate. The only question before their Lordships is whether or no his suit is barred by lapse of time.

The cause of action arose on the 1st April 1885. The suit was brought in February 1891 If the limit of time is three **[851]** years it would be barred in April 1888 unless saved by acknowledgment or payment. Both Courts below have considered that the case falls within article 61 of Act XV of 1877, and the argument here has proceeded on that footing. Without further examining the point their Lordships will take it, in the defendant's favour, that the limit of time is three years.

It is not necessary to discuss more than two of the transactions between the parties. In July 1887 the co-owners, three in number, presented a petition to the District Judge of Tippora, which was in effect an appointment of one Bhipro as Manager for (among other things) the protection of their *ijmali* (joint) property by the payment of their debts. One of the directions given to him was to apply surplus income "to the payment of the *ijmali* debts of us three co-owners of which a list is given below." The list contained the names of twelve persons from whom the money used to pay the judgment-creditor was borrowed; the amount due to each being set opposite to his name, and the total brought to the amount of Rs. 56,750.

That is a distinct acknowledgment that the total of the debts comprised in the list is a joint debt. The Subordinate Judge held that the defendant did not thereby admit any liability to the plaintiff, nor promise to pay him anything. But it is not required that an acknowledgment within the statute shall specify every legal consequence of the thing acknowledged. The defendant acknowledged a joint debt. From that follow the legal incidents of her position as joint debtor with the plaintiff, one of which is that he may sue her for contribution.

This acknowledgment is still more than three years prior to the suit. To gain a later starting-point of time the plaintiff alleges payments, of which it is only necessary to examine one. On the 14th July 1888 Bhipro, the Manager, paid Rs. 200 for interest on one of the loans constituting the total joint debt,

This is proved by his deposition, and by regular entries in his books and by endorsements on the creditor's bond. The Subordinate Judge thought that the date of payment was not proved; but it is difficult to see how proof can be more clear or precise. Then he held that the payment was not made for interest on a debt due to [852] the plaintiff, but was made to a third party, a creditor of the plaintiff, and not by his request. Section 20 of the Limitation Act says that a new starting-point of time shall be gained when interest on a debt is paid as such by the person liable to pay the debt or by his agent. It does not specify any particular mode or form of payment, and there are many modes in which payment may be made. In this case the common agent of the joint debtors paid interest on the joint debt out of joint funds under express instructions contained in the instrument of his appointment. That is clearly a payment in exoneration *pro tanto* of the liability of the plaintiff, and such as is contemplated by section 20 of the Limitation Act.

The Subordinate Judge dismissed the suit on the grounds above indicated. On appeal the High Court reversed his decree, and remanded the case to be tried. As their Lordships agree with the High Court they will humbly advise Her Majesty to dismiss this appeal. The appellant must pay the costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Tatham & Lousada.*

Solicitors for the Respondent: Messrs. *Barrow & Rogers.*

C. B.

NOTES.

[1. Acknowledgment contained in the pleadings is sufficient:—(1904) 26 All., 313; (1900) 24 Mad., 361; (1913) 25 M.L.J., 259; (1900) 27 Cal., 1004; (1908) P.R., 54; (1911) P.L.R., 180; (1906) 6 C.L.J., 141; (1906) 33 Cal., 1047.

2. An acknowledgment to be valid need not specify the legal consequences thereof:—(1902) 26 Bom., 562: 4 Bom. L. R., 447; (1906) 19 M.L.J., 650.

3. In (1909) 10 C.L.J., 517, it was held that an acknowledgment of sums due for rent to two creditors jointly was sfficient to keep alive the right of one of the creditors to enforce the claim for rent under the Bengal Tenancy Act, 1885.

4. As regards the question to whom the acknowledgment should be addressed, see (1906) 33 Cal., 613: 10 C.W.N., 551: 3 C.L J., 576; (1906) 6 C.L.J., 141; (1906) 33 Cal., 1047.]

[25 Cal. 852]

CRIMINAL REFERENCE.

The 20th June, 1898.

PRESENT:

SIR FRANCIS W. MACLEAN, K. C. I. E., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Queen-Empress
versus
Pratap Chunder Ghose.*

Nuisance—Criminal Procedure Code (Act X of 1882), section 144—Order regulating boat traffic at a landing place—High Court's power of Revision when order cannot be made under that section.

An order regulating the boat traffic at a certain landing place of a river in the manner directed by the order passed in this case held to be not an order that is authorised by section 144 of the Criminal Procedure Code.

* Criminal Reference No. 144 of 1898, made by L. Palit, Esq., Sessions Judge of Jessore, dated the 10th of June 1898.

If the order be one that cannot be made under section 144 of the Criminal Procedure Code, the mere fact of the order purporting to have been [853] made under that section does not prevent the High Court from interfering with it in revision.

Abhayeswari Debi v. *Sidheswari Debi*, (1888) I.L.R., 16 Cal., 80, and *Ananda Chundra Bhuttacharjee* v. *Stephen*, (1891) I. L. R., 19 Cal., 127, followed.

THE District Magistrate of Jessore passed the following order purporting to be made under section 144 of the Criminal Procedure Code (Act X of 1882): "Whereas it appears from the report of the Civil Surgeon of Jessore that the crowding of boats in the river Kabadak opposite the town of Kotechandpur above the Fakirpur Ghat is dangerous to the health of the residents of the town, and should be stopped, with this exception, that three or four boats containing altogether not more than twenty-five men in them may be allowed to come up above the said Ghat to discharge their cargo for a period of three days at a time and then return to a place opposite to or not above the said Fakirpur Ghat: It is accordingly hereby ordered that all persons having charge of or any control over boats on the river Kabadak, which are now moored above the said Fakirpur Ghat, do within three days of receipt of this order remove their boats down the river to a place opposite to or not above the said Ghat, and that after such removal any three or four boats containing not more than twenty-five persons in all may be allowed to come up above the said Ghat at a time and stay for not more than three days, and then return being succeeded in turn by others to the same number for a similar period. In order to determine which boats should have preference for the three days stay above the said Ghat, and in what order they should go, it is further directed that a list of the boats affected by this order be sent to the Sub-divisional Officer of Jhenida, who will decide in what order they should go, taking all the circumstances of the case into consideration, and it is directed that, except in the order prescribed by the Sub-divisional Officer, no boats shall proceed above the said Ghat. This order is addressed to the crews, lessees, proprietors or any other persons having control over the movements of the said boats, and is passed under section 144 of the Criminal Procedure Code. It extends [854] to all boats not being mere *dinghis*, and will have effect for two months from the date of publication. The Fakirpur Ghat is the Ghat situated below Mr. Macleod's house and above the Solemanpur Ghat."

The petitioner, who is the owner of the Ghat mentioned in the above order, moved before the Sessions Judge of Jessore, praying for the setting aside of the order or for a reference to the High Court. The Sessions Judge referred the matter to the High Court under section 438 of the Criminal Procedure Code (Act X of 1882). The material portion of the letter of reference was as follows:—

"This is a matter in which the petitioner moves this Court to refer an order under section 144 of the Criminal Procedure Code made by the District Magistrate of Jessore, with the recommendation that the order in question be set aside on grounds which amount to the general contention that the order was made illegally and without jurisdiction.

"The order complained of begins as follows: 'Whereas it appears from the report of the Civil Surgeon of Jessore that the crowding of boats in the river Kabadak opposite the town of Kotechandpur above the Fakirpur Ghat is dangerous to the health of the residents of the town.' This is all that is contained in the order regarding the necessity for making such an order. The petitioner has not been supplied with a copy of the report of the Civil Surgeon referred to in the order. Now according to the provisions of paragraph 2 of section 144 of the Code of Criminal Procedure the Magistrate making an order under that section is required to state therein the material facts of the case. The Magistrate in this case does not appear to me to have in any way complied with that requirement. The

grounds on which danger to the health of the town was apprehended, the nature of the danger etc., are not at all mentioned. The Civil Surgeon's report on which the order has been based should, I think, have been annexed as a part of the order.

"The next point is that the order was passed *ex parte* Paragraph 3 of section 144 provides that, in cases of emergency, or in cases where the circumstances do not admit of the serving in due time of a notice, the order may be passed *ex parte*. No doubt the order was directed to boatmen generally; and it may be argued that, that being so, the circumstances did not admit of a notice being served. But it is quite clear that the petitioner was a person who would be very greatly affected by the order, and as it cannot be said to have been a case of emergency; a notice should, I think, have been served upon him, in order that he might appear and show cause why the order should not be made.

[856] The most important and vital point in the case, however, is that the order itself is of a nature not justified by the provisions of section 144 of the Criminal Procedure Code. The heading of the Chapter, which consists only of this section, shows the nature of this provision of the law as contemplated by the Legislature. The heading is "Temporary orders in urgent cases of nuisance," and the first paragraph which sets forth the circumstances which would justify an order under section 144 of the Criminal Procedure Code uses the phrase, 'In cases . . . . where immediate prevention or speedy remedy is desirable.' Thus it is clear that the section is intended only to apply to urgent cases of nuisance where immediate prevention or speedy remedy is desirable, and where a temporary order would meet the requirements of the case. Now, in the present case, the Magistrate appeared to have been of opinion that the health of the town was likely to be endangered by the crowding of boats opposite the town of Kotechandpur. And he accordingly passed this order regulating the number of boats which were to be allowed to proceed to the place and the length of time they were to be allowed to stay. I do not see how an order of this nature can be said to be one passed to provide for an urgent case of nuisance in which immediate prevention or speedy remedy is desirable. The question of providing for the general health of a town by regulating the boat traffic is not a question which can in any way be considered one concerning an 'urgent case of nuisance' making 'immediate prevention or speedy remedy desirable.' It is not a question of the kind intended to be dealt with by an order under section 144 of the Criminal Procedure Code. I say nothing as to the wisdom of passing such an order affecting the trade of a whole locality. I say nothing as to the propriety of seeking to secure better health for a town by passing such an order (which, it must be remembered, can only be in force for two months), and as to other and better methods being applicable. I say nothing as to these questions because it appears to me that the Legislature never intended section 144 of the Criminal Procedure Code for such a purpose and it is on this ground, along with the other grounds mentioned by me, that I would refer the case to the High Court. The order itself as to only '3 or 4 boats containing altogether not more than 25 men in them' being allowed to come up above the said Ghat to discharge their cargo 'for a period of three days at a time' seems to be so worded that difficulty might well be felt in obeying it. It presupposes that every boat that comes up must acquaint itself with the number of boats already at the Ghat and with the number of men these boats contain. I need not, however, go on to criticise the mode in which the order has been framed. The order itself appears to me to be illegal and *ultra vires* on the grounds (1) that the order does not state the material facts of the case justifying the order; (2) that it was passed *ex parte* when circumstances did not justify the passing of such an order without notice being served and (3) that the order is of a nature not justified by the provisions of section 144 of the Criminal [856] Procedure Code. On these grounds I refer the matter to the High Court and recommend that the order be set aside."

No one appeared in support of the reference.

The **judgment** of the High Court (**Maclean, C.J.**, and **Banerjee, J.**) is as follows:—

We agree with the learned Sessions Judge in thinking that an order like the one made in this case regulating the boat traffic at a certain landing place,

S. C. B.

in the manner directed by the order, is not an order that is authorized by section 144 of the Code of Criminal Procedure. The very terms of the order go to show that it is not one directing "any person to abstain from a certain act or to take certain order with certain property in his possession or under his management" within the meaning of the section. That being so, the order is not authorised by the provisions of the law under which it purports to have been made, and there is no other law that we are aware of, under which the Magistrate could make such an order, nor does the mere fact of the order purporting to be made under section 144 of the Criminal Procedure Code prevent this Court from interfering with it in revision, if the order is one that cannot be made under that section. The view we take is amply supported by the cases of *Abhayeswari Debi* v. *Sidheswari Debi*, (1888) I. L. R., 16 Cal., 80, and *Ananda Chundra Bhuttacharjee* v. *Stephen*, (1891) I.L.R., 16 Cal. 127.

We, therefore, set aside the order complained of as not authorized by law.

C. E. B.

NOTES.

[See also 26 Cal., 188 ; 21 All., 391.]

[25 Cal. 856]

TESTAMENTARY JURISDICTION.

The 17th and 28th February, 1898.

PRESENT :

MR. JUSTICE SALE.

In the goods of W. H. Collett, Deceased.

Practice—Official Trustee, Appointment of—Official Trustees' Act (XVII of 1864) section 10—Consent of Beneficiaries—Evidence Act (I of 1872), section 85—Affidavit, Sufficiency of.

On an application under section 10 of the Official Trustees ' Act (XVII of 1864), where the petition was not signed by one of the beneficiaries, the [857] Court held upon other evidence, that such beneficiary was desirous of having the Official Trustee appointed as trustee of the will.

THIS was an application for the discharge of Samuel Cramer, the sole surviving trustee of the will of William Henry Collett, deceased ; and for the appointment in his stead of the Official Trustee under section 10 of the 'Official Trustees' Act (XVII of 1864).

The petition was signed by Samuel Cramer, by the Official Trustee, and by all the beneficiaries except A. S. Collett, who was resident in London. He, however, signed two documents, one an informal agreement to the appointment, the other a power of attorney. The power was not sufficiently proved, nor authenticated in the manner contemplated by section 85 of the Evidence Act (I of 1872), but was attested only in the presence of a solicitor.

Mr. *Caspersz*, who appeared for the petitioners, submitted that there was here sufficient evidence that all the persons beneficially interested were desirous of having the Official Trustee appointed.

Sale, J.—I think it would be desirable to strike out the name of A. S. Collett. I do not think notice to him is necessary, inasmuch as he is shown to have knowledge of the application and to have approved of it, but there must be an affidavit showing that he is absent in England.

Mr. *Caspersz* states that he will file an affidavit to that effect, and have the name of the person referred to struck out from the petition, and that he would mention the matter again upon the affidavit being ready.

[Mr. *Caspersz* subsequently mentioned the matter, and put in the affidavit required, with the original agreement and an office copy of the power of attorney annexed. Upon that his Lordship made the order prayed for.]

Solicitors for the Petitioners: Messrs. *Sanderson & Co.*

H. W.

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[858] CRIMINAL REVISION.

The 17th June, 1898.

PRESENT:

SIR FRANCIS W. MACLEAN, K. C. I. E., CHIEF JUSTICE AND MR. JUSTICE BANERJEE.

Punardeo Narain Singh and another............Petitioners

versus

Ram Sarup Roy............Opposite-party.*

Jurisdiction of Criminal Court—Criminal Procedure Code (Act X of 1882), section 182—Local area—Uncertainty as to the situation of the scene of offence—Marginal notes to sections of Act.

When there is an uncertainty as to whether a particular spot where an offence has been committed is situated within one district or another the case is governed by section 182 of the Criminal Procedure Code (Act X of 1882), and the offence is triable in the Court of either district. The expression "local area" includes, and was intended to include, a "district."

Marginal Notes to sections of an Act do not form part of the Act. *Sutton* v. *Sutton*, (1882) L. R., 22 Ch. D., 511, and *Dukhi Mollah* v. *Halway*, (1895) I. L. R., 23 Cal., 55, followed.

THE facts of the case appear fully from the judgment of BANERJEE, J.:—

Babu *Umakali Mukerji* on behalf of the Petitioners.

Mr. *Jackson* and Babu *Dwarka Nath Mitter* on behalf of the Opposite Party.

* Criminal Revision No. 400 of 1898, against the order passed by G. W. Place, Esq., Sessions Judge of Sarun, dated 23rd of April 1898.

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

Maclean, C.J.—This rule raises a short but somewhat interesting point. The question is, whether the Diara known as the Mutier Diara lies in the Balia or Sarun district. That depends upon what the boundary line of these two districts is. Now, we find that by a notification of the Government of India, dated the 5th of December 1888, it was declared: "That the deep stream of the Gogra is the boundary between the Balia district in the North-Western Provinces and the Sarun district in Bengal, up to the point where the boundary line between *mouzah* Ibrahimabad Nanhara in Balia, and *mouzah* Shitab Diara in Bengal, meets that river."

[859] The Sessions Judge finds: "The Government have frequently notified that the deep stream of the Gogra is the boundary between the two districts. Now at present, and apparently for a year or two, Mutier Diara is an island with a deep stream north of it, and another south of it. This latter is both wide and deep, but the stream north is a trifle deeper and seems more like the main stream."

The contention of the learned Vakil for the petitioner is that, inasmuch as the stream to the north is the deeper of the two streams, that is the "deep stream" within the meaning of the notification of December 1888, in which case this island would be in the Balia and not in the Sarun district, and the Magistrate in the latter district would have no jurisdiction to entertain the complaint. But I think the "deep stream" spoken of in the notification of December 1888 must be the deep stream as it then existed, that is ten years ago. It is a matter of notoriety that the channels of Indian rivers change very materially, and often in a very short time. What was the deep stream in 1888 may not be the deep stream of 1897, and it is consequently difficult for us to say what really is the deep stream which forms the boundary between the two districts. There is an uncertainty in the matter, and if there is such uncertainty, what is the course to be pursued? In my judgment we can invoke the assistance of section 182 of the Criminal Procedure Code, which lays down: "When it is uncertain in which of several local areas an offence is committed it may be inquired into or tried by a Court having jurisdiction over any of such local areas."

I ought to have stated that the alleged offence took place in April 1897 and that processes were applied for on the following day in the Sarun district.

It is urged by the learned Vakil for the petitioner that the words "in which of several local areas" does not apply to any uncertainty as to the district, but uncertainty as to the particular spot upon which the alleged offence was committed. That would be a very narrow construction to put upon the section, and treats the term "local area" as synonymous with the term "spot." In my opinion the expression "local area" includes and was intended to include a "district," and this view is fortified by a **[860]** reference to the language of section 531 of the Criminal Procedure Code.

In my opinion then, there is, for the reasons I have stated, sufficient uncertainty as to which is the true boundary between these two districts, and there being that uncertainty, section 182 applies, and it is competent for the Court in the Sarun district to inquire into this matter.

I may make a passing allusion to an argument of the learned Vakil for the petitioner that we must read into section 182 the marginal note to that section: in other words, that we must construe the section with reference to the marginal note. I decline to accept that view. It has been decided in the English Courts, and I believe in this Court as well, that the marginal notes

do not form part of the section, and cannot be referred to for the purpose of construing the section.

For these reasons I think that the Court in the Sarun district is competent to inquire into this matter, and the rule will accordingly be discharged.

Banerjee, J.—I am of the same opinion. We have been asked to set aside the order of the Court below directing that the case should be tried in the Sarun district in which it has been instituted, on the ground that upon the facts found by the learned Sessions Judge in his decision of the 23rd April last, it is the Court in the district of Balia, and not that in the Sarun district, that has jurisdiction to try this case under section 177 of the Criminal Procedure Code.

It is not disputed that the offence complained of, namely, that of rioting, is alleged to have been committed in an island *chur* called Mutier Diara, and that the island *chur* is situated in the River Gogra in that part of it which forms the boundary between the districts of Sarun and Balia, according to the notification of the Government of India.

That notification, which is dated some time in the year 1888, is to the effect that the deep stream of the River Gogra is the boundary between the Balia and Sarun districts; and the learned Sessions Judge has found that of the two streams of the **[861]** River Gogra, running north and south of *chur* Mutier Diara, the one on the north is a little deeper than that on the south. This would at first sight go to show that the Mutier Diara appertains to the district of Balia and not to that of Sarun. The learned Sessions Judge, however, is of opinion that in a matter like this, the question of convenience is to be taken into consideration, and upon that consideration he has hold that the Sarun Court has jurisdiction to try this case.

I am unable to accept this view of the matter as correct. But at the same time I do not think that the jurisdiction appertains to the district of Balia as contended for by the learned Vakil for the petitioner.

It is quite true that every offence, as provided by section 177 of the Criminal Procedure Code, shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed. The offence here is alleged to have been committed in the island *chur*, Mutier Diara; and if that *chur* appertains to the district of Balia it is the Balia Court and not the Sarun Court which would be competent to try the case. But is it clear that Mutier Diara appertains to the district of Balia? It is at any rate open to doubt whether the notification of 5th December 1888 referred to above should bear the construction sought to put upon it by the learned Vakil for the petitioner, namely, that the deep stream of the Gogra, the position of which may shift from time to time, is the boundary between Balia and Sarun. The notification may well be understood to mean that the boundary between Balia and Sarun would be the deep stream, as it existed at the date of the notification, and that this would continue to be the boundary until the Government thought fit to alter it by a further notification. Moreover, it is doubtful whether the notification was intended to meet a contingency like the present where two streams, one to the north and the other to the south, are both deep, with this difference that one is a trifle deeper than the other, as the learned Sessions Judge has found. Again, it is not certain what the position of this boundary was in 1888 with reference to the *chur* Mutier. In other words, it is not clear whether the *chur*, accepting the boundary to be the deep **[862]** stream of the river, as it existed in 1888, fell on the Balia or the Sarun side of the boundary. Nor would the Sessions Judge's finding, even upon the view of the notification which the learned Vakil for the petitioner asks us to adopt, be enough to remove

the uncertainty, for although the stream on the north may be the deeper of the two on the 23rd April 1898, or the time when the investigation was made, still that would not go to show which of the two streams was the deeper one in April 1897, the time when the alleged offence was committed.

Therefore in any view of the case the uncertainty remains as to whether this *chur* appertains to Balia or Sarun. That being so, the question is how is jurisdiction to be determined in a matter like this? I am of opinion that the question is answered by section 182 of the Criminal Procedure Code, which says: "When it is uncertain in which of several local areas an offence is committed, it may be inquired into or tried by a Court having jurisdiction over any of such local areas."

The learned Vakil for the petitioner contends that this section cannot apply to a case like the present, because the expression "local area" is not equivalent to "district," and there is no uncertainty here as to the spot in which the offence was committed, the uncertainty being as to the district in which the case should be tried. In other words, the learned Vakil's contention is that "local area" in section 182 means a spot and not a district or province. He may be right so far that the expression "local area" may comprehend not only a district or province, but also a spot; but his contention is not right so far as it seeks to restrict the expression "local area" to the spot where the offence was committed. And that his contention is not right is evident from section 531, that section clearly showing that a Sessions Division, District, or Sub-Division is, within the meaning of the Act, intended to be included in the term "local area."

Lastly, it was contended that the marginal note to section 182 would militate against the view we take. The answer to that is that the marginal note is no part of the Act, as has been pointed out in *Sutton* v. *Sutton*, (1882) L. R., 22 Ch. D., 511, and *Dukhi Mullah* v. *Halway*, (1895) I. L. R., 23 Cal., 55. I, **[863]** therefore, hold that as there is an uncertainty in the matter, the case is governed by section 182, and the offence is, therefore, triable in the Court having jurisdiction either over Sarun or over Balia.

The result is that as the Sarun Court has jurisdiction, this case will be tried there, and the rule will be discharged.

S. C. B.

NOTES.

[See also 28 Bom., 129; 20 M. L. J., 500 where also the marginal notes were rejected in interpretation.]

[25 Cal. 863]

The 12th May, 1898.

PRESENT:

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Gomer Sirda and others............Petitioners

versus

Queen-Empress on the Complaint of Ali Shiekh............Opposite-Party.*

Witness—Right of accused to have witnesses re-summoned and re-heard—Criminal Procedure Code (Act X of 1882), section 350 (a), section 357—Commencement of proceedings—Interlocutory orders—Trial, Meaning of—Right to have witnesses summoned and re-heard—Irregularity—Refusal to re-call witnesses.

An accused person does not lose the right of having the witnesses re-summoned and re-heard under proviso (*a*), section 350, of the Criminal Procedure Code, because an interlocutory application for enforcing the attendance of certain witnesses has been made and granted not at the trial but before the trial and with a view to the trial. The proper time for making such application is when the trial commences before the Magistrate.

The expression "trial" means the proceeding which commences when the case is called on with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecutions and for the defence, if the accused be defended, present in Court, for the hearing of the case.

Section 537 of the Criminal Procedure Code cannot cure the defect in the proceedings by reason of the Magistrate's refusal to re-summon and re-hear the witnesses in contravention of proviso (*a*), section 350.

THE facts of the case are fully set forth in the judgments.

Mr. *P. L. Roy* and Babu *Issur Chunder Chakravarti* for the Petitioners.

The *Advocate-General* (Sir *Charles Paul*) and Babu *Baikunto Nath Das* for the Crown.

[864] The following **judgments** were delivered by the High Court (MACLEAN, C.J. and BANERJEE, J.).

Maclean, C. J.—It is only necessary to refer to one or two facts in the history of this case. The petitioners were convicted of rioting on the 15th of March 1897, from which conviction they appealed to the Sessions Judge, who upheld the conviction. An application was then made to this Court to have the conviction set aside, upon the ground, to put it shortly, that the Magistrate had not exercised a proper judicial discretion, in refusing to allow certain witnesses, whom the accused desired to call, to be called.

That application was successful, and on the 5th July 1897, this Court made the rule absolute, and to quote the language of the Judges, they "set aside the conviction and sentence and sent the case back for re-trial, the Magistrate commencing the investigation from the point at which it was left on the 15th March before he delivered judgment."

It is obvious that the Judges of this Court were under the impression that the same Magistrate would continue to hear the case. It appears, however,

* Criminal Revision No. 239 of 1898, against the order passed by H. Maxwell, Esq., Officiating Sessions Judge of Assam Valley District, dated the 7th of February 1898, affirming the order passed by G. Balthasar, Esq., Assistant Commissioner of Goalparah, dated the 15th of November 1897.

that that Magistrate had left the District, and another Magistrate had taken his place. The observations of the Judges of this Court, as to the Magistrate taking up the case where he had left it could not apply, and I am satisfied, were not intended to apply, to the second Magistrate, who had not heard any portion of the evidence.

Then what occurred was this: I ought to mention that during this time the accused were out on bail. On the 6th August 1897 a mukhtear, purporting to appear for the accused, and I will assume, though the accused swear the contrary, that he had authority from them so to do, applied to the second Magistrate that certain processes for the attendance of witnesses for the accused might issue, and on the 9th of the same month, apparently upon the application of the same mukhtear, an order, as appears from the order sheet, was passed directing that warrants should issue against the witnesses named. On the 27th August, which was the first day upon which the accused were ordered to attend to be tried, the case was called on, and the **[865]** accused at once demanded that the witnesses who had been previously examined before the other Magistrate should be re-summoned and re-heard. The second Magistrate had not heard any of this evidence. The Magistrate refused that application upon the ground that the accused were too late in making it. His view, as I understand it, was that he had commenced his proceedings in the trial when he acceded to the applications of the 6th and 9th August, and that the demand by the accused can only be made when he commences his proceedings in the trial. To my mind this view is not well founded, and is calculated to materially prejudice the accused. The question turns upon the construction of proviso (a) to section 350 of the Code of Criminal Procedure, as to which I cannot think there can be any reasonable doubt. That proviso is in the following terms: "In any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard." It will be noticed that the primary, and, in one sense, the governing words of the proviso are, "in any trial," and, in my opinion, when the proviso speaks of the second Magistrate commencing his proceedings it must mean his proceedings upon that "trial." Now what is the "trial"? The "trial" to my thinking means the proceeding which commences when the case is called on, with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecution, and for the defence if the accused be defended, are present in Court for the hearing of the case. That is, I consider, the proceeding which is intended by the term "trial," and in my opinion the proper time for the accused to ask for the re-summoning and re-hearing of the witnesses is as soon as that trial commences before the Magistrate, and that he is entitled to make the demand at that time. The view placed upon the proviso by the Magistrate is far too narrow, for it means that the accused has lost the right given him by the proviso because an interlocutory application, as in this case, for enforcing the attendance of certain witnesses may have been previously granted by the Magistrate. This interlocutory order was not made at the trial, but before the trial, and with a view to the trial. In his explanation the Magistrate appears to attach but little importance to seeing the witnesses, but this would scarcely **[866]** appear to be a view shared by the Legislature, which, in the interests of the accused, has passed the proviso in question. As a general rule I think the second Magistrate taking up the case would be well advised to hear the whole case *de novo*. I may add, though in the view I take it is not necessary to decide it, that I am by no means satisfied that under the circumstances we could not have interfered under proviso (b) to section 350. It is unfortunate that both

the Magistrates in this case should have miscarried in their procedure, as there must be a retrial, virtually a third trial, and after the lapse of time since the occurrence, if an offence have been committed, as to which I express no opinion, the difficulty of proving the case may be increased. The rule must be made absolute, and as I understand the second Magistrate has now left the district, the case must be retried before the Magistrate who has taken his place.

Banerjee, J.—I am of the same opinion. We are asked to set aside the conviction and sentence in this case on the ground that the Magistrate has acted in contravention of section 350 of the Code of Criminal Procedure in deciding this case upon evidence recorded by his predecessor and in disallowing the application of the petitioners for the re-summoning and re-hearing of the witnesses. The ground upon which the Magistrate appears to have disallowed that application was that it was not made when he commenced the proceedings within the meaning of proviso (*a*) of section 350, but was made at the third hearing of the case before him. Now this is how the facts stand: The accused, the petitioner before us, who had been originally convicted, having moved this Court, this Court set aside the conviction and sentence and sent the case back for retrial.

The first order that was recorded after the remand was dated the 6th August, and was an order recorded before the accused had appeared in Court. It was recorded in the presence of the gentleman who had acted as their mukhtear at the previous trial, and directed the mukhtear to put in a list of witnesses against whom he wanted processes to issue.

The second order, which was recorded on the 9th August, **[867]** was simply to this effect that warrants should issue against the witnesses named. And it was not until the day on which the third order was recorded, namely, the 27th August, that the accused appeared before the Magistrate; and on the same day they made an application under section 350 of the Code of Criminal Procedure for the re-summoning and re-hearing of the witnesses who had been examined for the prosecution at the previous trial; and the question is whether it can be said that the proceedings after remand, that is, the proceedings before the Magistrate, who subsequently took up the case, commenced before the 27th August.

I am clearly of opinion that the question must be answered in the negative. For, although two orders were recorded previous to the 27th August, there is nothing to show that the accused had notice to appear before that day.

I may here observe that the procedure ordinarily observed, and the procedure which ought to be observed, when a case is remanded by a superior Court, should be for the inferior Court to make a preliminary order calling upon the parties to appear on a certain day on which the proceedings should commence. This does not appear to have been done here.

In all probability what was done was to send for the person who had acted as the mukhtear of the accused, and to call upon him to put in his list of witnesses, as the order of the 6th August would go to show.

The petitioners in their affidavit deny that this mukhtear had any instructions from them before they had entered appearance, and there is nothing to show that the mukhtear had any instructions from them previous to that.

That being so, as has been very fully and clearly shown by the learned Chief Justice, the retrial could not be held to have commenced before the 27th, which was the first day when the accused entered appearance after remand;

and if the retrial had not commenced, it could not be said that the proceedings of the Magistrate had commenced before that day.

I am, therefore, clearly of opinion that the Magistrate acted in contravention of the provisions of section 350 in refusing the [868] application of the petitioner for the re-summoning and re hearing of the witnesses.

A point was discussed as to whether section 537 of the Code may not have the effect of curing the defect in the proceedings by reason of the Magistrate's refusal to re-summon and re-hear the witnesses. I am of opinion that that section cannot cure the defect. For it is of the utmost importance that the first Court that has to try a case should have an opportunity of observing the manner and demeanour of the witnesses in order that it may form a correct estimate of their evidence.

The only exception that the Code of Criminal Procedure contemplates is that referred to in section 360. That provision is made evidently to meet the exigencies of the public service; but even that section provides that where the accused demands that the witnesses should be re-summoned and re-heard by a succeeding Magistrate, who takes up a case before it is finished, the demand should be complied with. A trial held by a Magistrate presiding in the Court of First Instance upon evidence not recorded by him, and upon evidence given by witnesses, whose manner and demeanour he had not the advantage of observing, must ordinarily be considered to be a trial held not according to law, and without one of the most important guarantees for a correct decision; and if that is so, we must say that there has been a failure of justice. Section 537 therefore cannot cure the defect in this case.

Before concluding I wish to make one observation with reference to what has been said by the Magistrate in his explanation, namely, that where an occurrence has taken place many months before a witness gives his evidence, the advantage of observing his demeanour is not of much value.

I do not think that the question of time has anything to do with the matter. The advantage to be derived from observing the demeanour of witnesses is one that ought never to be undervalued.

The conviction and sentences will be quashed, and there must be a fresh trial before another Magistrate.

S. C. B.

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[869] APPELLATE CIVIL.

The 27th April, 1898.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE STEVENS.

Kuldip Sing and another............Plaintiffs

versus

Khetrani Koer, 1st Party, Defendant, and L. MacDonald and another, 2nd Party............Defendants.*

Contract—Hindu Widow—Reversioners—Settlement of Dispute—Ikrarnamah—Condition in restraint of lease—Transfer of Property Act (IV of 1882), sections 10 and 15.

In an *ikrarnamah* executed by a Hindu widow on the one side, and her husband's cousins on the other, in settlement of disputes regarding her husband's estate, one of the conditions agreed upon was that if either of the parties should want to execute a lease jointly or individually, "it would be executed and delivered by mutual consultation of both the parties," and if "the document be not signed and consented to by both the parties, it shall be null and void." In a suit brought on the basis of the *ikrarnamah* to set aside a lease granted by the widow.

Held, there is nothing in any statute law which renders such a provision inoperative; neither sections 10 and 15 of the Transfer of Property Act (IV of 1882) nor any principle underlying them is applicable to it; it is not an unreasonable provision; there was no absence of equity in the arrangement, and effect should be given to it.

THE defendant, first party, Mussummat Khetrani Koer, was the widow of one Udit Narain Singh, who was great-grandson of Teka Singh, while the plaintiffs were the grandsons of the same person, Udit as well as the plaintiffs being descended in the male line. The question in this appeal was whether a lease granted by the widow to the defendants, second party, in respect of the shares left by Udit, for a term of years, was invalid by reason of a certain condition in an *ikrarnamah* executed by the plaintiffs and the widow in settlement of a dispute regarding Udit's property. The facts and the conditions of the *ikrarnamah* on [870] which the plaintiffs based their claim are sufficiently stated in the judgment of the High Court.

The lower Court held that the condition which imposed restriction upon the widow was void and it therefore dismissed the plaintiffs' suit. The plaintiffs appealed to the High Court.

Babu *Umakali Mukerjee* and Babu *Baldeo Narayan Singh* for the Appellants.

Mr. *Hyde*, Mr. *G. B. McNair* and Mr. *C. T. Geddes* for the Respondents.

The **judgment** of the High Court (**Trevelyan** and **Stevens, JJ.**) was as follows:—

In this case we regret that we are unable to agree with the learned Subordinate Judge in the view he has taken.

The case is a simple one.

It is alleged in the plaint that there were three persons, Kuldip Singh, Pardip Singh and Udit Narain Singh, who formed a joint Hindu family. Udit

* Appeal from Original Decree No. 216 of 1896, against the decree of Babu Jaggaddurlabh Mozoomdar, Subordinate Judge of Tirhoot, dated the 1st of May 1896.

Narain Singh was a first cousin once removed of the others. On Udit Narain's death his interest passed to Kuldip Singh and Pardip Singh. As a matter of fact, Udit left a widow by name Khetrani Koer. Disputes arose between the plaintiffs, Kuldip and Pardip and Khetrani Koer, and those disputes were settled by an *ikrarnamah*. The *ikrarnamah* gives the lady possession for her life on account of her maintenance of her husband's share of the property, and there is a provision in it which has given rise to the present question. That provision is this: "If I (that is Khetrani Koer) take and execute any sort of document then it will be null and void. And be it known that if any party out of the two parties be under the necessity of executing a simple *pattah*, *zarpeshgi pattah*, *mokarari* and *kashtkari*, jointly or individually, then it would be executed and delivered by mutual consultation of both the parties, and if it be signed by both the parties, then it would be valid and trustworthy, and the document not signed and consented to by both parties shall be null and void." The lady executed a lease for eleven years in favour of the proprietors of the Dooria Indigo Concern. The plaintiffs claim that the execution of that lease is a breach **[871]** of this covenant, and that they are entitled to a declaration to that effect and to have the lease set aside. There were other questions raised, which have not been determined.

The learned Subordinate Judge has held that this covenant is invalid and has no operation. He has therefore dismissed the suit.

We are unable to follow the reasoning upon which he comes to that conclusion. Admittedly there is nothing in any statute law which renders such a provision inoperative. Sections 10 and 15 of the Transfer of Property Act have no application here; and we are unable to see any principle underlying those sections which can be applied to the present case, or that there was any sort of absence of equity in an arrangement of this kind. This was a settlement of a dispute, and effect should be given, as far as possible, to every portion of it. It is not at all an unreasonable provision that reversioners giving up their claim and allowing a Hindu widow to remain in possession of their property should wish to retain supervision over it and to prevent any acts on her part which might cause injury to their reversionary rights. A provision of this kind is not only not contrary to law, but is one which might reasonably be made in common prudence by reversioners. There being admittedly nothing in law to show that this covenant is illegal, effect must be given to it.

This does not dispose of the case. There are other questions. The case must, therefore, go back to the Subordinate Judge to have those questions determined, the decree of the lower Court being set aside. The respondents who appeared must pay the costs of the appeal.

The Court-fee on the Memorandum of Appeal will be refunded to the appellant under section 13 of the Court Fees Act.

S. C. C. *Appeal allowed. Case remanded.*

NOTES.

[See also (1914) 24 I. C. 120 (Mad).]

[872] The 21st March, 1898.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BANERJEE.

Lala Kandha Pershad............Judgment-debtor

versus

Lala Lal Behary Lal... ....Decree-holder.*

Second appeal—Suit of the nature cognizable in Court of Small Causes—Execution of decree—Transfer of decree for Execution—Civil Procedure Code (Act XIV of 1882), sections 223, 224, 228, 586.

A suit not exceeding Rs. 500 in value was brought in a Court exercising jurisdiction as a Court of Small Causes, and that Court passed a decree and transferred it for execution to the Munsif under sections 223 and 224 of the Civil Procedure Code: the Munsif passed an order in execution, and the order was confirmed in appeal.

Held, that the words "suit of the nature cognizable in Courts of Small Causes" in section 586 of the Code is equally applicable, whether the suit be brought in a Court of Small Causes or in any other Court, that section 586 controls section 228 in a case of this kind, and no second appeal would lie from the Munsif's order.

Harakh v. *Ram Sarup*, (1890) I. L. R., 12 All, 579, cited and approved.

THIS was an appeal from an order passed in execution of a decree for Rs. 365 payable by instalments, which was made by the Subordinate Judge of Arrah in the exercise of his jurisdiction for the trial of suits cognizable by a Small Cause Court, up to Rs. 500 in value. The decree was sent for execution under sections 223 and 224 of the Civil Procedure Code to the Munsif of Arrah before whom the judgment-debtor raised an objection on the ground of limitation. The objection was overruled by the Munsif as well as by the District Judge on appeal.

The judgment-debtor preferred a second appeal to the High Court.

Dr. *Asutosh Mukerjee* for the Appellant.

Mr. *C. Gregory* for the Respondent.

Mr. *C. Gregory* on behalf of the respondent raised a preliminary objection on the ground that no second appeal lay in this case.

[873] The arguments on both sides appear from the **judgment** of the High Court (**Trevelyan** and **Banerjee, JJ.**) which was as follows —

The first question, which we have to determine, is whether a second appeal, that is an appeal to this Court, lies.

The suit was brought in a Small Cause Court. The decree was, under the provisions of section 224 of the Civil Procedure Code, sent for execution to the Court of the first Munsif of Arrah, and certain landed property has been attached by such Court.

The judgment-debtor objected to the decree being executed on the ground that the application for execution was barred by the law of limitation. The learned Munsif disallowed that objection. There was an appeal to the Judge, who has upheld the Munsif's decision. A second appeal has been preferred to this Court. The respondent has objected that no second appeal lies. We have to consider such objection. This question depends, in our opinion,

* Appeal from Order No. 369 of 1897, against the order of F. H. Harding, Esq., District Judge of Shahabad, dated 23rd of September 1897, affirming the order of Babu Mohim Chandra Sarkar, Munsif of Arrah, dated the 22nd of May 1897.

entirely upon the construction which should be placed upon sections 228 and 586 of the Civil Procedure Code. The former section provides that where a decree is sent for execution by the Court which passed it to another Court, the orders of the latter Court shall be subject to the same rules in respect of appeal as if the decree had been passed by itself. Section 586 provides that no second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

It is quite clear to our minds that the construction of the words a "suit of the nature cognizable in Courts of Small Causes" does not depend upon the tribunal in which the suit is brought, and is equally applicable whether the suit be brought in a Court of Small Causes or in any other Court. It was contended that this expression only applied to cases where suits are brought in Courts other than Courts of Small Causes. The result of this construction would be that there would be no second appeal where the suit was brought in a Court other than a Small [874] Cause Court, and there would be a second appeal where it had been brought in a Small Cause Court. This would be anomalous.

The case comes within the plain words of the section; and in our opinion section 586 in a case of this kind controls section 228. There is express authority on this question, *Harakh* v. *Ram Sarup*, (1890) I. L. R., 12 All., 579. With that authority we agree and hold that no second appeal lies. It is therefore unnecessary to consider the other question in this case. We dismiss the appeal with costs.

Preliminary objection allowed.

S. C. C. *Appeal dismissed.*

NOTES.

[See also (1900) 27 Cal. 484; (1905) 8 O.C. 405; (1911) 10 I.C. 412 (Cal.) where also it was held that there was no second appeal in such cases.]

[25 Cal. 874]

The 11th July, 1898.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE STEVENS.

Baroda Sundari Ghose............Plaintiff

versus

Dino Bandhu Khan and others............Defendants.*

Benami transaction—Benami purchaser—Right of benamidar to sue for possession of immoveable property.

A *benami* purchaser of immoveable property has no right to sue for recovery of possession of the same.

Hari Gobind Adhikari v. *Akhoy Kumar Mazumdar*, (1889) I. L. R., 16 Cal., 364, and *Issur Chundra Dutt* v. *Gopal Chundra Das*, (1897) I. L. R., 25 Cal., 98, followed.

* Appeal from Appellate Decree, No. 830 of 1896, against the decree of R. H. Anderson, Esq., District Judge of Mymensingh, dated the 24th of March 1896, modifying the decree of Babu Biprodass Chatterjee, Subordinate Judge of that District, dated the 27th of August 1894.

Nand Kishore Lal v. *Ahmad Ata*, (1895) I. L. R., 18 All., 69, referred to.
Gopi Nath Chobey v. *Bhugwat Pershad*, (1884) I. L. R., 10 Cal., 697, distinguished.

THE facts of the case appear sufficiently from the judgment of the High Court

Dr. *Rash Behary Ghose* and Babu *Dwarka Nath Chuckerbutty* for the Appellant.

Mr. *Hill* and Babu *Jogesh Chunder Roy* for the Respondents.

[875] The **judgment** of the High Court (**Prinsep** and **Stevens, JJ.**) was as follows:—

Chunder Nath Dey Sarkar, defendant No. 1, and Puddo Lochan Dey Sarkar, the deceased husband of defendant No. 2, mortgaged certain properties to Harish Chunder Shaha, who obtained an *ex parte* decree against them. In execution of that decree Sorosoti Dasi and Rutton Moni Dasi successfully objected to the sale of their shares in these properties, and accordingly their shares were exempted from sale, the sale being held of only the remaining shares. These ladies having died, their shares passed to the mortgagors as reversionary heirs, and on application made by the decree-holder these shares were sold in satisfaction of the balance of the mortgage debt An attempt to obtain possession through the Court failed, and proceedings under section 334 of the Code of Civil Procedure were instituted, but were afterwards withdrawn by the decree-holder purchaser, who subsequently sold to the plaintiff. The present suit has been brought by this purchaser to obtain possession as against the judgment-debtors and purchasers from them.

Of the several points raised at the hearing of this second appeal, the principal one relates to the finding of the District Judge, that the purchase by the plaintiff was a *benami* purchase for her husband, and next, to its effect.

The appellant's pleader contends that there is no evidence in support of the District Judge's finding that it was a *benami* transaction. We think, however, that facts disclosed by the evidence of the plaintiff's husband, as set out in the judgment of the District Judge, are in themselves sufficient to establish this.

It next becomes necessary to consider the right of the plaintiff as *benamidar* to sue to recover the lands purchased. As an authority against this we are referred to the case of *Hari Gobind Adhikari* v. *Akhoy Kumar Mazumdar*, (1889) I. L R., 16 Cal., 364, which has been followed in *Issur Chundra Dutt* v. *Gopal Chundra Das*, (1897) I. L. R., 25 Cal, 98, and we understand also in another case which has not been reported. These cases proceed on the practice of this Court in the cases [876] referred to in the case of *Hari Gobind Adhikari* v. *Akhoy Kumar Mazumdar*, (1889) I. L. R., 16 Cal., 364, and there are no cases in this Court to the contrary On the other hand, we observe that in *Nand Kishore Lall* v. *Ahmad Ata*, (1895) I. L. R., 18 All., 69, the learned Judges of the Allahabad High Court have expressed a dissent.

We can see no reason to doubt the correctness of the law laid down by this Court on the cases mentioned.

In *Gopi Nath Chobey* v. *Bhugwat Pershad*, (1884) I L. R ,10 Cal., 697, the learned Judges have no doubt expressed themselves generally in favour of the right of the *benamidar* to sue, but that was not a suit in ejectment, so we do not feel pressed by it. In this view it is unnecessary to decide the other points raised in this appeal. The appeal is, therefore, dismissed with costs.

B. D. B. *Appeal dismissed.*

NOTES.

[A benamidar has no right to sue for **possession** of *land*.—**30 Cal., 265**; 7 C. W. N., 229; 11 C.L.J., 47; 30 Mad., 245; 7 I C., 218; 9 I.C. 487, 8 M.L.T., 154. See, however, 21 All., 380.]

[25 Cal. 876]
The 14th March, 1898.
PRESENT:
MR. JUSTICE TREVELYAN AND MR. JUSTICE BANERJEE.

Harkhoo Singh............One of the Defendants
versus
Bunsidhur Singh and others............Plaintiffs.*

Jurisdiction of Civil Court—Sale for arrears of Revenue—Revenue Sale Act (XI of 1859), section 33—Sale for arrears not due—Suit to set aside sale—Appeal to Commissioner.

A suit may be brought in the Civil Court to set aside a sale held under Act XI of 1859, on the ground that no arrears were due, although such ground was not declared and specified in an appeal to the Commissioner as provided for in section 33 of Act XI of 1859.

Baijnath Sahu v. *Lala Sital Prasad*, (1868) 2 B. L. R. (F. B.), 1: 10 W. R. (F. B.), 66, followed.

Gobind Lal Roy v. *Ramjanam Misser*, (1893) I. L. R., 21 Cal., 70: L. R., 20 I. A., 165, distinguished and explained.

THE facts material to the report of this case and arguments on both sides appear in the judgment of the High Court.

The purchaser (defendant No. 1) appealed to the High Court.

[877] Dr. *Rash Behary Ghose*, Moulvie *Mahomed Yusuf*, Babu *Karuna Sindhu Mukerjee*, Babu *Saligram Singh*, and Babu *Mahabir Singh*, for the Appellant.

Babu *Srinath Das*, Dr. *Asutosh Mukerjee*, and Babu *Ganendra Nath Bose* for the Respondents.

The **judgment** of the High Court (**Trevelyan** and **Banerjee, JJ.**) was as follows:—

In this case the learned Subordinate Judge, from whose judgment the present appeal has been preferred, has set aside a sale purporting to be for arrears of Government revenue, on the ground that there were no arrears, and that, therefore, the Collector had no power to sell the property.

The first question which we have to determine is whether there were any arrears. If there were arrears, it would follow that the suit must fail. If there were no arrears, there remains the question whether, having regard to the fact that the absence of arrears was not declared and specified in an appeal to the Commissioner, the provisions of section 33 of the Revenue Sale Law do not bar this suit.

With regard to the first question, we had at first some little difficulty in understanding the decision of the learned Subordinate Judge, but when we come to examine the evidence, we see no reason to differ from the conclusion at which he has arrived. There was a *butwara* of this property, and after partition the revenue and instalments of revenue were fixed by the Commissioner of Revenue. These instalments are shewn in Exhibit 1, which is a copy of an extract from the revenue roll register. The *kists* are there specified; the first of these being for April, Rs. 33-2-0, the last of these being the *kist* of March Rs. 16-9-0. By section 2 of the Revenue Sale Law if the whole or any portion

*Appeal from Original Decree No. 262 of 1896, against the decree of Babu Upendra Chunder Mullik, Subordinate Judge of Patna, dated the 26th of August 1896.

of a *kist* of any month of the era, according to which the settlement and *kistbundi* of any mehal have been regulated, be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue. We must take it that this register proves that the *kistbundi* was regulated according to the Christian era, and therefore the [878] instalment for March did not become an arrear of revenue until the 1st of April.

Under section 3 of the Revenue Sale Law the Board of Revenue has to determine upon what dates all arrears of revenue shall be paid up, in default of which payment these estates shall be sold. The dates which have been fixed are admittedly the 28th of June, the 28th September, the 12th January and the 28th March. It would follow that as the March *kist* did not become in arrear until the 1st of April, the property could not be sold in respect of it unless default had continued until the 28th of June, which was the next fixed date after that instalment became in arrear.

The whole difficulty has here risen in consequence of the zemindari account register being kept with reference both to the Christian era and to the Fusli era, which is prevalent in the district. That register gives the *kists* of amounts corresponding to those described in the revenue roll register, but the months when these *kists* are payable are differently described.

An attempt was made by the learned Vakil for the appellant to induce us to assimilate the month in the two registers, the effect of which would be to compel us to alter the amounts payable in respect of each *kist*. The sum total would, of course, be the same.

It is perfectly obvious, from a comparison of the two registers to which we have referred, that the course adopted by the officer who computed the zemindari account register has been to call the April *kist*, the *kist* for March or Cheyt; the May *kist*, the *kist* for April or Bysack; the June *kist*, the *kist* for May or Jeyt; the October *kist*, the *kist* for September or Assin, the November *kist*, the *kist* for October or Kartick; the December *kist*, the *kist* for November or Aughran; the January *kist*, the *kist* for December or Pous; the February *kist*, the *kist* for January or Magh; and lastly the March *kist*, the *kist* for February or Falgoon.

The inconvenience of mixing up the two eras is obvious, and [879] its practical effect has been to anticipate the due date of the several *kists*.

The next document of importance is the memorandum of demands, which shows how the sum of Rs. 3-8-2, for the non-payment of which this property has been sold, has been arrived at. According to that document, that sum is the balance after crediting all sums paid up to and including the 28th of March 1894, and after debiting the *kists* due, up to and including the *kist* of Rs. 16-9 which is described in the zemindari account as the *kist* of February or Falgoon, but which is in reality, as we have pointed out, the *kist* for March. If this *kist* of Rs. 16-9, which was due in reality on the 1st of April, had been omitted from the account, there would have been a surplus instead of a deficit, and, therefore, we must hold that there were no arrears for which a sale could take place.

Our attention has been drawn to a decision of a Division Bench of this Court, in which we are told that the circumstances are similar; but the learned Judges arrived at a conclusion different to that at which we have arrived. We need hardly remark that a conclusion of fact in another case can be in no way a precedent, and can be of little, if any, help to us.

Having found as a fact that there were no arrears, we have still to consider the only remaining question, namely, whether, having regard to the fact that

the absence of arrears was not declared as a ground of appeal to the Commissioner, the provisions of section 33 of the Revenue Sale Law bar this suit.

There is no doubt that this question was authoritatively determined by a Full Bench of this Court in the case of *Baijnath Sahu* v. *Lala Sital Prasad*, (1868) 2 B. L. R. (F. B.), 1; 10 W. R. (F. B.), 66, and has also been decided in several other cases.

It has, however, been argued that the Judicial Committee of the Privy Council in *Gobind Lal Roy* v. *Ramjanam Misser*, (1893) I. L. R., 21 Cal., 70; L. R., 20 I. A., 165, have expressed an opinion inconsistent with the decision of the Full Bench.

[880] In our opinion their Lordships did not express any intention of travelling beyond the points which arose in the particular case.

In that case there were arrears of revenue, and the sale was for such arrears, but it was held good in spite of an express prohibition in the Act.

The decision of their Lordships is to be found in the following words:—

"Giving, however, full weight to these considerations, their Lordships, having regard to the scheme of the Act and the express direction contained in section 33, are of opinion that in every case where a sale for arrears of revenue is impeached as being contrary to the provision of Act XI of 1859, no grounds of objection are open to the plaintiff which have not been declared and specified in an appeal to the Commissioner.

"In the opinion of their Lordships a sale is a sale made under the Act XI of 1859 within the meaning of that Act, when it is a sale for arrears of Government revenue held by the Collector or other officer authorized to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provision for exemption having been directly contravened."

If there were no arrears, this was not a sale for arrears of revenue, and there is nothing in the decision of the Privy Council which can be in point in this case.

We dismiss the appeal with costs. No reference was made at the hearing to the cross-objection.

S. C. C. *Appeal dismissed.*

NOTES.

[See also 1 C.L.J., 565; 17 M.L.J., 467; 16 C.L.J., 620; 13 C.W.N., 710.]

[881] The 1st April, 1898.

PRESENT:

SIR FRANCIS W. MACLEAN, K. C. I. E., CHIEF JUSTICE, AND MR. JUSTICE MACPHERSON.

Mokoond Lal Singh............Petitioner

versus

Nobodip Chunder Singha and another............Opposite-party.*

Guardian—Appointment of Guardian—Guardians and Wards Act (VIII of 1890), sections 9 and 17—Application by a Christian father to be appointed guardian of his Hindu minor son—Matters to be considered by the Court in appointing guardian.

A, who was originally a Hindu, but afterwards became a Christian and abandoned his family residence, applied to be the guardian of the person of his minor son. On the objections of the paternal and maternal uncles of the boy that, under the circumstances of the case, the father was not fit and proper person to be appointed the guardian of the minor.

Held, although the father is *prima facie* entitled to the custody of his infant child, he can be deprived of such parental right if the circumstances justify it; therefore in a case where a child who was brought up as a Hindu, and who expressed a desire to remain a Hindu, and was living with his Hindu relation, who was maintaining him and was looking after his education properly, it would not be to the welfare of the child that he should be handed over to the father and brought up in the Christian faith, and that the Court below, under the circumstances of the case, was right in dismissing the application.

THIS appeal arose out of an application made by one Mokoond Lal Singh, under section 9 of the Guardians and Wards Act (VIII of 1890), to be appointed the guardian of the person of his minor son, a boy of 12 or 13 years of age. The applicant, who was originally a Hindu, was converted to Christianity on the 23rd April 1893, when he abandoned his family residence and left his minor son in the custody of his grandfather, a Hindu; and since the latter's death, the boy was living with his maternal uncle. The application was opposed by the maternal uncle of the minor, as also by his paternal uncle. The District Judge of Nuddea, upon the evidence, having found that the welfare of the minor would not be promoted by making him over to the custody of his father, [882] dismissed the application. Against this judgment the applicant appealed to the High Court.

Dr. *Ashutosh Mookerjee*, Babu *Hara Prosad Chatterjee*, and Babu *Gyanendra Nath Bose* for the Appellant.

Babu *Monmotha Nath Mitter* for the Respondent.

Babu *Hara Prosad Chatterjee*, for the Appellant, contended that a Hindu father is not deprived of his right to the custody of his children, merely because he has been converted to Christianity. See the cases of *Muchoo* v. *Arzoon Sahoo*, (1866) 5 W.R., 235, and *Skinner* v. *Orde*, (1871) 14 Moore's I. A., 309: 10 B. L. R., 125. A Hindu is *primâ facie* entitled to the custody of his children as natural guardian in preference to other relations. See Mayne's Treatise on Hindu Law and Usage, 5th Edition, paragraphs 192 and 193. He also referred to section 17 of the Guardians and Wards Act, and argued that the words in clause (2) of the said section to the effect that, in considering

* Appeal from order No. 236 of 1897, against the order of G. K. Deb, Esq., District Judge of Nuddea, dated the 3rd of April 1897.

what will be the welfare of the minor, the wishes, if any, of the deceased parent should be regarded, clearly show that the parent, if alive, would have a preferential right to the custody of his children.

Babu *Monmotha Nath Mitter* for the Respondent.—Under section 17 of the Guardians and Wards Act, in appointing a guardian the Court should be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. In this case it will not be to the welfare of the minor if he is made over to his Christian father. He referred to the following cases: *In re Newton*, L. R., (1896), Ch. D., Vol. I., 740; *In re McGrath*, L. R., (1893) Ch. D., Vol. I., 143; *The Queen* v. *Gyngall*, L. R., (1893), Q. B., Vol. II., 232; *In re Joshy Assam*, (1895) I. L. R., 23 Cal., 290; and *In the matter of Saithri*, (1891) I. L. R., 16 Bom., 307; and he also referred to the Treatise on *Minority* by Trevelyan, pages 78 and 236.

Dr. *Ashutosh Mookerjee*, in reply, referred to the following **[883]** cases: *Kanahi Ram* v. *Biddya Ram*, (1878) I. L. R., 1 All., 549; *Queen* v. *Nesbit*, (1843) Perry's O. C., 103; *In re Himnauth Bose*, (1863) 1 Hyde. 111; *In re Agar-Ellis* v. *Lascelles*, (1883) L. R., 24 Ch. D., 317 (328).

The **judgment** of the High Court (MACLEAN, C. J. and MACPHERSON, J.) was as follows:—

Maclean, C J.—This is an application by a father, originally of the Hindu persuasion, but now a Christian, to have himself appointed guardian of his infant son, a boy of about 12 years old. The real object of the application is to obtain the custody of the minor. There is virtually no dispute as to the facts. The father in April 1893 embraced Christianity, and then, if he did not actually abandon, at any rate left his child under the care and custody of his grandfather, who was a Hindu, and after his death he remained, as he still is, in the care of his uncle, who is also a Hindu. The boy, hitherto, has been brought up in the Hindu religion, surrounded by Hindu relations. There is no suggestion, least of all any well-founded suggestion, that the child is not being well cared for, or that he is unhappy. No considerations of that nature arise. The father is about 33 years old: he is not well off, his monthly income being some 15 rupees. He apparently lives at a Christian Mission House at Hooghly, and is paid his salary by the Mission. The mother of the child is dead, and the father has recently married a young Christian girl. A somewhat loose suggestion of immorality is made against the father, but I attach no importance to this. After he left his child, the father contributed nothing to his support, has attempted but once to see him; and, beyond that, has taken no notice of him whatsoever. The present application is dated the 9th July 1896. The circumstances of the boy's Hindu relations appear to be good. The District Judge of Nuddea refused the application: hence the present appeal.

I do not think there is any substantial difference in the law applicable to a case such as this, between the law of England and the law of India, except so far as the Guardians and Wards **[884]** Act (VIII of 1890) may create any difference. That Act is mainly, if not entirely, based upon the principles of English law. The English authorities establish that, even as against the *primâ facie* legal right of the father to the custody and control of the education of his child, the real object to be considered is the welfare of the child, and under section 17 of the Guardians and Wards Act the Court has to be guided by what, consistently with the law to which the minor is subject, appears under the circumstances to be for his welfare. The boy has been examined, and has expressed a preference to remain with his Hindu uncle, and to continue in the Hindu religion, and not to become a Christian; and though, having regard to his age, and to the possibility that this expression of his wishes

may have been suggested to him by his Hindu relations, too much importance must not be attached to what he says, it is a feature in the case which ought not to be left entirely out of consideration. There is no doubt that under the Hindu law, as under the English, the father is *primâ facie* entitled to the custody and control of his infant child, and it is for those who maintain the contrary to show that, under the particular circumstances of the particular case, he ought to be deprived of such initial parental right. That he can and may be so deprived if the circumstances justify it, is well established by many cases in the English Courts, one of the most recent being that of *In re Newton*, L. R. (1896), Ch. D., Vol. I, 740, and also in the Indian Courts [see *In the matter of Saithri*, (1891) I. L. R., 16 Bom., 307, and the recent case in this Court before Mr. Justice SALE of *In re Joshy Assam*, (1895) I. L. R., 23 Cal., 290]. In the above case in the Bombay High Court, Mr. Justice BAYLEY very carefully reviewed all the authorities, English and Indian, upon the point.

There are some matters incident to this question, —and one can scarcely avoid, if not concluding, at any rate suspecting, that the real question in this litigation is as to whether this child is to be brought up as a Christian or as a Hindu,—which to my mind are fairly well established. The authorities appear to me to establish that *primâ facie* the father is entitled to say in what religion his [885] infant child should be brought up, but, at the same time, that, in a proper case, there is undoubted jurisdiction in the Court to disregard those wishes. But the circumstances must be at least unusual to justify the Court in so acting.

As was said by Lord Justice LINDLEY in the case of *In re Newton*, L. R. (1896), Ch. D., Vol. I., 740: "But as a legal proposition, it is clear that the Court has jurisdiction in a proper case to deprive a father of the custody of his children, and it also has jurisdiction to decline to change the religion in which the children have been brought up." Our attention has not been drawn to anything showing, nor has it been argued, that this statement of the law does not apply equally to a Hindu father and child as to an English father and child.

Then we have to consider what is really for the welfare of this minor, using the term 'welfare' in its widest sense, and looking, not only to the question of money and comfort, but to the moral and religious welfare of the child and to the ties of affection. I need scarcely point out, as has been stated by Judges in the Courts of England, that the Court, judicially administering the law, cannot say that one religion is better than another. As I have indicated above, the Guardians and Wards Act says, we must look to the welfare of the child. Those being the principles of law applicable to the present case, and bearing in mind those principles and the initial right of the father to the custody of his infant child and to control its religious education, we must consider whether it is for his welfare that the child should be handed over to the father, and brought up, as the father states is his intention, in the Christian faith. Looking to the fact that when the father embraced Christianity in 1893 he was of, and the child had been brought up in, the Hindu religion, that in 1893 he left the child with his own father who was a Hindu, that on the latter's death he tacitly permitted the child to be taken care of by his maternal uncle, who was also a Hindu, that since April 1893 he has not contributed anything towards his child's maintenance or education, that virtually he has not attempted to recover the custody of his child until he instituted these proceedings, and, practically, has only seen him once, to the fact that (as is sworn to by his brother [886] the witness Nabadwip Chunder Singh) he said "when he was going to become a Christian that he did not want his son, nor his father, nor his brother nor anybody" (a by-no-means improbable statement in his then mood), to the fact that the child, with the father's assent, has been brought up as a Hindu, that

he (the child) respects the Hindu gods and goddesses, and that he has himself, a boy of 12 or 13 years old, expressed a preference not to become a Christian: looking, I say, to all the circumstances, not separately, but collectively, I am of opinion that the District Judge was justified in his conclusion that it was not for the child's welfare that he should be handed over to the costody of his father. In arriving at this conclusion, one must not lose sight of the circumstances that if the child become a Christian, he becomes an outcast from his old religion, and if when he attains his majority he desires to return to that religion and method of life, he will only, if at all, be able to do so upon performing strict and possibly costly expiatory ceremonials. For some years this child has been allowed by his father to remain with his Hindu relations, who are willing to educate and take care of him, and who have, in fact, maintained and educated him for some years at their own cost, and has been permitted by his father to be brought up according to the rites of the Hindu religion, the tenets of which, having regard to his age, are not improbably impressed to some extent upon his mind and understanding; and if now he be handed over to his father, such a course must necessarily result in breaking the ties of affection and destroying the associations connected with his life with his Hindu relations. I cannot bring my mind to think that this can really be for the child's welfare. Jealous as the Court is and ought to be in interfering with the legal right of the father as regards the custody and religious training of his child, I consider that, under the circumstances of this case, the father must be regarded as having abdicated his strict legal parental rights, and that it would be (as has been said by a most learned and distinguished Judge) a capricious, if not a cruel, resumption of his paternal authority, if he could now compel his child to be brought up henceforth as a Christian, which admittedly would be the result of handing over the child to the custody of his father. Look-**[887]**ing at all the circumstances of the case, I think the Court below was justified in its conclusion, and that this appeal must be dismissed. We, however, give no costs.

Macpherson, J.—I am entirely of the same opinion and have nothing to add to the judgment of the learned Chief Justice.

S. C. G. *Appeal dismissed.*

NOTES.

[See also (1911) 22 M.L.J., 247 where it was held that the father has the right to say in what religion the child should be brought up; and (1914) 27 M.L.J., 30 as regards jurisdiction, ascertaining the wishes of aged infants, etc.]

[25 Cal. 887]

ORIGINAL CIVIL.

The 4th April, 1898.

PRESENT:

MR. JUSTICE JENKINS.

Khetter Kristo Mitter............Plaintiff

versus

Kally Prosunno Ghose............Defendant.*

Costs—Attorney's lien for costs—General jurisdiction of Court over all suitors—Compromise by parties without knowledge of attorney—Lien, Notice of—Attorney and Client.

The decree obtained by the plaintiff in a suit was satisfied by defendant behind the back of the plaintiff's attorney, although he had notice of the lien for costs of the plaintiff's attorney. The plaintiff's attorney thereupon applied for an order upon the plaintiff and the defendant, or either of them, to pay his costs:

Held, that the High Court has general jurisdiction over its suitors; that although a defendant has the right to compromise with a plaintiff without the knowledge of the plaintiff's attorney, such compromise must be made with the honest intention of ending the litigation, and not with any design to deprive the attorney of his costs, and he cannot make a payment to the plaintiff under that compromise, if he has notice of the lien for the costs of the plaintiff's attorney.

THIS suit was instituted in 1887, the attorneys for the plaintiff at that time being Messrs. Gregory and Jones. Subsequently Babu Mohini Mohun Chatterji became the attorney, and at the plaintiff's request he paid a sum of Rs. 2,192-7-6 to the former attorneys in satisfaction of their bill of costs. On 9th September 1895 a decree was passed for Rs. 17,000, each party to bear his own costs. The costs up to and including the decree were taxed as between attorney and client, and Rs. 2,017-13-6 were allowed. Subsequent costs to the amount of Rs. 613 were further incurred. From time to time payments on account were made, leaving Rs. 914-4-9 [888] finally due from the plaintiff to Babu Mohini Mohan Chatterji. In execution of the above decree, certain immoveable property was attached and advertised to be sold on 10th March of this year. In the meantime the defendant, without the knowledge of the attorneys on either side, had settled with the plaintiff personally, and an application was made on behalf of the defendant for stay of the sale. That application was granted with the object of keeping matters in *statu quo*.

The compromise made no provision for payment of Babu Mohini Mohun Chatterji's costs, and the present application was, therefore, now made for an order upon the plaintiff and the defendant, or either of them, to pay to him Rs. 914-4-9, being the balance of his costs, and also his costs subsequent to the decree to be taxed, and in default that he be at liberty to proceed with the sale of the property attached or for such other order as to the Court may seem meet. It was admitted that Babu Mohini Mohun Chatterji had informed the defendant of his lien for costs.

Mr. *Sinha* for Babu Mohini Mohun Chatterji.—The authorities in England show that, although the parties are entitled to compromise, no payment can

* Application in Original Civil Suit No. 159 of 1887.

be made under it to the prejudice of the attorney's lien after notice of it has been given to the person by whom the payment is made, and the same rule applies here. In this case the defendant was informed of the lien for costs.

Mr. *J. G. Woodroffe* for the Defendant.—This Court has no jurisdiction *brevi manu* to make the order asked for. There is no such practice in these Courts. See *Domun* v. *Emaum Ally*, (1881) I. L. R., 7 Cal., 401, and *Mahommed Zohuruddeen* v. *Mahomed Nooroodden*, (1893) I. L. R., 21 Cal., 85. The notice of lien also must be of a more definite character than the notice given in this case: *Price* v. *Crouch*, (1891) 60 L. J. Q. B., 767. Further, inasmuch as part of the aggregate claim consists of costs paid to a prior attorney, no lien to that extent can be claimed: *Christian* v. *Field*, (1842) 2 Hare, 177.

[889] Jenkins, J.—This suit was commenced in 1887, the attorneys for the plaintiff being at that time Messrs. Gregory and Jones. Later on there was a change to Babu Mohini Mohun Chatterji, and on the occasion of that change he paid a sum of Rs. 2,192-7-6 to the former attorneys at the plaintiff's request. On the 9th September 1895 a decree was passed, and by it a sum of Rs. 17,000 became payable from the defendant to the plaintiff. Each party was to bear his own costs of the suit. The costs up to and including the decree have been taxed as between attorney and client, and Rs. 2,017-13-6 have been allowed on that taxation. Subsequent costs to the amount of Rs. 613 have also been incurred. From time to time payments on account have been made, which leave Rs. 914-4-9 still due from the plaintiff to Babu Mohini Mohun Chatterji on account of his costs, besides subsequent costs which are still untaxed.

In execution of the decree in the suit certain immoveable property was attached and advertised to be sold on the 10th March of this year.

In the meantime, however, the defendant had settled with the plaintiff personally without the intervention of the attorneys on either side, and an application was made on the 10th March for stay of the sale. That application was granted for the purpose of keeping matters solely in *statu quo*, and not so as to prejudice the rights which otherwise existed.

The compromise to which I have referred made no provision for payment of Babu Mohini Mohun Chatterji's costs, and he has accordingly made this present application that the plaintiff and the defendant, or either of them, be ordered to pay to him Rs. 914-4-9, being the balance of his costs, and also his costs subsequent to the decree to be taxed, and in default that he be at liberty to proceed with the sale of the property attached or for such other order as to the Court may seem meet.

This claim on the part of the applicant is based on the right commonly known as an attorney's lien on the fund recovered in suit. Whether that is the most appropriate mode of description it is unnecessary to discuss, for the nature of the right is free from doubt.

[890] It is a claim on the part of the attorney to have secured to him his due reward out of the fruit of his labour, and for that purpose to call in aid the equitable interference of the Court. But while the right is clear, it must be conceded that the litigants themselves are really masters of the suit, and that it is within their power to compromise it without the acquiescence or even the knowledge of their attorneys. The exercise of this right, however, is subject to important qualifications. In the first place the compromise must have been made with the honest intention of ending the litigation, and not with any design to deprive the attorney of his costs; and, secondly, no payment can be made under the compromise to the prejudice of the attorney's claim after notice of it has been given to the person by whom the payment is made.

These principles appear to me to be the clear result of the authorities in England; and founded, as they are, on justice, equity and good conscience, I see no reason why they should not apply in this country. Now the applicant on this occasion claims that both conditions to which I have referred exist, though it is clear it would suffice for his purpose, if he can establish either of them. The facts on which he relies as establishing his position by virtue of notice given are set forth in that part of his affidavit which commences with paragraph 6. He says: "I personally informed the defendant for whom I acted as attorney in a suit in this Honourable Court, being suit No. 770 of 1894, wherein Gooroo Prosunno Ghose was the plaintiff and the defendant herein was the defendant, of my said lien for costs, and at the time when I informed the defendant as aforesaid, Babu *Prosunno Chunder Roy*, a Vakil of this Honourable Court, who was instructing me on the defendant's behalf in the said suit, No. 770 of 1894, was present."

"That I have personally and repeatedly informed Babu Peari Mohun Chatterji, Dewan or Manager of the defendant's affairs, of my said lien."

The facts set forth in the paragraphs which I have just read are uncontradicted, and it is admitted on the part of the defendant that he had notice of the claim for a lien, so that the case would appear to come within the second of the qualifications I have mentioned.

[891] It has, however, been urged by Mr. *Woodroffe*, who has argued the case very fully and ably for the defendant, that it is not open to me to make the order asked for, and he has urged several objections. The principal objection is one which goes to the root of the whole matter, and I will, therefore, deal with it first. He contends that the Court has no jurisdiction *brevi manu* to make such an order as is asked for, and in support of the objection he refers to the absence of any practice justifying such a procedure as is sought to be used on this occasion. In addition he has referred to two cases: one the case of *Domun* v. *Emaum Ally*, (1881) I. L. R., 7 Cal., 401; and the other the case of *Mahommed Zohuruddeen* v. *Mahommed Nooroodden*, (1893) I. L. R., 21 Cal., 85.

The first of the two cases seems to me to have no application to the matter now under consideration. It simply refers to the question whether, on summary application, an order could be made directing a party to pay his attorney the costs of suit when taxed. It was held that such an order could not be made. That is a wholly different case from the present.

In the same way the case of *Mahommed Zohuruddeen* v. *Mahommed Nooroodden*, (1893) I. L. R., 21 Cal., 85, appears to me to throw no light on the point. The facts are shortly these: An attorney had by way of securing his costs taken a deposit of title deeds, and made a summary application in a suit to which he was no party to have that equitable lien enforced. It was held he should, if he desired to enforce his equitable lien, commence a suit of his own. I fail to see how a decision on those facts can in any way negative the applicant's right to proceed in the manner he has selected.

The present application appears to me to be based on the principle that the Court has general jurisdiction over its suitors, and I see no reason why that jurisdiction should not be as fully vested in a Court here as it is in the English Courts. I therefore think it is open to the Court to deal with this particular question on a summary application framed as the present is.

[892] The other objection raised by Mr. *Woodroffe* were not of so far-reaching a character. He referred to *Price* v. *Crouch*, (1891) 60 L. J., Q. B., 767, as authority for the proposition that notice of lien must be of a more definite character than the notice given in this case. I find nothing in the decision given in that case which calls for the conclusion that the notice given

by the applicant in the present case was insufficient, for there it was simply held as a matter of fact that the notice was insufficient, because it was not in any sense a notice of lien, but merely of an expectation that provision would be made for costs.

In the present case the attorney has given, in the clearest terms that could have been used, notice that he did claim a lien for his costs of the suit.

Another point urged by Mr. *Woodroffe* was this: He contended that inasmuch as part of the aggregate claim consists of costs paid to a prior attorney, no lien to that extent can be claimed, and in support of that proposition he referred to the case of *Christian* v. *Field*, (1842) 2 Hare, 177. That case is not an authority for the broad proposition in support of which it was cited.

Be this however as it may, the state of facts on which the argument is based has no existence here, for I do not find that the unpaid balance of costs is in any way made up of the amount paid by Babu Mohini Mohun Chatterji to Messrs. *Gregory* and *Jones*. That amount was the earliest item in the account, and if Mr. *Woodroffe's* argument is correct, it is unsecured, and I certainly should presume that the payments already received were, under the circumstances, attributed in the first place to the discharge of that amount.

I have now dealt with all the points raised except that as to the proper form of the order. I hold in this case that sufficient notice of lien was given by the attorney, Babu Mohini Mohun Chatterji, to the defendant before payment was made by him under the compromise, and I, therefore, come to the conclusion that Babu Mohini Mohun Chatterji's present application is **[893]** rightly conceived. I may add, I think, it is very desirable in this country, both in the interests of attorneys and in the interests of litigants themselves that the Court should possess a power to interfere summarily, as has been done in this case.

I direct payment of the amount of costs, which have been taxed, and subsequent costs when they have been taxed, by the plaintiff and the defendant, including the costs of this application.

[Mr. *Sinha* asks that the application be certified for Counsel. The Court certifies for Counsel.]

Attorney for the Plaintiff: Mr. *M. M. Chatterji.*

Attorney for the Defendant: Mr. *W. C. Roy.*

C. E. G.

NOTES.

[This was dissented from in (1899) 27 Cal., 269 but followed in (1904) 30 Bom., 27; 6 Bom.L.R., 879. See also (1905) 7 Bom.L.R., 547.]

[25 Cal. 893]

The 14th June, 1898.

PRESENT:

SIR FRANCIS W. MACLEAN, K. C. I. E., CHIEF JUSTICE,
MR. JUSTICE BANERJEE AND MR. JUSTICE JENKINS.

Chuni Lal and others............Defendants

versus

Anantram and others............Plaintiffs.*

Costs—Application for stay of execution—Practice.

Where the defendants in an original suit applied to the Appellate Court for stay of execution of the decree pending the appeal:

Held, (BANERJEE, J., dissenting) that the applicant who asked for the indulgence must pay the costs of the application.

THIS was an application for stay of execution of the decree passed in this suit by Mr. Justice P. O'KINEALY sitting on the Original Side of the Court.

Mr. *Allen* for the Appellant.—Applications of this nature can be heard by the Judge sitting on the Original Side, and the practice of getting an Appellate Bench appointed for the purpose of hearing such applications is cumbrous and inconvenient. The Original Side has ample jurisdiction to deal with such applications—sections 239 and 545 of the Civil Procedure Code. The decisions of NORRIS, J, in *Mahdab Kissen Sett* v. *Protap Chandra Ghose*, [unrep. Suit No. 98 of 1888, 4th June 1883], and of HILL, J., in *Courjon* v. *Leheraux*, [unrep. Suit No. 267 of 1877, 10th May 1892] which have altered the earlier practice of the Court are incorrect. [BANERJEE, J.—Section 545 contemplates that the Appellate Court is the proper Court for such application after [894] appeal filed. MACLEAN, C J.—Section 545 does not seem in any way inconsistent with section 239 of the Civil Procedure Code, but as in my view the Appellate Court has jurisdiction and a Bench has been specially formed to hear this application the discussion is somewhat academical. Besides it has been the practice of late years to make such applications to the Appellate Court]

Mr. *Chaudurı* for the respondents opposed the application for stay of execution, and submitted that the respondents were entitled to the costs of and incidental to the application—*Simpson* v. *Moore*, (1898) 2 Cal., W. N. ccxxxi.

Mr. *Allen* in reply.—The defendant is successful in this application inasmuch as he has obtained an order staying execution, and the costs should abide the result.

The following **judgments** were delivered by the High Court (MACLEAN C.J., and BANERJEE and JENKINS, JJ.):

Maclean, C.J.—The applicant must pay the costs of this application. He has come for an indulgence, and as he asks for an indulgence he ought to pay the costs of obtaining it.

That, in my view, is the principle which ought to apply generally to applications of this class, and that view is supported by the practice in the courts of England. . I think that should be the general rule; I do not say it is an inflexible rule. Any way under the circumstances of this case the applicant must pay the costs of the application.

Banerjee, J.—I agree in the order made as to costs, having regard to the special circumstances of this case, which are that the decree-holder was, in the

* Application in Original Suit No. 406 of 1897.

first instance, unnecessarily made to appear before the Judge on the Original Side upon this application for stay of execution. That is a point upon which, speaking for myself, I must say that the judgment-debtor has not been able to satisfy me that he was right. But, as a matter of general principle, I am of opinion that the costs of an application like this ought to abide the ultimate result. I do not think that an application like this is an application for an indulgence; when the law allows an appeal, and furthermore when it allows an appellant, upon proper cause being shown, to ask for [896] and obtain an order for stay of execution, it cannot be said that he asks for what is merely an indulgence. And looking at the reason of the thing, it would seem to be something more than an indulgence, being in fact what is necessary to enable the appellant to secure the full benefit of his success in the appeal. For when the law allows an appeal, if the appeal succeeds, and if, in the meantime, the party successful in the Court of First Instance is able to enforce the decree of the first Court by the sale of any immoveable property of his judgment-debtor, the success of the appeal may not secure to the appellant all that he would be entitled to, as the reversal of a decree cannot affect the sale of any immoveable property held in execution thereof while it was in force.

That being so, I think that the applicant ought not to be made unconditionally liable for the costs, but that his liability should depend upon the result of the appeal.

There might be circumstances under which the costs of opposing an application like this should be made payable by the applicant independently of the result of the appeal. Thus, where the opposition has reference to the sufficiency of the security offered, and the security is found to be insufficient, so far as the costs may relate to the opposition to that extent, the applicant may justly be deemed liable for those costs independently of the result of the appeal; but he ought not to be made unconditionally liable for costs generally.

Jenkins, J.—I agree as to the incidence of the costs, and I come to that conclusion for the reasons stated by the Chief Justice. Section 220 of the Code of Civil Procedure no doubt says: "If the Court directs that the costs of any application or suit shall not follow the event, the Court shall state its reasons in writing."

Assuming that the application has succeeded, still I think that there is ample reason in this case for requiring the applicant to pay the costs, because he is asking for an indulgence which will have the effect of interfering for the present with the enforcement by the respondent of his decree, and he who seeks such an indulgence should in the absence of special circumstances pay for it.

On these grounds I think the order proposed is right.

Attorney for the Defendants (Applicants): Babu *Ashutosh Dey*.

Attorneys for the Plaintiffs: Messrs. *Fox & Mandal*.

C. E. G.

NOTES.

[1. The Appellate Court it is that should stay execution when an appeal has been filed:—(1912) 35 All., 119.

2. On the question of costs, this was followed in (1909) 10 C.L.J., 631. Messrs. Woodroffe and Ameer Ali in their Civil Procedure Code 1908 (I Edn. 1908) p. 1230 say, with reference to the dissenting judgment of Banerjee, J. that "there is certainly strong support in reason for the view that, when the law allows an appeal and allows an appellant upon proper cause being shown to ask for and obtain an order for stay, it cannot be said that, what is asked for, is merely an indulgence."]

[896] FULL BENCH.

The 3rd February, 1898.

PRESENT :

SIR FRANCIS W. MACLEAN, K. C. I. E., CHIEF. JUSTICE, MR. JUSTICE MACPHERSON, MR. JUSTICE TREVELYAN, MR. JUSTICE GHOSE, AND MR. JUSTICE RAMPINI.

Nabu Mondul............Plaintiff

versus

Cholim Mullik and others, Minors, by their certificated guardian Sudan Bibi and others............Defendants.*

Full Bench, Reference to—Power of a Single Judge sitting alone, to refer a case in which the value of the subject matter in dispute does not exceed Rs. 50—Division Court—Rules of the High Court, ch. V, Rule 1, ch. VI, Rules 1 and 6 - Statute 24 and 25 Vic. cap. 109, section XIII.

A reference to the Full Bench cannot be made by a Judge of the High Court sitting alone to hear cases in which the value of the subject-matter in dispute does not exceed Rs. 50.

MR. JUSTICE RAMPINI sitting alone referred a second appeal, in which the value of the subject-matter in dispute did not exceed Rs. 50, to a Full Bench for a decision on the point "whether mere long continued possession of a parcel of homestead land, say upward of sixty years, and not *mokurari*, or held at a fixed rent or rate of rent, is sufficient to justify a Court in presuming that the tenancy of the land is of a permanent and transferable nature, or whether to justify such a presumption something more is required, *viz.*, proof of the land having been originally let out for the erection of *pucka* buildings, or building purposes, or proof of the landlord having stood by and allowed his tenant to erect *pucka* buildings, or expend large sums of money in making improvements of a substantial character."

The judgment of reference was as follows:-

"The plaintiff brings this suit to eject the defendants from a certain parcel of homestead land situated in the Munsif of Baraset. The defendant No. 1 is a recent purchaser from the defendant No. 2. According to the plaintiff, the defendant No. 2 had no permanent or transferable interest in the land, and therefore the defendant No. 1 is in the position of a trespasser. The [897] defendant No. 1, however, pleaded that his vendor's ancestor took the land for dwelling purposes more than 50 years ago, that he and his successors have occupied the land ever since, and planted mango, cocoanut, and jack trees on it, that the interest of the defendant No. 2 was *kaimi*, *maurasi* and *mokurari*, and, therefore, that the defendant No. 2 had a right to transfer the land to him.

"The Munsif found (1) that there was no proof as to the origin of the tenancy. The origin, he said, was lost in obscurity; (2) the defendant No. 2's grandfather took a lease of the land over 60 years ago, and he and his successors have since resided there, having erected dwelling houses with mud walls and planted mango, cocoanut and jack trees on it; (3) that "there is no evidence creating the tenure to be *maurasi*, *mokurari* or *kaimi*;" (4) that there was no

* Reference to the Full Bench in Appeal from Appellate Decree No. 1517 of 1896.

evidence to prove that the tenure is transferable by custom; (5) that it could not be presumed to be *mokurari*; but (6) that it may be presumed that the land was acquired for building or dwelling purposes, and so that the tenancy was *maurasi, kaimi* and assignable. He, accordingly, relying on the cases of *Beni Madhub Banerjee* v. *Jai Krishna Mookerjee*, (1869) 7 B. L. R., 152, and *Gungadhar Shikdar* v. *Ayimuddin Shah Biswas*, (1882) I. L. R., 8 Cal., 960, dismissed the suit.

On appeal the Subordinate Judge said "that the respondents relied upon a *kaimi* right and a right founded on custom and long occupation." He then found that "there was not satisfactory proof of the *kaimi* right and custom, and therefore there are good reasons for making a differentiation between this case and that of *Beni Madhub Banerjee* v. *Jai Krishna Mookerjee*, (1869) 7 B. L. R., 152. He, however, went on to say "the long occupation of the respondents is not disputed in this Court, and from it the grant presumed by the lower Court was, in my opinion, presumable." He accordingly affirmed the Munsif's decree.

"The plaintiff now appeals, and on his behalf it has been pointed out that all that the Subordinate Judge has found in favour of the respondent is long occupation of the land by the defendant [898] No. 2 and his ancestors, and it is contended that this is not sufficient to justify the presumption of a permanent, and therefore of an assignable or transferable, right, which the lower Courts have made in favour of the respondents. The learned pleader for the plaintiff, appellant, has cited the following cases in support of this argument of his, *viz.*, *Prosunno Coomaree Debea* v. *Rutton Bepary*, (1877) I. L. R., 3 Cal., 696, *Tarukpodo Ghosal* v. *Shyama Churn Napit*, (1881) 8 C. L. R., 50, *Prosunno Coomar Chatterjee* v. *Jagan Nath Bysack*, (1881) 10 C. L. R., 25, *Narayanbhat* v. *Davlata*, (1891) I. L. R., 15 Bom., 647 and *Secretary of State for India* v. *Luchmeswar Singh*, (1888) I. L. R., 16 Cal., 223, and he has further called my attention to the case of *Ramgopal* v. *Shamskhaton*, (1892) I. L. R., 20 Cal., 93; 19 I. R., I. A., 218, as showing that the question is one which raises a point of law upon which a Court would be justified in interfering in second appeal. This last mentioned case is clear and convincing authority for the learned pleader's second contention, and I therefore propose now to consider the cases above referred to for the purpose of determining whether there is sufficient authority for the proposition laid down by the Subordinate Judge, *viz.*, that from mere long occupation of homestead land, extending over 60 years, a Court is justified in presuming a permanent and assignable grant.

"I will begin with the cases relied on by the Munsif, the first of which is that of *Beni Madhub Banerjee* v. *Jai Krishna Mookerjee*, (1869) 7 B. L. R., 152. In that case it was found that the tenures in question were transferable by the custom of the country. This completely distinguishes that case from the present one, in which both Courts have found that no custom of transferability has been proved in respect of such land as is the subject of dispute in this case. Moreover, in that case *pucka* buildings had been erected on the land. This is not the case in the present suit. There is further in that case an *obiter dictum* of PEACOCK, C.J., that if a man grants a tenure to another for the purpose of living upon the land [899] that tenure, in the absence of evidence to the contrary, is assignable. But this is a mere *obiter dictum*, and in the present case it has not been found that the lease was granted for the purpose of living upon the land. On the contrary, the origin of the tenancy is said to be unknown and to be lost in obscurity. In any case the land was not leased to the defendant No. 2's grandfather for the purpose of erecting *pucka* buildings on it.

"The next case relied on by the Munsif is that of *Durga Prasad Misser* v. *Brindaban Sookul*, (1871) 7 B. L. R., 159.

"In this case the lessee had been in possession of the land for 40 years; he had built mud buildings and had planted trees on it. It was accordingly held that he had an assignable interest in the land, but it was not held that he had a permanent interest in it. An interest may be assignable without being permanent; so that this case would seem to be no authority for the view taken by the lower Courts.

"In the next case cited by the Munsif, *viz.*, *Gungadhur Shikdar* v. *Ayimuddin Shah Biswas*, (1882) I. L. R., 8 Cal., 960, there is this difference between it and the present one that the lands in that case were apparently let out for building purposes and the buildings are described as being of a substantial character.

"I now turn to the cases cited by the learned pleader for the appellant. The first of them is *Prosunno Coomaree Debea* v. *Rutton Bepary*, (1877) I. L. R., 3 Cal., 696, in which the land was homestead land. It had been occupied by the defendants, their father and grandfather, for 60 years, a house had been built on the land and fruit trees planted on it and there was no evidence as to the origin of the tenancy. It was held that these circumstances were not sufficient to justify the presumption of a permanent grant, which could only be presumed from long and uninterrupted possession by the original grantee and his descendants, coupled with the fact of the land having been let by the landlord expressly for the purpose of the tenant building *pucka* houses upon it.

[900] "This was followed in the case of *Tarukpodo Ghosal* v. *Shyama Churn Napit*, (1881) 8 C. L. R., 50, in which it was laid down that there is no law in this country which gives anything in the nature of a protected tenure or holding to a person who has occupied a piece of homestead land, not forming part of an agricultural holding, however long may have been the period of his possession.

"The next case cited for the appellant is the case of *Prosunno Coomar Chatterjee* v. *Jagun Nath Bysack*, (1881) 10 C. L. R., 25. In that case it has been said: "The Subordinate Judge says that as the defendants and their ancestors have held this land for generations and have made gardens and dug tanks upon it, they cannot be regarded as tenants at will, but that they have a permanent interest, the nature and extent of which he does not define, and cannot be turned out of their possession so long as they pay rent. This doctrine is directly opposed to several cases in this Court in which it has been held that the mere fact of land having been used for many years for purposes other than agricultural, or even as a homestead, is not enough to confer upon the tenants a permanent tenure [see *Addaito Charan Dey* v. *Peter Das*, (1872) 13 B. L. R., 417 note: 17 W. R, 383; *Prosunno Coomaree Debea* v. *Rutton Bepary*, (1877) I. L. R., 3 Cal., 696]. No doubt if land is let for building *pucka* houses upon it, or if the tenant with the knowledge of the landlord does in fact lay out large sums upon it in buildings or other substantial improvements, that fact, coupled with long continued enjoyment of the property by the tenant or his predecessor in title, might justify any Court in presuming a permanent grant, especially if the origin of the tenancy could not be ascertained. But the mere circumstance of a tenant occupying buildings upon property would not justify such presumption, unless it could be shown that they were erected by him or his predecessor, because a landlord might let property of that kind in the same way as agricultural land at will or from year to year."

"Thus, that case seems to lay down that mere long continued [901] enjoyment of property by a tenant or his predecessor in title is not sufficient to justify the presumption of a permanent grant, and that there must be more, *viz.*, either (1) the land must have been expressly let for building *pucka* houses upon it, or (2) the tenant must have, with knowledge of his landlord, laid out sums upon it in building or other substantial improvements.

"The next case cited for the appellant is that of *Secretary of State for India* v. *Luchmeswar Singh*, (1888) I L.R., 16 Cal., 223: L. R., 16 I. A., 6, in which it has been decided by their Lordships of the Privy Council that possession at a low and unvaried rent from 1798 to 1873 does not justify the inference of a permanent grant. But that case is distinguishable from the present one, as in it the origin of the tenancy was well known, the land having admittedly been acquired for the purposes of a stud farm.

"Then, in *Narayan Bhat* v. *Davlata*, (1891) I. L. R., 15 Bom., 647, it was said by SARGENT, C.J.: "Both Courts have assumed that the tenure in perpetuity as alleged by defendants could be established by merely long possession at an invariable rent. This is opposed to the rulings of this Court, unless it appears that it may be so acquired by local usage—*Babaji* v. *Narayan*, (1879) I. L. R., 3 Bom., 340."

"The Subordinate Judge has alluded to the case of *Rakhal Das Addy* v. *Dino Moyi Debi*, (1889) I. L. R, 16 Cal., 652, and says it is distinguishable from the present, because the tenant in that case claimed a right of occupancy which was disallowed, as the subject of litigation was homestead land. This is quite true, but I think it supports the argument of the learned pleader for the appellant in this case that something more than mere long possession is required to justify a presumption of a permanent and transferable grant.

"There remains the case of *Dunne* v. *Nobo Krishna Mookerjee*, (1889) I. L. R., 17 Cal., 144. In that case, which was one under the Land Acquisition Act, it was held that, as the defendant had shown his possession of the land for over a hundred years, it was to be presumed that his interest was a permanent and transferable one. There [902] was no standing by on the part of the landlords, except that they never attempted to interfere with the possession of the defendants or to vary their rent. That is, therefore, an authority in favour of the view taken by the Subordinate Judge. It is, however, to be noticed (1) that the head-note in that case is in one respect incorrect : the defendant's rent receipts did not show possession over a hundred years: they extended over only more than 30 years : the possession of a hundred years was evidenced by oral testimony: (2) the learned Judges who decided that the defendant had a permanent and transferable interest in the land did not apportion the compensation in that case on this principle. They gave the defendant the share in the compensation to which he would have been entitled if the land had been agricultural and he had been an occupancy *raiyat*. On the finding that the defendant's tenancy was a permanent and transferable one, he would seem to have been entitled to the whole of the compensation money after deducting from it the capitalized value of the rent payable to the landlord, and the value of the landlord's right of reversion, if any.

"On a review of the above cited cases it would seem to me that in the case of *Dunne* v. *Nobo Krishna Mookerjee*, (1889) I. L. R., 17 Cal., 144, alone it has been held that mere long possession of homestead land is sufficient to justify the presumption of a permanent grant, but that all the other cases, *viz.*, *Prosunno Coomaree Debea* v. *Rutton Bepary*, (1877) I. L. R., 3 Cal., 696; *Taruk Podo Ghosal* v. *Shyama Churn Napit*, (1881) 8 C. L. R., 50; *Prosunno Coomar Chatterjee* v. *Jagun Nath Bysack*, (1881) 10 C. L. R., 50; and *Narayan Bhat*

v. *Davlata*, (1891) I. L. R., 15 Bom., 647, show that this fact alone is not sufficient to justify such a presumption, and that before such an inference can be made there must be something more, *viz.*, either (1) the fact of the land having been let for the erection of *pucka* buildings :or (2) the fact of the tenant to the knowledge of the landlord and without objection on his part having erected *pucka* buildings or having spent large sums in improvements of a substantial character. **[903]** The cases of *Gungadhur Shikdar* v. *Azimuddin Shah Biswas*, (1882) L. I. R., 8 Cal., 960, and of *Rakhal Das Addy* v. *Dino Moyi Debi*, (1889) I. L. R., 16 Cal., 652, also support this view.

"In this conflict of rulings and as I disagree with the ruling in the case *Dunne* v. *Nobo Krishna Mookerjee*, (1889) I. L. R., 17 Cal., 144, I think it necessary to refer this case, the decision of which involves the determination of a question of much importance, to a Full Bench, and the question I would propound for their decision is whether mere long continued possession of a parcel of homestead land, say for upwards of 60 years and not *mokurari* or held at a fixed rent or rate of rent, is sufficient to justify a Court in presuming that the tenancy of the land is of a permanent and transferable nature, or whether to justify such a presumption something more is required, *viz.*, proof of the land having been originally let out for the erection of *pucka* buildings or for building purposes, or proof of the landlord having stood by and allowed his tenant to erect *pucka* buildings, or expend large sums of money in making improvements of a substantial character.

"I would add that under section 2, clause (*c*), Act IV of 1882, the provisions of the Transfer of Property Act do not apply to the lease in this case, as it is admittedly of date anterior to the passing of the Transfer of Property Act [see *Hari Nath Karmoker* v. *Rajendra Karmoker*, (1897) 1 Cal., W. N., 136]. If the case had been of later date, the defendant No. 2's interest would have been transferable, section 108 (*d*), but not necessarily of a permanent nature."

Dr. *Ashutosh Mookerjee* and Babu *Jananendra Nath Bose*, for the Appellant.

Babu *Chunder Kant Sen*, for the Respondents.

Babu *Chunder Kant Sen*, on behalf of the respondents, when the case came on for hearing before the Full Bench, took a preliminary objection to the hearing of it, on the ground that the reference to the Full Bench was not in accordance with law, inasmuch as a Judge of the High Court sitting alone could not **[904]** make such a reference, in a case in which the value of the subject-matter in dispute did not exceed Rs. 50.

Dr. *Ashutosh Mukerjee* was heard on behalf of the appellant.

The **judgment** of the Full Bench (MACLEAN, C.J., and MACPHERSON, TREVELYAN, GHOSE and RAMPINI, JJ., *concurring*) was as follows: —

Maclean, C.J.—A preliminary objection has been taken on behalf of the respondent in this case to the effect that a reference to a Full Bench cannot be made by a Judge of this Court sitting alone to hear cases in which the value of the subject-matter in dispute does not exceed Rs. 50. The point is one of considerable importance. Under Rule 1 of Chapter V of the Rules of the High Court, Appellate side, a reference to a Full Bench can only be made when one Division Court differs from another Division Court upon a point of law or usage having the force of law. The question, therefore, to my mind resolves itself into this, whether a Judge sitting alone, as was the case here, is a "Division Court" within the meaning of the rule which I have just read.

When we look at the rules carefully it will be found that in them distinctions are drawn between a Division Court and a Judge sitting alone. That is apparent from Rule 6, Chapter VI, in which, speaking of appeals under clause 15 of the Letters Patent, the rule says: "In every appeal under clause 15 of the Letters Patent against the judgment of a Division Bench or of a Judge sitting singly on the Appellate side of the High Court." That shows the distinction which is drawn between a Judge sitting alone and a Division Court. In referring to that rule I am not unmindful of the argument which was addressed to us to the inference properly deducible from rule 1 of that Chapter, which speaks of every appeal to the High Court under clause 15 of the Letters Patent from a judgment of a Division Court on the Appellate side of the High Court. It was contended that, inasmuch as there was an appeal under that clause from the decision of a Judge sitting alone, and as the rule only refers to a Division Court, the inference was that a Judge sitting alone was to be treated and regarded as a Division Court within the meaning of the rule, and that an indication was **[905]** thus afforded that the distinction which I have suggested between a Division Court and a Judge sitting alone was not well founded. But giving all weight to that contention, and it was upon this rule that Dr. *Ashutosh Mukerjee* mainly relied, we must necessarily look at all the rules, and I think we obtain a fairly clear indication of what was intended by the term "Division Court" from section 13 of 24 and 25 Vic., cap. 109, the Act establishing High Courts of Judicature in India. That section shows that a "Division Court" must be constituted of two or more Judges of the High Court, which is incompatible with such a Court being composed of a single Judge sitting alone. It can hardly be supposed that the framers of the rules made under the Act intended to use the term "Division Court" in a sense different from that in which it was used in the Act itself. Moreover the term "Division Court" is scarcely the term one would ordinarily apply to a Judge sitting alone.

The view that one Judge cannot refer a case to a Full Bench is further strengthened by Rule 2 of Chapter V, which indicates that at least two Judges must differ from the decision of the former Division Court. On these short grounds, I am of opinion that it is not competent for a Judge sitting alone to make a reference to a Full Bench, and consequently that the preliminary objection must prevail. The result, therefore, is that the reference to a Full Bench is irregular, and the case must go back to the learned Judge who made the reference, to be dealt with by him as he thinks right.

Under the circumstances we do not think there ought to be any costs of this hearing.

Case remanded.

After the case was remanded to Mr. Justice RAMPINI, he, having heard the Vakils on both sides, delivered the following **judgment**:—

This case was heard by me, sitting alone on the 28th May 1897. On that occasion no one appeared for the respondents. I reserved judgment, and on the 7th June 1897 I referred the case to a Full Bench. It has now been held that I had no **[906]** power under the rules of Court to refer the case to a Full Bench and the case has been returned to me for disposal.

The respondents now appear by pleader, who argues that he has a right to be heard on behalf of the respondents as the order of the Full Bench reopens the case. I am of opinion that looking at the provisions of sections 556 and 571 of the Civil Procedure Code, the pleader for the respondent has no right at this stage of the case to be heard, but I have allowed him to appear as *amicus curiæ* and argue the case for the respondents in that capacity.

His contentions are: (1) That whether the defendant No. 2 has a permanent interest in the homestead land, which is the subject of dispute in this case, or not, he has an assignable interest in it, and, therefore, that the defendant No. 1 is a tenant of the land and cannot be ejected without a notice to quit; (2) that the cases cited by me in my order of reference lay down no hard and fast rule as to when a Court may infer that a tenancy of homestead land is of a permanent character; and (3) that the lower Courts in this case have come to a finding of fact as to the tenancy of defendant No. 1 having been of a permanent nature, and that I cannot interfere with this finding in second appeal.

In support of his first contention the learned pleader for the respondent has cited the Transfer of Property Act, sections 106, 108 (*j*) and 111 (*h*), and the cases of *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee*, (1869) 7 B. L R., 152; *Durga Prasad Misser* v. *Brindaban Sookul*, (1871) 7 B. L. R., 159; *Doya Chand Shaha* v. *Anund Chunder Sen Mozumdar*, (1887) I.L. R., 14 Cal., 382; *Appa Rau* v. *Subbanna*, (1889) I. L. R., 13 Mad., 60., and *Venkatasamy Naick* v. *Muthuvijia Ragunada*, (1870) 5 Mad. H. C., 227.

Regarding the learned pleader's reference to the provisions of the Transfer of Property Act, I would only say that I have already in my judgment of reference expressed my opinion that the provisions of the Transfer of Property Act do not apply to this case as the defendant No. 2's lease is of date anterior to the [907] passing of that Act. The case of *Hari Nath Karmoker* v. *Rajendra Karmoker*, (1897) 2 Cal. W. N., 122, which I then cited, has now been fully reported in 2 C. W. N., 122. In the judgment in this case, I have referred to the case of *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee*, (1869) 7 B. L. R., 152, and stated that, in my opinion, it shows that previous to the passing of the Transfer of Property Act non-agricultural holdings might or might not be assignable. In the present case the lower Courts have both held that the land in dispute is not transferable by custom, and I do not see that it was ever contended on behalf of the respondents in the Courts below that it was transferable or assignable on any other ground. From the judgment of the Munsif it no doubt appears that the defendants in their pleadings did plead that the "*jama* was transferable according to law and custom." But the contention raised at the trial was only that it was transferable by custom and this plea was negatived by both Courts. Anyhow, there was no law before the passing of the Transfer of Property Act which made a lease of homestead land transferable otherwise than by custom.

I have nothing further to add to the remarks I have already made in my judgment of reference on this case of *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee*, (1869) 7 B. L. R., 152. The case of *Durga Prasad Misser* v. *Brindaban Sookul*, (1869) 7 B.L.R., 159 seems to me to lay down no general rule. On the contrary, JACKSON, J., observed that "everything must depend on the circumstances of the case," and in that case the defendant had been allowed to erect buildings on the land, and it was said that his holding was not a temporary one.

Then the case of *Doya Chand Shaha* v. *Anund Chunder Sen Mozumdar*, (1887) I. L. R., 14 Cal., 382, evidently refers to a *raiyati* holding, and not to a plot of homestead land. This is apparent from the terms of the judgment and is demonstrated by the fact that it was referred to and not followed in the case of *Kripamoyi Dabia* v. *Durga Gobind Sirkar*, (1887) I. L. R., 15 Cal., 89, which relates to a *raiyati* holding, and in which the learned Judges who decided it, said: "It seems to us that unless [908] the defendant can prove the tenure set up by him, viz., a permanent and transferable tenure, the plaintiff, the admitted landlord, is entitled to enter into possession, and this

view has been uniformly taken by this Court, as would appear from an examination of the case quoted above."

The cases of *Appa Rau* v. *Subbanna*, (1889) I. L. R., 13 Mad., 60, and *Venkatasamy Naick* v. *Muthaiyia Ragunada*, (1870) 5 Mad. H. C., 227, were also not cases concerning homestead land, and are, therefore, I think irrelevant.

In respect to the learned pleader's contention that there is a conclusive finding of fact by the lower Courts, I would only refer to the Privy Council case of *Ramgopal* v. *Shamskhaton*, (1892) I. L. R, 20 Cal., 93; L. R., 19 I. A., 228, which in my opinion effectually disposes of it.

The cases, I have cited in my judgment of reference may lay down no hard and fast rule on the subject, but the rule which I think should be deduced from them is, as I have already pointed out, that mere long possession of homestead land is not sufficient to justify the presumption of a permanent grant, and that before such a presumption can be made there must be something more, viz., either (1) the land having been let for the erection of *pucka* buildings or (2) a standing by on the part of the landlord, while the tenant without objection erects permanent buildings or effects substantial improvements on the land. In addition to the cases already cited, I would quote one more, viz., *Lalla Gopee Chand* v. *Luakut Hossein*, (1876) 25 W. R., 211, which I consider supports the view I take of this subject.

Taking this view of the matter, I must hold that the Court below were not justified in presuming that the defendant No 2 had a permanent and transferable interest in the land, and therefore that the suit should have been decreed. I accordingly decree this appeal and the suit with all costs in all Courts.

My judgment of reference dated 7th June 1897 should be read along with this judgment, as the first part of it

S. C. G. *Appeal allowed.*

NOTES.

[As regards the presumption of permanency drawn from buildings being erected on the land, see the Privy Council decision in 21 All., 196. See also (1908) 12 C.W.N., 987; (1903) 7 C.L.J., 309]

[909] APPELLATE CIVIL.

The 9th March, 1898.

PRESENT:

MR. JUSTICE TREVELYAN AND MR. JUSTICE BANERJEE.

Lala Hurro Prosad and another...........Defendants Nos. 6 and 7

versus

Basaruth Ali...........Plaintiff.*

Guardian—Power of Guardian to mortgage Minor's property—Act XL of 1858, section 18—Guardians and Wards Act (VIII of 1890), section 30, read with section 2, Retrospective effect of—Mortgage without sanction of Court.

A mortgage of a minor's property, made by his guardian holding a certificate under Act XL of 1858, without obtaining sanction of Court as required by section 18 of the Act, is absolutely null and void.

Section 2 of the Guardians and Wards Act (VIII of 1890) does not give retrospective effect to section 30, which, therefore, does not apply to a mortgage executed before the Act came into operation, so as to destroy its void character and render it merely voidable.

THE facts material to the report of this case and the arguments on both sides appear in the judgment of the High Court.

Defendants Nos. 6 and 7, auction-purchasers of the interest of the minors, appealed to the High Court.

Mr. *C. Gregory* and Babu *Satish Chandra Ghose* for the Appellants.

Dr. *Ashutosh Mukerjee* and Moulvie *Syed Mahomed Tahir* for the Respondent.

The **judgment** of the High Court (**Trevelyan** and **Banerjee, JJ.**) was as follows:—

In this case a guardian, who had taken out a certificate under Act XL of 1858 on the 27th of May 1884, executed a mortgage, purporting to charge the property of his wards. He did not obtain the sanction of the Civil Court as required by section 18 of Act XL of 1858. This suit is brought against the wards on the footing of the mortgage. Certain persons, who have purchased [910] the interests of the minors at auction sales, are also parties defendants. Two of the wards have attained majority; one has died, and is represented in this suit by his widow; the fourth is still a minor. The learned Munsif, before whom the case first came, dismissed the suit, on the ground that the mortgage, being without sanction, was void. He declined to try any other issue.

On appeal the learned District Judge has held that the mortgage was voidable, but has remanded the case for evidence to be taken as to the *bona fide* nature of the mortgage, and as to its having been executed for legal necessity. It is admitted before us by the learned Vakil for the respondent, and it is abundantly clear, that if the bond were void the suit must fail.

It is also admitted that the weight of the decisions of this Court treats mortgages made without sanction under section 18 as absolutely void. He, however, contends that the provisions of Act VIII of 1890 apply to this case,

* Appeal from order No. 314 of 1897, against the order of G. W. Place, Esq., District Judge of Sarun, dated the 7th of June 1897, reversing the order of Babu Anant Ram Ghose, Subordinate Judge of that District, dated the 30th of August 1895.

and that having regard to the terms of section 30 of that Act he is entitled to sue on the mortgage at any time unless it has been avoided by the ward.

In the view which we take of this case it is unnecessary for us to decide what is the effect of section 30, and how it could be applied to the facts of this case. It is also unnecessary for us to decide whether under any circumstances effect can be given to a voidable contract before the ward has attained majority, and has had an opportunity of finally ratifying or avoiding the contract.

In our opinion Act VIII of 1890 has no application to the present case. The mortgage was executed while the provisions of Act XL of 1858 were in force, and section 18 of that Act unquestionably applied to it at the time it was made. The question remains whether Act VIII of 1890 operates to destroy the void character of this mortgage, and to render it merely voidable. It would be somewhat extraordinary if the rights of parties to a transfer had been altered by subsequent legislation; section 30 in terms refers to a disposal of property in contravention of sections 28 and 29, and to nothing else. Section 28 has nothing to do with the present question. Section 29 only contains a prohibition against the disposal of property by Court-appointed guardians without the sanction of the Court. The words are " he *shall* **[911]** not." How this can refer to transactions antecedent to the Act, it is impossible to see. A statutory prohibition could have no reference to transactions which had been completed before the Act came into force. If Act XL of 1858 had contained no prohibition, and certificate holders had power to dispose of property without the sanction of the Court, could it have been argued that sections 29 and 30 of Act VIII of 1890 rendered voidable acts done before the Acts came into force, and which were valid according to the existing law?

It is contended before us that section 2 (2) of Act VIII of 1890 has the effect of applying section 30 to this transaction. We do not see how that section can have such effect.

In our opinion the mortgage being void no other issue arose.

We accordingly set aside the decree of the Subordinate Judge and restore that of the Munsif. The appellant is entitled to his costs in both Appellate Courts.

S. C. C. *Appeal allowed.*

NOTES.

[See also (1899) 2 O.C. 233 ; (1904) 17 C.P.L.R. 13.]

[25 Cal. 911]

The 27th January, 1898.

PRESENT:

MR. JUSTICE AMEER ALI AND MR. JUSTICE PRATT.

Nirmal Chunder Bandopadhya............Objector No. 1

versus

Saratmoni Debya............Petitioner.*

Will—Hindu Wills Act (XXI of 1870)—Indian Succession Act (X of 1865), section 50—Execution of a will, by impression of the fac simile *of the name, whether valid in law.*

A testator, who, for a number of years, was, as he was unable to write, in the habit of using a name stamp, which used to be attached by a servant to any document or paper he wanted to sign, executed a will, and under his direction a servant affixed the impression of his name stamp on the said document.

Held, that the execution of the will in this case was proper and came strictly within the meaning of the words used in section 50 of the Indian Succession Act.

THIS appeal arose out of an application by one Saratmoni Debya for the probate of the will of her deceased husband Janaki Nath Mookerjee. The *caveators* opposed the application on the [912] grounds that the alleged will of the deceased was not executed according to law, as only the name stamp of the testator was affixed on the will by his servant; that it was not a genuine document; and that at the time of the alleged execution of the will the testator was not in such a state of mind and health as to enable him to execute the said will, or to understand the purport or effect thereof. The learned District Judge of Hooghly, having held that the affixing of the name stamp by the testator's servant in the testator's presence and by his direction was a signature by another person within the meaning of section 50 of the Indian Succession Act, and also having held that the testator had the mental capacity when the will was so signed on the occasion of its execution allowed the application and granted probate of the will. From this decision the objector No. 1 appealed to the High Court.

Mr. *J. G. Woodroffe*, with him Babu *Boicunt Nath Das*, for the Appellant.

Babu *Dwarka Nath Chuckerbutty*, with him Babu *Surendra Nath Roy*, for the Respondent.

Mr. *Woodroffe*, on behalf of the appellant, contended that the affixing of the name stamp only by a third person was not sufficient, and the execution of the will was not proper within the meaning of section 50 of the Indian Succession Act, and he referred to the case of *Nitya Gopal Sircar* v. *Nogendra Nath Mitter*, (1885) I. L. R., 11 Cal., 429. Section 50 of the Act contemplates that either the testator shall sign himself or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction. In this case, the servant of the testator affixed his name stamp, though under his direction, but that would not be a signature by some other person on behalf of the testator within the meaning of the said section.

Babu *Dwarka Nath Chuckerbutty* for the Respondent.—Affixing a name stamp in the will by a third party is sufficient, and its execution is proper under the law. See the cases of *Jenkyns* v. *Gaisford*, (1863) 11 W. R., (Eng.) 854 : 3 Sw. & T., 93, and *In the goods of Emerson*, 9 L. R. (Ir.), 443.

* Appeal from Original Decree No. 151 of 1897, against the decree of J. F. Bradbury, Esq., District Judge of Hooghly, dated the 10th of February 1897.

[913] Mr. *Woodroffe* replied.

The **judgment** of the High Court (**Ameer Ali** and **Pratt, JJ.**) was as follows:—

This appeal arises out of an application by a lady named Saratmoni Debya for the probate of a will, dated the 15th November 1895, alleged to have been executed by her husband, Janaki Nath Mookerjee. The will was undoubtedly registered on the 18th of November 1895. Janaki Nath died on the 11th of December 1895, and it was propounded on the 17th January 1896.

Caveats were entered, one by a person named Nirmal Chunder Banerjee on the 24th February 1896, and the other on the 23rd January 1897, on behalf of the minor, Shibdhone Banerjee, by his father and guardian, Mani Lal Banerjee. In the *caveats* the *factum* of the will was impugned. It was stated that the alleged testator was not of a disposing mind; and it was contended that if the will was executed its execution was not proper under the law.

A considerable body of evidence has been adduced on behalf of the propounder of the will. Nirmal, who was the contesting objector, gave no evidence, and the learned District Judge, upon the circumstances and facts deposed to by the witnesses for the lady Saratmoni Debya, held that the will was genuine; that the testator was of disposing capacity; and that there was proper execution.

The *caveator* No. 1 has appealed to this Court, and the learned Counsel on his behalf has raised the same questions which were raised by the objector in the Court below. We shall deal with the questions relating to the *factum* of the will and the capacity of the testator under one head, leaving the question regarding the proper execution to be dealt with separately, both upon the facts as well as upon the law.

[The learned Judges then considered the evidence relating to the *factum* of the will, and continued.]

We think that all the circumstances point conclusively to the *factum* of the will or that occasion: *factum* in the sense that the testator was perfectly conscious and able to understand [914] what he was doing, and that his name, or the stamp of his name was attached to the will under his direction.

It is unnecessary to dwell further upon these two questions, because we agree with the District Judge in the opinion formed by him that, in spite of the infirmity from which Janaki suffered, and in spite of his paralysis and the difficulty he was under with regard to movement, etc., he was a person fully competent to make a will, and that he understood fully what he was doing at the time.

There remains now the question whether, if the will was executed on the 15th of November 1895, it was *properly* executed. We have already mentioned that it was registered on the 18th of November 1895. The Sub-Registrar, who has now retired from service, has given his evidence, and he has proved that he went to the residence of Janaki, whom he found perfectly conscious, and that he had a talk with him; that Janaki acknowledged the will; that at his instance he (Janaki) affixed his thumb-marks to the different pages; and that thereupon he attached his own signature to the will. Another witness, named Jugabundho Banerjee, did the same. The Sub-Registrar states that all this was done in the room where Janaki was lying and "in one and the same assembly;" giving rise to the distinct inference of fact that the witnesses to the impression of the thumb-marks, altogether three persons, including the Sub-Registrar, attached their signatures to the document about the same time in the presence of the testator and in the same assembly. The evidence

being to that effect, assuming that the contention to which we shall presently refer was well founded, and assuming even that the will was not properly executed on the 15th November 1895, inasmuch as Janaki himself did not attach his signature or mark to it, the defect would be removed and there would be proper execution before the Sub-Registrar.

But over and beyond this it appears to us that the objection which has been taken by the learned Counsel for the caveator regarding the proper execution of the will on the 15th of November is not well founded. His contention is that the stamp of Janaki's name was attached, not by Janaki, but **[915]** by somebody else; that consequently the act does not come within the meaning of section 50 of the Indian Succession Act, which was made a part of the Hindu Wills Act; and that, therefore, the execution was not valid under the law. Now section 50 runs thus: "Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or a mariner at sea, must execute his will according to the following rules:—*First*, the testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence, or by his direction" . . . . It is unnecessary to refer to the 2nd and 3rd clauses. The 1st clause gives sufficient indication of the objection raised. It is contended that the affixing of the stamp, the *fac simile* of Janaki's name, does not amount to proper execution, inasmuch as the only person under the section who is authorised to make a mark is the testator himself, and nobody else; and that if any other person is directed to sign for the testator, he may not affix his name-stamp, as that is equivalent to making a mark.

Now, under the English Wills Act, it has been held that the affixing of the *fac simile* of a name, either by the testator or by somebody else, is sufficient under the law. Section 9 of I Vic., c. 26, provided as follows: "That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction." The rest is immaterial. It will be noticed that in the English Act the words relating to the affixing of a mark do not occur; the reason for the introduction of those words in the Indian Act seems to us to be obvious.

In England there are not so many illiterate persons as in this country; and probably the Legislature considered it necessary that, in order to cover the case of the vast majority of people who are not sufficiently literate to sign their names, some provision should be made to enable them to make their wills by marks. In order to understand exactly the difference between signing and affixing the mark, it is necessary to explain what we think is meant by these words. We understand the word "signing" to mean the writing of the name of a person so that **[916]** it may convey a distinct idea to somebody else that the writing indicates a particula individualr whose signature or sign it purports to be. A "mark" is a mere symbol and does not convey any idea to a person who notices it, often even to the person who makes it. The Legislature, therefore, provides that so far as the testator is concerned, if he is literate, he may either sign his name, which would convey a distinct idea regarding the executant of the document, or, if illiterate, may fix his mark as an indication of his act as executant of the will. In the case of somebody else writing for him, it requires that he should write the name or put it in such a manner as would lead anybody else to see at once who the person was who executed the document. If that view be correct, it is evident that the impression of the *fac simile* of the name is not the making of a mark, but really the affixing the name to the document. The use of a pen and ink does not seem to be necessary for the

purpose of putting on the signature required. In the case of *Jenkyns* v. *Gaisford*, (1863) 11 W. R., (Eng.) 854 ; 3 Sw. & T., 93, the Judges indicate that the use of pen and ink was not necessary for signing, and that argument may be well applied to this case also. A person may sign or put his name down by means of types, or, if he uses a *fac simile* for signing his name, he may use it for his signature.

Now let us see what the facts of this case are. It appears that for a number of years Janaki had been in the habit of using a name stamp as he was unable to read or write. That name stamp used to be kept by a servant, and under Janaki's direction used to be attached to any document or papers he wanted to sign. That being so, it appears to us that the learned District Judge was perfectly right in holding that the execution of the will in this case was proper and came strictly within the meaning of the words used in section 50.

We think, therefore, for all those reasons that the order of the District Judge was right, and that this appeal ought to be dismissed with costs.

S. C. G. *Appeal dismissed.*

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[917] *The 16th July, 1897*

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE AMEER ALI.

Baidya Nath De Sarkar and another...... .....Plaintiffs

versus

Ilim and others...........Defendants.*

Bengal Tenancy Act (VIII of 1885), section 188—Right of fractional co-sharer to maintain a suit for enhancement of rent—Agreement with fractional co-sharer to pay rent separately, Effect of—Joint landlords.

A fractional shareholder cannot bring a suit for enhancement of rent. Under the provisions of section 188 of the Bengal Tenancy Act, where there are several joint-landlords, they must all join in bringing a suit for enhancement of rent ; an agreement in a *kabuliyat* by one tenant to pay an enhanced rent to some of the landlords, if, on measurement, the *jama* of his *jote* is increased, does not create a right to maintain such a suit by those landlords. Such a suit cannot be brought otherwise than under the terms of the Bengal Tenancy Act.

An agreement by a tenant with some of several joint-landlords to pay his share of the rent separately does not create a separate tenancy:

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* Appeal from Appellate Decree No. 293 of 1896, against the decree of Babu Baroda Prosunno Shome, Subordinate Judge of Mymensingh, dated the 3rd of December 1895, affirming the decree of Babu Phani Bhushan Mukerjee, Munsif of Iswargunge, dated the 31st of December 1894.

Gopal Chunder Das v. *Umesh Narain Chowdhry*, (1890) I.L.R., 17 Cal., 695, and *Hari Charan Bose* v. *Runjit Singh** approved of.

[918] *Panchanan Banerji* v. *Raj Kumar Guha*, (1892) I. L. R., 19 Cal., 610, and *Tejendro Narain Singh* v. *Bakai Singh*, (1895) I.L.R., 22 Cal., 658, distinguished.

THE facts of the case appear sufficiently from the judgment.

Babu *Jogesh Chunder Roy* for the Appellants.

Babu *Gobind Chunder Dey Roy* for the Respondents.

The **judgment** of the High Court (**Macpherson** and **Ameer Ali, JJ.**) was as follows :—

The plaintiffs are four-anna shareholders of a *taluk*, within which the first three defendants have a *raiyati* holding. They purchased a two-anna share of this *taluk* in 1287 (1880), and the other two-anna share in 1296

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* *The 7th September, 1896.*

PRESENT :

SIR W. COMER PETHERAM, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Hari Charan Bose............Defendant No. 1

versus

Runjit Singh............Plaintiff.†

THE facts of the case are fully set forth in the **judgments** of the High Court (PETHERAM, C.J., and BANERJEE and RAMPINI, JJ.), which were as follows :—

Banerjee, J.—This appeal arises out of a suit brought by the plaintiff respondent for a declaration of his title to a certain holding, and for an injunction restraining the defendant No. 1 from attaching or proceeding in execution against the same. The main allegations upon which the plaintiff bases his suit are these, namely, that the plaintiff purchased the holding in question in August 1892 at a sale in execution of a decree for rent obtained by a co-sharer in the superior tenure to which the holding is subordinate, in respect of his share of the rent ; that, previous to his purchase, that is, in March 1892, the defendant No. 1, who owns an eight-anna share in the *dar-patni*, and a two-anna share in the *patni*, of Taraf Kabilpore, in which the holding in question is situate, obtained a decree for arrears of rent due in respect of his said two shares ; that the defendant No. 1, having sought to sell the eight-annas and the two-annas shares in the holding on the allegation of such shares forming two separate *jotes*, the plaintiff intervened, but his intervention was unsuccessful ; and that the said shares of the holding do not constitute separate *jotes*, and the defendant is not entitled to bring them to sale in disregard of the rights acquired by the plaintiff by his purchase.

The defence was that the alleged holding of the plaintiff was not one holding, but consisted of four separate holdings, created by four separate leases granted to the plaintiff's predecessors in title on different dates : two, by the two-annas *patnidar* and the four-annas *patnidar* of Taraf Kabilpore in Aghran 1266, one by the two-anna *patnidar* in Magh 1266, and a fourth by the eight-anna *dar-patnidar* in Bysak 1267, the rights of the last two lessors having now vested in defendant No. 1, and that the defendant No. 1 was, therefore, entitled to proceed against the two tenancies, the one granted by the two-anna *patnidar* and the other by the eight-anna *dar-patnidar*, in execution of the rent decree obtained by him, notwithstanding the subsequent purchase by the plaintiff, the said rent being a first charge on the tenancies. It was not disputed in the Courts below that, if the case came under section 65 of the Bengal Tenancy Act, the defendant No. 1 would be entitled to proceed against the holding. But the main question was whether the case came under that section or not ; the plaintiff contending that it did not, because the leases relied upon by the defendant No. 1 did not create separate and distinct tenancies, whilst the defendant No. 1 contended that it did.

The Court of First Instance gave effect to the defendant's contention, and dismissed the suit. On appeal by the plaintiff, the Lower Appellate Court has accepted the plaintiff's

† Appeal from Appellate Decree No. 1695 of 1894, against the decree of F. Taylor, Esq., District Judge of Moorshidabad, dated the 31st of July 1894.

(1889). They say that, in 1287, the first [919] defendant executed a *kabuliyat* by which he agreed to pay to the plaintiffs their share of the rent separately, and also to pay an increased rent, if, on measurement an excess area was found. They allege that the area of the holding has been found by measurement to be in excess of the area for which the defendants were paying rent, and they bring this suit for an enhancement of the rent of the holding, including the increased area, and to get their share of the enhanced rent from the defendants.

It appears to be conceded that the different shareholders were collecting their share of the rent separately from the defendants. Both Courts have dismissed the suit on the ground that the plaintiffs, as fractional co-sharers, cannot maintain this suit for enhancement. The only question we have to determine in this appeal is whether the suit is maintainable. Apart from the *kabuliyat*, and in so far as it rests on the agreement of the defendants to pay the plaintiffs their share of the rent separately, we think that this suit is clearly not maintainable as a suit for enhancement, or as a suit for the rent of the area said to be in excess of the area for which the defendant was paying rent. This was held in the case of *Gopal Chunder Das* v. *Umesh Narain Chowdhry*, (1890)

contention as correct, reversed the decision of the first Court, and given the plaintiff a decree as prayed. Against that decree the defendant No. 1 has preferred this second appeal, and the learned Judges, who heard the appeal first, having differed in opinion, the case has been referred to me under section 575 of the Code of Civil Procedure.

The main contention in the appeal on behalf of the appellant is, that two tenures have been created in respect of a two-anna share, and an eight-anna share of certain lands in Taraf Kabilpore, by the two leases granted by the two-annas *patnidar* and the eight-annas *dar-patnidar* in Magh 1266 and in Bysak 1267 while the contention on the other side is that those two *pattas* have not the effect attributed to them, and that, in any view of the case, undivided shares in parcels of land cannot constitute distinct holdings within the meaning of the Bengal Tenancy Act. It was argued for the plaintiff respondent that the land was originally let out for the purpose of cultivating indigo, that the tentant was, therefore, a "*raiyat*" and not a "tenure-holder" within the meaning of section 5 of the Bengal Tenancy Act, that the tenancy can only be a "holding" and not a "tenure" within the meaning of that Act, and that the definition of "holding" as given in clause (9) of section 3 does not include an undivided share in any parcel or parcels of land such as goes to constitute each of the alleged separate tenancies in this case. I think this argument is sound. It is clear from the findings arrived at by the Lower Appellate Court, and from the leases relied upon by the appellant, that the tenancy or tenancies were *raiyati* tenancies and not tenures; and it has never been questioned that the plaintiff would be entitled to a decree if the case does not come under section 65 of the Bengal Tenancy Act. The whole question is, whether it comes under that section, or in other words, whether what the defendant No. 1 is seeking to proceed against in execution of his decree for rent, notwithstanding the plaintiff's purchase, is a "tenure" or "holding" within the meaning of that section; and, as already observed, it cannot be a tenure for the simple reason that the tenancy was created for the purpose of cultivation by the tenant presumably through hired labour. The question, therefore, reduces itself to this, namely, whether the leases relied upon by defendant No. 1 have created separate holdings within the meaning of section 65, or whether there is but one holding under the proprietors of the entire sixteen annas? Now a "holding" is thus defined in section 3, clause (9): "'Holding' means a parcel or parcels of land held by a *raiyat* and forming the subject of a separate tenancy." Does this mean an entire parcel or entire parcels, or may it also include an undivided fractional share of a parcel or parcels of land? Evidently the definition applies only to an entire parcel or entire parcels, and is not intended to include an undivided share in a parcel or parcels, and the reason seems to be obvious. A *raiyati* holding, which from the very definition of a "*raiyat*" in section 5, sub-section 2, means land occupied by a *raiyat* for the purpose of cultivation, can be ordinarily held only in its entirety, and the cultivation of an undivided fractional share of a parcel of land will be ordinarily meaningless. A "tenure," on the other hand, which is the interest of a tenure-holder, who, as defined in section 5, sub-section 1, is a person who has acquired a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, may relate only to an undivided fractional share in land without leading to any practical difficulty. And it is for this reason that whilst "tenure" is defined as the interest of a tenure-holder, or an under-tenure-holder, "holding" is defined, not as the interest of a *raiyat* but as a parcel or parcels of land held by a *raiyat* and forming the subject of a separate tenancy

I. L. R., 17 Cal., 695. The agreement of the defendant to pay the [920] plaintiffs their separate share of the rent did not constitute a separate tenancy under the plaintiffs. Under section 30 of the Tenancy Act, the landlord of a holding of an occupancy *raiyat* may, subject to the provisions of the Act, institute a suit to enhance the rent on certain grounds, the grounds alleged in this case being that the defendant was holding at a rate which was below the prevailing rate. Now the plaintiffs are not the "land-lords" of this holding within the meaning of this section; they are only some of the landlords. The holding is an entire one, and there is no separate holding as regards the share of the plaintiffs. That was held in the case of *Hari Charan Bose* v. *Runjit Singh* (*ante*, p. 917). The plaintiffs cannot, therefore, enhance the rent of the entire holding, because, under section 188, all the landlords must join as plaintiffs in a suit for that purpose, and they cannot enhance the rent of their share of the holding as there is no separate holding under them. The case of

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I may add that if the definition of a holding were to include an undivided fractional share in a parcel or parcels of land, the definition would be incompatible with the provisions of sections 121 and 122 of the Bengal Tenancy Act which relate to the distraint of crops or other products of holdings. It was argued for the appellant that, if this view is correct, not only would the separate tenancies created by the several leases in this case, not come under the definition of "holding" but the aggregate of the tenancies created thereby would also be

a separate tenancy, as it cannot be said that tenancies created at different times, and differing in some of their incidents, constitute "a separate tenancy" within the meaning of the definition; and if that was so, tenancies of the kind in question in this suit, which are by no means an uncommon class of tenancies, would have to be excluded from the scope of the Bengal Tenancy Act. I do not think that we are driven to such a consequence as that. Though the tenancies created by the several documents are, in one sense, separate tenancies, no doubt, still, having regard to the fact that one important element for consideration, namely, the land in respect of which the tenancy or tenancies are created, remains still one and undivided, we may disregard the diversity in the comparatively immaterial elements, namely, the time of creation of the tenancies, and the mode of payment of the rent that occurs in the several leases, and treat them all as combining in the constitution of one tenancy, especially when we find that the rents reserved in the several leases are but the aliquot parts of a whole, such parts corresponding to the shares of the grantors of the leases. Great reliance was placed upon the case of *Panchanan Banerji* v. *Raj Kumar Guha*, (1892) I. L. R., 19 Cal., 610, as showing that the leases granted by undivided co-sharers in certain cases go to constitute distinct tenancies. That case, however, is quite distinguishable from the present, as that was a case in which the lease related not to a *raiyati* holding, but to an *ousut taluk* or tenure. Some reliance was also placed on the case of *Jardine Skinner and Co.* v. *Surut Soondari Debi*, (1878) L. R., 5 I. A., 164: 3 C. L. R., 140, in which their Lordships of the Privy Council held that a right of occupancy might be acquired in an undivided share in land, and also upon the case of *Gur Buksh Roy* v. *Jeolal Roy*, (1888) I. L. R., 16 Cal., 127, in which a somewhat similar view was taken; but those cases were under the old law, Bengal Act VIII of 1869, which contained no definition of the term "holding" such as we have in the Bengal Tenancy Act. For the foregoing reasons I agree with Mr. Justice RAMPINI in thinking that the Court of Appeal below was right in its decision; that, what the defendant No. 1 is seeking to proceed against, are not distinct holdings within the meaning of the Bengal Tenancy Act, but are only undivided shares in a holding; and that the defendant No. 1 is only one of a body of joint landlords. That being so, I think this appeal ought to be dismissed with costs.

PETHERAM, C. J.—An area of land, consisting of about 1,160 *bighas*, was owned by four groups of fractional sharers. One group being the owners of eight annas, another of four, and the two others of two annas each. Each of these groups about the year 1859 let its own share to Mr. Laruletta in perpetuity at an agreed rental by a separate lease for cultivation, and under these four leases Mr. Laruletta held and cultivated the whole of the 1,160 *bighas* until his interest in it was purchased by Mr. Howard. Afterwards a decree was obtained by the lessor of one of the leases against Mr. Howard. And after that decree had been passed all Mr. Howard's interest in the land was sold under it and purchased by the plaintiff.

The question for decision in this case is, whether the lessee under each of the four leases is a permanent tenure-holder or a *raiyat* holding at fixed rates, or an occupancy *raiyat* within the meaning of section 65 of the Tenancy Act, and the rent a first charge on the holding, or whether all the grantors of the four leases are joint landlords within the meaning of section 188 and the 1,160 *bighas* of land one holding under them all.

Punchanan Banerji v. *Raj Kumar Guha*, (1892) I. L. R., 19 Cal., 610, which was relied upon by the appellants, is clearly distinguishable. That case turned entirely upon the particular terms of the *kabuliyat*, and it was, moreover, a suit to enhance the rent on account of the plaintiffs' share of a tenure and had nothing to do with a *raiyati* holding.

[921] Then it is contended that the plaintiffs are entitled, according to the terms of the *kabuliyat*, and apart altogether from the provisions of the Tenancy Act, to enhance the rent of the defendants. The *kabuliyat*, which has not been quite correctly translated in the translation put before us, was for a term of three years, from 1287 to 1289. It deals with the holding as an entire holding, and the first defendant, who alone executed it, **[922]** agreed to pay the plaintiffs separately their share of the rent. Then, there is another provision upon which the appellants relied, which is to this effect: "If,

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The Subordinate Judge took the former view, the District Judge the latter. I think that the view taken by the Subordinate Judge is the correct one.

The grantee under the four leases is certainly the tenant of the land and as certainly a *raiyat* holding at fixed rates, as he acquired the land for the purpose of cultivation ; and if he is a tenant of all the land, it must, I think, follow that he is the tenant under each group of the undivided fractional share which the group has let to him and of which it has put him in possession ; but all the groups are not joint landlords of the tenant because he has made no contract with them jointly ; for this reason section 188 cannot apply to this case, and the only question is, whether what the tenant holds under each of the four leases is either a "tenure" or a "holding" within the meaning of section 65.

I have no doubt it is a holding. Section 2, sub-section 9, defines a "holding" as "a parcel or parcels of land held by a *raiyat* and forming the subject of a separate tenancy," and the argument for the plaintiff is that the use of the words "parcel or parcels of land" excludes the idea that a share though undivided can be a holding. I do not think this is the case. The owner of an undivided fractional share in a parcel of land is the owner of that share in every part of it, and a tenant in possession of such an undivided share is the holder of an undivided share in every part of it, and is, I think, properly described as the holder of the parcel, because he is holder of an undivided share in every part of it.

I would decree the appeal and restore the judgment of the Subordinate Judge, but as Mr. Justice RAMPINI is of a different opinion, the case will be laid before a third Judge.

RAMPINI, J.--The plaintiff purchased a certain *jote* or holding in the possession of the defendant No. 2 on the 15th July 1892 in execution of a decree for arrears of rent. The defendant No. 1, who is owner of an eight-annas of a *darpatni* and of two-annas of a *patni* of this *jote*, obtained a decree for his share of the rent, due from the defendant No. 2, on the 30th March 1892 In execution of this decree he has attached and had proclaimed for sale ten-annas of the holding, alleging that the defendant No. 2 held two separate holdings, consisting of eight annas and two-annas, respectively, of the original *jote*, purchased by the plaintiff in 1892. The plaintiff objected to the proposed sale, on the ground that there were no such separate *jotes*, or holdings, and that the entire *jote* had been purchased by him. Failing in his intervention in the course of the proceedings taken in execution of the defendant No. 1's decree, he has instituted this suit to have it declared that there are no separate *jotes* of eight-annas and two-annas each, on which the defendant No. 1, as the holder of a decree for rent, has a first charge under section 65 of the Tenancy Act, and that the entire *jote* is his by right of purchase; and that the defendant No. 1 cannot proceed against a ten-annas share of it.

The Subordinate Judge dismissed the suit, holding that the defendant No. 2 did hold two separate holdings of eight-annas and two-annas of the original *jote*. The District Judge, however, reversed the Subordinate Judge's decision, as he was of opinion that the original holding had never been sub-divided, though the rent payable for it to the various *patnidars* and *dar-patnidars* had been distributed, and was payable in separate shares.

The defendant No. 1 now appeals, and on his behalf it has been contended that the learned District Judge has misinterpreted the documents (Exhibits H, A and R), which, it is said, show that the holding itself was sub-divided, and not merely that its rent was distributed between the co-sharer landlords.

I must premise that as the finding of the District Judge that the defendant No. 2 never held separate holdings, and that the holding purchased by the plaintiff has not been sub-divided, is a finding of fact, it cannot be disturbed by this Court in second appeal, unless the learned Judge has clearly misinterpreted the terms of these documents, and I would add

according to your measurement *jamabandi*, the *jama* of my *jote* is increased, I shall pay rent and give *kabuliyat* without objection according to the increased rate." That, we think, gives the plaintiffs no right to maintain a suit of this description. It merely provides, we think, that if the rent [923] of the entire holding is increased, increased rent shall be paid to the plaintiffs for their share in the holding; but the rent cannot be increased otherwise than under the terms of the Act. There is no agreement to pay any specific amount of rent to the plaintiffs at any further time. So far, therefore, of the terms of the *kabuliyat* are concerned, we think it gives the plaintiffs no [924] right to maintain a suit of this description, either for enhancement of the rent of the holding, or for the rent of the increased area; nor do we think that the plaintiffs would be in any better position, so far as regards their right to bring a suit of this [925] description, if they limited their claim to recover rent for an excess area in proportion to the two-anna share of the *taluk* in respect of which the *kabuliyat* was given. The case of *Tejendro Narain Singh* v. *Bakai*

that there is unquestionably other evidence on the record besides these exhibits on this point, viz., the *dakhilas* for rent granted by the landlords, and application for execution filed by the defendant No. 1 himself, so that the determination of the question as to whether the land held by defendant No. 2 is one holding or several holdings does not rest entirely on the interpretation of these documents.

I, however, see no reason for thinking that the learned District Judge has misinterpreted the terms of exhibits H, A and R.

Exhibit H is a *kabuliyat* executed in 1259 by the predecessor of the defendant No. 2 in favour of one of the eight-annas *patnidars*. It speaks of 1,150 *bighas* of *diara* land, known as "Guru Persad Sirkar," being held under a *roka* from the *patnidars*. It is said that in 1259 the executants of the *kabuliyat*, viz., Messrs. A. and J. Larulетta, held "the whole of this land," that the rent of it was Rs. 772, and that they agreed to pay separately Rs. 386 per annum to the eight-annas *patnidars* for his share of the rent. This is certainly strong evidence that the 1,150 *bighas* form one holding, originally acquired for the purpose of the cultivation of indigo in the name of one Guru Persad Sirkar, and that at the time of execution of this *kabuliyat* the rent only was distributed between the then landlords.

The next document A is a *pottah* granted to Mr. J. Larulетta on the 6th Magh (not Aughran) 1266, by the two-annas *patnidars* of the holding, the total area of the whole land is given, viz., 1,160 odd *bighas*. The boundaries of the whole of the land are described. The lessee is enjoined to keep these boundaries intact, and a permanent lease is granted for the lessor's share of the land on payment of a rent of Rs. 117 odd, after deduction from Rs. 942 odd, the total rent of the holding, of Rs. 824 odd, the rent due to the owners of the remaining 14 shares who are specified.

The other document (exhibit R) is another *pottah*, dated 31st Bysack 1267, executed by the owners of the eight-annas *dar-patni* in favour of the same predecessor of the defendant No. 2, viz., Mr. J. Larulетta. It is couched in similar terms to those of exhibit A. It describes the holding as one parcel of land, gives the boundaries of this parcel, grants a permanent lease of the executant's eight-annas share "for the purpose of cultivating indigo and other crops thereon," and stipulates for the payment to the executants of a rent of Rs. 471 odd, being half of the total rent of the holding of Rs. 942 odd.

Both these documents, exhibits A and R, in my opinion, support the view taken by the District Judge that the original holding of 1,160 bighas was never sub divided, but that only the rent of it was distributed.

There is, however, one provision in the documents A and R, which it is contended is inconsistent with this view. Both documents contain provisions that the land within the specified boundaries "shall be surveyed at the interval of every five years. But this does not seem to me to point to the conclusion that the holding was sub-divided. Neither document contains any stipulation that the executants themselves are to be at liberty to survey the lands. The land referred to is the land within the boundaries mentioned in the *pottahs*, that is, the whole 1,160 bighas, or in other words, the whole holding. The measurement of this land would have to be made by all the landlords jointly. There is certainly no provision that the *patnidars* and *dar-patnidars* may each independently measure either all the lands, or the lands appertaining to the share of each, which latter step they could not take, the lands appertaining to the share of each being undivided and undistinguishable from the lands of the others.

Singh, (1895) I. L. R., 22 Cal., 658, which the appellants relied upon, is quite distinguishable. There the tenant had given a [926] *kabuliyat* before the Tenancy Act came into force for a term of seven years, which expired after the Tenancy Act came into force, and he agreed to pay rent separately to the plaintiff for that term of seven years, and, after the expiry of that term, to pay a fixed sum in case he failed to execute a fresh *kabuliyat*. The suit [927] was brought for that fixed sum upon the express terms of the agreement,

I may mention that, according to exhibit O, the rent due to its executant is to be paid quarterly, while according to exhibit R, the rent stipulated for is to be paid monthly. These provisions are, however, mere stipulations for the payment of the rent entered into by the parties for the convenience of the landlords. They in no way affect the question of the division or non-division of the entire holding.

Several cases have been alluded to by the lower Courts in their judgments and have been discussed before us. The first of these is the well-known case of *Guni Mahomed* v. *Moran*, (1878) I. L. R., 4 Cal., 96. That case decides that when a tenant has agreed to pay a co-sharer landlord his share of the rent separately, he can be sued separately for arrears of such rent, but he cannot be sued for a *kabuliyat*, "for the grant and acceptance of a binding lease of the separate share," it is said, "cannot exist contemporaneously with the original lease of the entire *jote*." I do not, however, understand this decision as laying down a general rule to the effect that the granting of a *kabuliyat* of any kind necessarily operates as the creation of a new and separate tenancy. If it does, it is an *obiter dictum*, but no such rule would seem to me to be laid down in this case. Whether a *kabuliyat* creates a new and separate tenancy or not, and effects a sub-division of the holding or not, must, I think, depend on its terms. A *kabuliyat* merely stipulating for the payment of a certain share of the rent by monthly or quarterly instalments, would not seem to me to operate as creating a new tenancy, or as sub-dividing a holding, and this is all, in my opinion, that the *pottahs*, exhibits A and R, provide for.

This principle that the effect to be given to a *kabuliyat* must depend upon its terms is apparently impliedly admitted in the case of *Panchanan Banerji* v. *Raj Kumar Guha*, (1892) I. L. R., 19 Cal., 610, which is the second of the cases referred to by the lower Courts and discussed before us. In this case it was held, upon the terms of the *kabuliyats* executed by the defendant's predecessor, that a separate tenancy had been created. But the terms of that *kabuliyat* were very different from those of exhibits A and R in this case. In the *kabuliyat* in *Panchanan Banerji's* case, the area of the land "which proportionately would belong to the plaintiff," the co-sharer landlord, was set out. It was estimated at 661 *bighas*. The plaintiff, however, on measurement made it 11 *bighas*, and the Court after measurement held it to be 679 *bighas*. Now this is exactly what exhibits A and R in this case do not do.

As already pointed out, they give the boundaries and area of the entire holding, and make no attempt to estimate the proportionate areas of land liable for the shares of the rent payable to the executants of each of them, or to specify their boundaries. Then the *kabuliyat* in *Panchanan Banerji's* case, (1892) I. L. R., 19 Cal., 610, gave the plaintiff a right to measure the land, and for the reasons already given I do not think that exhibits A and R give such a right to the co-sharers landlords who executed them.

The case of *Lalun Monee* v. *Sona Monee Dabee*, (1874) 22 W. R., 334, has also been cited by the District Judge. In that case it has been said: "If the evidence shows that the amounts were paid as aliquot parts of the whole rental, that would go to show that the tenure was one." That is exactly how the rent payable to each co-sharer in this case is treated in exhibits A and R.

For these reasons I agree with the District Judge in concluding that there was no division of holdings in this case, but merely a distribution of the rent, and, that being so, the defendant No. 1 cannot proceed to sell his eight-annas and two-annas shares of the defendant No. 2's holding, which was purchased by the plaintiff in July 1892, as if they were separate and distinct *joles*. Nor can he sell these shares as a share or shares of the original holding, because the whole *jote* has already been purchased by the plaintiff, and under the Full Bench ruling in *Beni Madhub Roy* v. *Jaod Ali Sircar*, (1890) I.L.R., 17 Cal., 390, he, being a "fractional co-sharer 'landlord,' must pursue his remedies to recover his share of the rent under the ordinary law of the country and independently of the Bengal Tenancy Act." But independently of section 65 of the Bengal Tenancy Act, the defendant No. 1 has no right to proceed against a share of the holding, for it is only under the provisions of section 65 that he can have a first charge upon a property which is no longer the property of his judgment-debtor but that of a third person.

I, therefore, consider that the plaintiff is entitled to the declaration that he seeks for, and I would accordingly dismiss this appeal with costs.

and it was held that as the *kabuliyat* was given before the Tenancy Act came into operation, and there was an express agreement to pay a fixed sum on the expiry of the term, the plaintiffs could maintain the suit on the terms of the agreement, apart from the provisions of the Tenancy Act. That is not the case here, as we think that no suit either to enhance the rent, or [928] to recover rent for the alleged excess area, could be brought otherwise than under the terms of the Tenancy Act. The decision appealed from, therefore, appears to us to be right, and we dismiss the appeal with costs.

S. C. B. *Appeal dismissed.*

NOTES.

[I. **PARTIAL INTEREST**—

1. Section 188A was inserted in the Bengal Tenancy Act, 1885, by Bengal Act I of 1907, and it provides for the procedure in suits by joint landlords.

2. All the fractional shareholders must join in the suit :—(1912) 15 I.C., 847.

In (1913) 20 I. C., 659 (Cal.,) it was held insufficient that the co-sharers who had been unwilling to join as plaintiffs had been joined as defendants.

3. In (1899) 27 Cal., 417, this decision was applied to the converse case of a co-sharer tenant claiming the benefit of section 52, Tenancy Act, 1885.

4. Although the landlords can collect rents on their several separate leases, the tenancy is one and consequently the tenant must bring one application against all the co-sharer landlords for the determination of the incidents of the tenancy :—(1913) 20 I. C., 820 (Cal.).

5. In (1899) 26 Cal., 937, it was held that the Bengal Tenancy Act did not contemplate or provide for the sale of a holding at the instance of one only of several joint landlords who had obtained a decree for the share of the rent separately due to him and that when an occupancy holding, not transferable by custom or local usage is sold in execution of a decree obtained by one of several joint landlords for the share of the rent separately due to him, the purchaser acquires nothing by the purchase, the judgment-debtor having no saleable interest in the holding ; see also (1902) 2 C. L. J., 10.

6. The effect of a consent on the part of some of several co-sharers to an alienation by the tenant was considered in (1909) 10 C. L. J., 618.

Upon the validity or otherwise of alienations by the tenant of occupancy holdings apart from custom or local usage, see (1914) 42 Cal , 172 F. B.

7. As to when there is a separate tenancy, see also (1905) 2 C. L. J., 535 ; (1903) 7 C. W. N., 670.

8. In (1902) 8 C. W. N., 192 it was held that a *raiyati* right could be acquired in a share in a tank forming an integral portion of an agricultural holding situated on its bank.

II. **'HOLDING'**—

'Holding' in sec. 30 of the Bengal Tenancy Act, 1885, means an entire holding :—(1897) 25 Cal., 917 ; (1902) 2 C. L. J., 10 ; (1898) 2 C. W. N., 680 ; (1912) 16 C. L. J., 9 : 16 C. W. N., 877.]

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XI of 1890. See PREVENTION OF CRUELTY TO ANIMALS ACT.
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I of 1895. See PRESIDENCY SMALL CAUSE COURTS ACT, 1895.
VIII of 1897. See REFORMATORY SCHOOLS ACT.
X of 1897. See GENERAL CLAUSES CONSOLIDATION ACT.
Done in good faith under belief it is justified by Law. See WRONGFUL RESTRAINT.
Effect of Repeal of. See REFORMATORY SCHOOLS ACT.

Action on the Contract—

See MINOR.

Administration

Of estate of Shia Mahomedan. See MAHOMEDAN LAW.
Suit for. See WILL.

Administrator-General-

Certificate of. See INTEREST ACT.
Right of, to commission. See WILL.

Administrator-General's Act—

II of 1874 —

s. 35. *Right of creditors to immediate payment in full if assets sufficient—"Rateable payment." Meaning of - Costs- Meaning of "shall be liable to pay"—Succession Act (X of 1865), s. 282 Probate and Administration Act (V of 1881), s. 104.* In a suit by a creditor, if his demand be uncontested or proved and the executor admits assets, the plaintiff is entitled at the hearing to an order for immediate payment without taking the accounts. The admission of assets for the payment of a debt is also an admission of assets for the purposes of the suit and extends to costs if the Court thinks fit to give them. There is nothing in s. 35 of the Administrator-General's Act (II of 1874) which qualifies or restricts or otherwise interferes with the right of a creditor to demand immediate payment of his claim in full when the realizable assets in the hands of the Administrator-General are sufficient for the immediate payment of all claims in full. The "rateable payment" referred to in the above section, as well as in s. 282 of the Succession Act (X of 1865), and in s. 104 of the Probate and Administration Act (V of 1881), is rateable payment *out of the assets*; it is nowhere provided that it shall be made out of the net income of the estate or any other specific part of the assets. The language ("Shall be liable to pay the costs") used in clause 1 of s. 35 of the Administrator-General's Act (II of 1874) shows that it was intended, not to impose upon a creditor to whom the condition of exemption was inapplicable, an absolute

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Administrator-General's Act— *(continued.)*

II of 1874—*(continued.)*

obligation to pay the costs of the suit, but to leave a discretion to the Court to relieve him of the obligation if the circumstances of the case required it. *James* v. *Young* referred to.

OMRITA NATH MITTER *v.* ADMINISTRATOR-GENERAL OF BENGAL ... XXV 54

s. 54. See WILL.

Admission of Title—

Against minor. See MINOR.

Adopted Son—

Right of, in lifetime of adoptive mother. See HINDU LAW, WILL.

Adoption—

See HINDU LAW.

Suit based on allegation of validity of. See LIMITATION ACT, ART. 119.

Suit to set aside. See LIMITATION ACT, ARTS. 92, 93.

Adverse Possession—

See LIMITATION ACT, ART. 121.

Of Insolvent. See LIMITATION ACT, ART. 180.

Affidavit—

Sufficiency of. See PRACTICE.

Age—

Misrepresentation as to. See MINOR.

Age of Child—

Proof of. See EVIDENCE ACT, S. 32.

Agent—

Authority of. See ARBITRATION.

Of manager of Railway. See RAILWAYS ACT, S. 77.

Of party to suit. See INSPECTION OF DOCUMENTS.

Receipt given by. See BENGAL TENANCY ACT, S. 56.

Agreement—

As to rent, varying lease. See LEASE.

Comprising matters not subject of suit. See COMPROMISE OF SUIT.

For satisfaction of decree. See EXECUTION OF DECREE.

Made out of Court. See COMPROMISE OF SUIT.

To pay rent separately, Effect of. See BENGAL TENANCY ACT, S. 188.

Void. See LANDLORD AND TENANT.

Alienation—

By manager of endowment. See HINDU LAW, ENDOWMENT.

By widow. See PRIVY COUNCIL, PRACTICE OF.

Direction against. See HINDU LAW, WILL.

Of part of tenure. See BENGAL TENANCY ACT, S. 50.

Animal—

See PREVENTION OF CRUELTY TO ANIMALS ACT.

Antecedent Debt—

See HINDU LAW, JOINT FAMILY.

Appeal—

See ARBITRATION: CIVIL PROCEDURE CODE, SS. 525, 526 CONTRIBUTION, SUIT FOR: LETTERS PATENT, HIGH COURT, CL. 15.

Arbitration—Validity of award—Judgment in accordance with an award—Code of Civil Procedure (Act XIV of 1882), ss. 521 and 522. An appeal will lie against a decree given in accordance with an award under s. 522 of the Code of Civil Procedure, when the award upon which the decree is based is not a valid and legal award. *Debendra Nath Shaw* v. *Aubhoy Churn Bagchi*, *Joy Prokash Lall* v. *Sheo Golam Singh*, *Bindessuri Pershad Singh* v. *Jankee Pershad Singh*, *Lachman Das* v. *Brij Pal*, and *Venkayya* v. *Venkatappayya* referred to. A Court is justified in holding that an award is not valid and binding upon the defendant, when the

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Appeal—(*continued.*)

arbitrator was the retained pleader of plaintiff, and no disclosure of this fact was made, before the arbitrator was appointed, to the defendant who was consequently unaware of it.

KALI PROSANNO GHOSE *v.* RAJANI KANT CHATTERJEE ... ... XXV 141

Chota Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879), *ss.* 37, *cl.* (4), 39, 137 *and* 139—*Rent, Suit for—Appeal in cases where the aggregate amount claimed is above* Rs. 100. An appeal lies to the Judicial Commissioner and not to the Deputy Commissioner from a decree passed by the Deputy Collector, in a suit for rent, where the aggregate amount of rent claimed under s. 39, Bengal Act I of 1879, is above Rs. 100.

PRIAG NATH SAH DEO *v.* MURA MUNDA ... ... XXIV 249

Common ground of. See CIVIL PROCEDURE CODE, S. 424.

Dismissal of. See JUDGMENT.

Dismissal of, Effect of. See DECREE.

Dismissal of, for default. See REVIEW.

Form of judgment on. See JUDGMENT.

From order remanding case. See SECOND APPEAL.

Lower Burmah Courts Act (XI of 1889), *s.* 40—*Burmah Courts Act (XVII of* 1875), *s.* 49—*Probate and Administration Act (V of* 1881), *ss.* 3 *and* 86—*Code of Civil Procedure (Act XIV of* 1882), *ss.* 595 *and* 614. A decree passed by the Recorder of Rangoon in a suit for grant of probate of a will is a final decree passed by him in the exercise of Original Civil Jurisdiction. No appeal lies to the High Court from a final decree passed by the Recorder of Rangoon in the exercise of Original Civil Jurisdiction, where the value of the subject-matter of the suit is above ten thousand rupees, but an appeal lies to Her Majesty in Council.

ESOOF HASSHIM DOOPLY *v.* FATIMA BIBI ... ... XXIV 30

Order appointing Commission to effect partition after preliminary decree—Interlocutory order—Effect of not appealing from order—Civil Procedure Code (XIV of 1882), *ss.* 2, 244, 591. *Held*, by the majority of the Full Bench (O'KINEALY, MACPHERSON, TREVELYAN and BANERJEE, JJ.) that an order passed in a suit for partition, subsequently to the preliminary decree appointing a commission to make the partition, is not an order in execution, and, therefore, is not appealable under s. 244 of the Civil Procedure Code. It is an interlocutory order pending the suit which has not been finally decided; and the appellant may take objection to it in an appeal against the final decree. MACLEAN, C.J., thought it unnecessary under the circumstances to decide the point.

JOGODISHURY DEBEA *v.* KAILASH CHUNDRA LAHIRY ... ... XXIV 725

Order granting review of judgment—Civil Procedure Code (Act XIV of 1882), *s.* 629—*Grounds of appeal.* No appeal lies from an order granting a review of judgment except in cases specified in s. 629 of the Civil Procedure Code. *Bombay and Persia Steam Navigation Company* v. *S. S.* "*Zuari*" followed. *Har Nandan Sahai* v. *Behari Singh* and *Baroda Churn Ghose* v. *Gobind Proshad Tewary* referred to. That the Court which has granted the review has done so without sufficient reasons is not a valid ground of appeal under s. 629.

MUNNI RAM CHOWDHRY *v.* BISHEN PERKASH NARAIN SINGH ... XXIV 878

Order under Civil Procedure Code (Act XIV of 1882), *s.* 293, *on defaulting purchaser to make good deficiency on resale—Second appeal—Sale in execution of decree—Civil Procedure Code (Act XIV of* 1882), *ss.* 244, 313—*Misdescription of property in proclamation of sale.* Both an appeal and a second appeal lie from an order under s. 293 of the Civil Procedure Code, directing a defaulting purchaser at an execution-sale to make good the deficiency of price happening on a resale owing to his default. *Sree Narain Mitter* v. *Mahatab Chand*, *Sooruj Buksh Singh* v. *Sree Kishen Doss*. *Joobraj Singh* v. *Gour Buksh Lall*, *Baij Nath Sahai* v. *Moheep Narain Singh* and *Amir Baksha Sahib* v. *Venkatachala Mudali* followed. *Deoki Nandan Rai* v. *Tapesri Lal* referred to and discussed. In this case it was held on appeal, reversing the decision of the lower Courts, that under the circumstances the purchaser was not liable for the deficiency.

KALI KISHORE DEB SARKAR *v.* GURU PROSAD SUKUL ... ... XXV 99

Right of. See COMPLAINT, DISMISSAL OF.

Second. See LANDLORD AND TENANT: 'RES JUDICATA.'

Succession Certificate Act (VII of 1889), *ss.* 9 *and* 19—*Order granting certificate, conditional, upon giving security.* Where, on an application for a certificate of succession under the Succession Certificate Act (VII of 1889), an order was made

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Appeal—*(concluded.)*

granting the certificate conditionally upon the applicant's giving security : *Held*, that this was an order "granting, refusing, or revoking a certificate" within the meaning of s. 19 of the Act, and that, therefore, an appeal would lie therefrom. *Bhagwani* v. *Manni Lal* dissented from.

RADHA RANI DASSI *v.* BRINDABUN CHUNDRA BASACK ... ... XXV 320

Withdrawal of, from District Court. See HIGH COURT, JURISDICTION OF.

Appeal in Criminal Case—

Criminal Procedure Code (Act X of 1882). *ss.* 101, 520, 522—*Order as to restoration of immoveable property—Jurisdiction of Appellate Court to reverse such an order.* There is no appeal from an order restoring possession of immoveable property under s. 522 of the Criminal Procedure Code (Act X of 1882), nor can such an order be regarded as an integral part of the judgment appealed from, so as to stand or fall according as the judgment is upheld or reversed. *Basudeb Surma Gossain* v. *Naziruddin*, *Queen-Empress* v. *Fattah Chand*, *In re Annapurna Bai* and *Rodger* v. *Comptoir D'Escompte de Paris* referred to.

RAM CHANDRA MISTRY *v.* NOBIN MIRDHA ... ... XXV 630

Appeal to Commissioner—

See JURISDICTION OF CIVIL COURT.

Omission to bring. See RIGHT OF SUIT.

Appealable Order—

Effect of not appealing against. See RIGHT OF SUIT.

Appellate Court –

Additional evidence in. See SECOND APPEAL.

Decree of. See MORTGAGE.

Power of, to add parties as respondents. See CONTRIBUTION, SUIT FOR.

Powers of. See EVIDENCE.

Application—

In accordance with Law. See LIMITATION ACT, ART. 179.

To determine incidents of tenure. See BENGAL TENANCY ACT, S. 158.

To sue in forma pauperis, Refusal of. See LIMITATION ACT, S. 4.

Approver –

Prosecution of. See PRACTICE.

Arbitration—

See APPEAL: CIVIL PROCEDURE CODE, SS. 525, 526.

Award—Decree in accordance with award with slight modification—Appeal—Illegal award—Reference applied for by agent without authority—Knowledge and tacit ratification by principle—Civil Procedure Code (1882), s 522. In a suit which was defended by an agent (*am-mukhtar*) on behalf of the defendant, the agent applied for a reference to arbitration, although he had no power to do so under the *am-mukhtarnamah*. After the submission of the award, objection was made on behalf of the defendant that the agent had no authority to apply for or consent to the reference. The objection was overruled by the Court, and a decree made in accordance with the award with one slight modification in the defendant's favour. *Held*, (1) in answer to an objection that no appeal lay under s. 522 of the Civil Procedure Code, except in so far as the decree was in excess of or not in accordance with the award, that an appeal would lie if the award was shown to be illegal and void *ab initio*, *Nandram Daluram* v. *Nemchand Jadavchand* followed. (2) That although the agent was not authorized to apply for or consent to a reference, the defendant having been aware of the proceedings and tacitly ratified the action of his agent, could not be allowed to question the legality of the award, and the award was not void *ab initio*. *Unniraman* v. *Chathan* referred to.

SATURJIT PERTAP BAHADOOR SAHI *v.* DULHIN GULAB KOER ... XXIV 469

Armenians—

See ENGLISH LAW.

Army Act (1881)—

s. 151. See ATTACHMENT.

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Arrest —

See WARRANT OF ARREST.

On land occupied by Hyderabad State Railway. See JURISDICTION OF CRIMINAL COURT.

Assam Land and Revenue Regulation —

I of 1886.

ss. 39, 41 and 154 — *Right to obtain a settlement — Jurisdiction of Civil Court.* The question as to the right of a party to obtain a settlement from the Revenue authorities is not excluded from the jurisdiction of the Civil Court by the provisions of s. 154 of the Assam Land and Revenue Regulation.

PALAN MARIA v. BHAGIRAM DUTT BARNA ... XXIV 239

ss. 3, 154 cl. (e), 96, 97 — *Suit for partition — Jurisdiction of Civil Courts — Perfect and imperfect partition — Entire estate.* An estate does not cease to be an entire estate within the meaning of the Assam Land and Revenue Regulation (I of 1886) because a few plots of land are common to it and some other estate, or because they are *lakhiraj* or *debutter*, or because they are held in some undefined way jointly with other persons. Where a suit was brought for the partition of an estate, excluding certain portions as being *lakhiraj* and *debutter* or as being held jointly by third persons, how or in what capacity not being stated: *Held*, the jurisdiction of the Civil Court was barred by s. 154 of the Regulation.

SARAT CHANDRA PURKAYASTHA v. PROKASH CHUNDRA DAS CHOWDHURY ... XXIV 751

Assault

Culpable. See WARRANT OF ARREST.

Assets

Collection of. See WILL.

Payment out of. See ADMINISTRATOR GENERAL'S ACT, s. 3[illegible].

Assignment pendente lite

See LIMITATION ACT, s. 22.

Attachment —

See LIMITATION ACT, ART. 180; SALE IN EXECUTION OF DECREE.

Resistance to. See PENAL CODE, s. 183.

Subject to attachment — Pay of Military Officer in Indian Staff Corps — Officer not a member of the Regular Forces — Civil Procedure Code (Act XIV of 1882), s. 266 cl. (h) — Army Act (1881), s. 151 — Public Officer. An Officer of the Indian Staff Corps is a Public Officer within the meaning of cl. (h) of s. 266 of the Civil Procedure Code, read with the interpretation clause (s. 2) of the Code. His pay is therefore subject to attachment in execution of a decree against him, but the operation of the attachment must be restricted to pay received from the Indian Government. The pay of an Officer of the Regular Forces is not so subject to attachment. The attachment in this case was allowed subject to a decree previously passed against the defendant, by which under s. 151 of the Army Act half his pay was ordered to be deducted and applied in payment of the amount due under that decree — the repeal of that section not affecting a decree previously passed under it, and the right to enforce such a decree continuing until satisfaction has been obtained.

CALCUTTA TRADES ASSOCIATION v. RYLAND ... XXIV 102

Without sale. See EXECUTION OF DECREE.

Attorney

Lien of. See COSTS.

Attorney and Client

See COSTS.

Award

See ARBITRATION; CIVIL PROCEDURE CODE, ss. 523, 526.

Validity of. See APPEAL.

Benami Transaction —

Benami purchaser — Right of benamidar to sue for possession of immoveable property. A *benami* purchaser of immoveable property has no right to sue for recovery of

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Benami Transaction—*(continued.)*

possession of the same. *Hari Gobind Adhikari* v. *Akhoy Kumar Mazumdar* and *Issur Chundra Dutt* v. *Gopal Chundra Das* followed. *Nand Kishore Lal* v. *Ahmad Ata* referred to. *Gopi Nath Chobey* v. *Bhugwat Pershad* distinguished.

BARODA SUNDARI GHOSE v. DINO BANDHU KHAN ... ... XXV 874

Onus of Proof Purchase, ism farzi, in the name of a person other than the real purchaser—Proof of the actual transaction. In liquidation of a mortgage debt the mortgagors sold the mortgaged property, and executed a sale deed with a recital that they had received from the wife of the mortgagee the amount of the mortgage debt and interest with also a small sum of money. In after years the husband, now plaintiff, and the wife, defendant, contested which of the two was the real purchaser. *Held*, that the burden of proving that the mortgagee gave the consideration for the sale was upon him at the outset, as he claimed contrary to the tenor of the admitted document, which burden had been discharged by his evidence that the substantial consideration for the sale by the mortgagors was the extinction of the mortgage debt due to him. This proof shifted on to the wife the burden of showing that this extinction was effected by her money or of showing that she had continuous possession in accordance with the sale deed She did not prove that any money was paid by her, either to the vendors or to the mortgagee; nor was there such an amount of possession proved as affected the question either way. The conclusion was that the wife's name was used *ism farzi* for the husband's as alleged

SULEIMAN KADAR BAHADUR v. MEHNDI BEGUM ... .. XXV 473

Benamidar—

See RIGHT OF SUIT. SECOND APPEAL.
Question as to whether party was a. See 'RES JUDICATA.'
Right of, to sue. See BENAMI TRANSACTION.
Suit by See PARTIES.
Suit to declare defendant a mere. See CIVIL PROCEDURE CODE S. 244 DECLARATORY DECREE, SUIT FOR.

Beneficial Owner

See RIGHT OF SUIT.

Beneficiaries—

Consent of. See PRACTICE.

Bengal Act -

II of 1867. See GAMBLING ACT.
VII of 1868. See BENGAL EXCISE ACT.
VI of 1870. See VILLAGE CHAUKIDARI ACT.
VII of 1876. See LAND REGISTRATION ACT.
VIII of 1876 See ESTATES PARTITION ACT.
VII of 1878. See BENGAL EXCISE ACT.
I of 1879. See CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT.
VII of 1880. See PUBLIC DEMANDS RECOVERY ACT.
IX of 1880. See BENGAL CESS ACT.
IV of 1881. See BENGAL EXCISE ACT AMENDMENT ACT.
III of 1884. See BENGAL MUNICIPAL ACT
II of 1888. See CALCUTTA MUNICIPAL CONSOLIDATION ACT, S. 87.

Bengal Cess Act

Bengal Act IX of 1880—

ss. 34 and 35. *Preparation and publication of valuation roll—Liability to pay cess.* In the case of rent-paying lands the publication of the valuation roll under s. 35 of the Cess Act (Bengal Act IX of 1880) is not a condition precedent to the attaching of liability to pay road cess in accordance with the valuation rolls. *Ashanutulah Khan* v. *Trilochan Bagchi* distinguished.

BHUGWATI KUWERI CHOWDHRANI v. CHUTTERPUT SINGH ... XXV 725

s. 47. *Decree for arrears of cess—Sale in execution of decree, Effect of.* Although the procedure for the realization of cesses may be the same as the procedure laid down for the realization of rent due upon the tenure, yet it does not necessarily follow that the effect of a sale for cesses should be the same as that of a sale for arrears of rent for which the tenure itself is liable to be sold. *Umachurn Bag* v. *Ajadannissa Bibee* followed. Notwithstanding, therefore, that s. 47 of the Cess Act, 1880, provides that "every holder of an estate or tenure to whom any sum may be

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Bengal Cess Act—*(continued.)*

Bengal Act IX of 1880—*(continued.)*

payable under the provisions of this Act may recover the same with interest at the rate of twelve and a half per centum per annum in the same manner and under the same penalties as if the same were arrears of rent due to him," the effect of a sale by the Collector in execution of a decree for cesses against some of the owners of a tenure is not to convey to the purchaser the whole tenure, but only the right, title and interest of the particular persons against whom the decree had been obtained.

MAHANUND CHUCKERBUTTY *v.* BANI MADHUB CHATTERJEE ... XXIV 27

Bengal Excise Act -

Amendment Act (Bengal Act IV of 1881), s. 3. See BENGAL EXCISE ACT, S. 4.

Bengal Act VII of 1868, s. 2. See SALE FOR ARREARS OF REVENUE

Bengal Act VII of 1878-

ss. 4, 40, 75. *Bengal Excise Act Amendment Act* (*Bengl Act IV of* 1881),s. 3 —*Right of search—Gurjat-ganja—Exciseable article—Foreign exciseable article.* In a case where an Excise Sub-Inspector attempted to search a house for *gurjat-ganja*, a "foreign exciseable article, under the Excise Act (Bengal Act VII of 1878), and resistance was offered: *Held*, that *gurjat-ganja* being a "foreign exciseable article" under s. 4 of the Act as amended by Bengal Act IV of 1881, the excise officer had no legal authority to enter and search the house under section 40 of the Act; he had authority only to enter and search for any "exciseable article" as defined in s. 4 of the Act; and that no offence, either under s. 141 or s. 353 of the Penal Code, was committed. *Held*, also, that s. 75 of the Act does not apply to a "foreign exciseable article."

JAGARNATH MANDHATA *v.* QUEEN-EMPRESS ... ... XXIV 324

ss. 40, 75. See BENGAL EXCISE ACT, S. 4.

s. 53. *Spirituous Liquor—Medicinal preparation containing alcohol.* The term "spirituous liquor" in s. 53 of the Excise Act (Bengal Act VII of 1878) is not intended to include a medicinal preparation merely because it is a liquid substance containing alcohol in its composition. The case would be different if alcohol were manufactured separately for the purpose of being used in the preparation of a medicine.

GONESH CHUNDER SIKDAR *v.* QUEEN-EMPRESS ... ... XXIV 157

Bengal Municipal Act --

Bengal Act III of 1884—

See JURISDICTION OF CIVIL COURT.

s. 204. *Projection caused by restoring portion of an old building which has been pulled down with the object of its being rebuilt—Meaning of the words "which may have been so erected or placed" Metropolis Management Amendment Act,* 1862 (25 *and* 26 *Vict. c.* 102) *s* 75. Section 204 of the Bengal Municipal Act (Bengal Act III of 1884) does not apply to the case of a projection forming part of a building which is merely in substitution for an old building which has existed upon the same site before the date on which the District Municipal Improvement Act, 1864, or the District Towns Act, 1868, or the Bengal Municipal Act, 1876, as the case may be, took effect in the Municipality. The words "which may have been so erected or placed" in s. 204 mean erected or placed for the first time.

ESHAN CHANDER MITTER *v.* BANKU BEHARI PAL ... ... XXV 160

ss. 237, 238 and 273. *Notice of intention to build—Commencing to build before sanction—Refusal of sanction within the period of six weeks—Liability to fine.* If a person after giving notice in writing of his intention to erect a house under s. 237 of the Bengal Municipal Act (Bengal Act III of 1884) commences to build without waiting for the six weeks mentioned therein (as he is not bound to do under the Act, there being no such provision in it) he does not necessarily contravene the law; but when he so acts, the reasonable view must be that he does it at his risk, his act being liable to be treated as one in contravention of any legal order of the Commissioners issued within the statutory period of six weeks, if such order does not sanction the proposed building; the above appears to be the only reasonable view of s. 238 of the Act.

CHUNDRA KUMAR DEY *v.* GONESH DAS AGARWALLA ... ... XXV 419

ss. 320, 321. See FACTORIES ACT.

s. 363. See 'RES JUDICATA.'

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Bengal, N.-W.P. and Assam Civil Courts Act—

XII of 1887—

s. 13. See EXECUTION OF DECREE.

s. 23. See PROBATE.

s. 37. See SPECIFIC PERFORMANCE.

Bengal Tenancy Act—

VIII of 1885—

See LANDLORD AND TENANT.

s. 5, sub-sec. 5 and ss. 25 and 178. *Definition of raiyati holding—Lessees who are not raiyats within the Act—Zur-i-peshgi lease—Act X of 1859, s. 7.* A tenant, holding under a lease assigned to him in 1890 by the original lessee, who since 1867 had continuously occupied the land under successive leases, claimed, in virtue of the occupancy for more than twelve years, to be a *raiyat* within the Bengal Tenancy Act, 1885, either with occupancy, or with non-occupancy, rights. *Held*, that this tenant's holding was excluded from the operation of that Act by the effect of s. 5, sub-sec. 5, on account of the extent of the area of the land leased which was more than one hundred standard *bighas*. *A zur-i-peshgi* lease is not a mere contract for the cultivation of the land at a rent, but is a security to the tenant for his money advanced. Two of the leases were *zur-i-peshgi* or made on money advanced by the lessee to the lessor. The tenant's possession in this case was in part at least that of a creditor operating payment to himself and was no foundation for a claim for occupancy rights. As to the effect of written stipulations contrary to the latter, s. 7 of the Bengal Rent Law Act X of 1859 is superseded if not wholly repealed by s. 178 of the Bengal Tenancy Act, 1885.

BENGAL INDIGO COMPANY *v.* ROGHOBUR DAS ... ... XXIV 272

s. 16. *Right of suit—Succession to permanent tenure—Omission to give notice of succession to Collector, Effect of—Non-payment of fees, Effect of on right to decree.* Section 16 of the Bengal Tenancy Act does not preclude a party from instituting a suit for rent, notwithstanding that the Collector has not received the notice and the fees referred to therein. But that section is a bar to the plaintiffs obtaining a decree before the notice and the fees are received by the Collector.

KALIHUR GHOSE *v.* UMAR PATWARI ... ... XXIV 241

s. 20, cl. 3. *Right of non occupancy raiyat—Death of raiyat having right of non-occupancy—Heirs—Re-entry by landlord—Bengal Tenancy Act, ss. 79, 82, 85, 160, sub-secs. (c) and (e).* The right of a non-occupancy raiyat (who does not hold under any express engagement) in his holding is not heritable.

KARIM CHOWKIDAR *v.* SUNDAR BEWA ... ... XXIV 207

s. 22, cl. 1. *Effect of purchase, by Talukdar, of raiyat's holding.* If a *Talukdar*, at a sale in execution of a decree obtained by him against a *raiyat*, purchase the *raiyat's* interest, such purchase does not extinguish the holding, but merely divests it of the right of occupancy (if any) attached to it. *Jawadal Huq v. Ram Das Saha* followed.

MIAJAN *v.* MINNAT ALI ... ... XXIV 521

s. 22, cl. 2. *Co-owner's purchase of occupancy right, Effect of.* There is no law which prevents one of several co-proprietors from holding the status of a tenant under the other co-proprietors of land which appertains to the common estate. The effect of the purchase, by one co-owner of land of the occupancy right, is not that the holding ceases to exist, but only the occupancy right which is an incident of the holding. *Sitanath Panda v. Pelaram Tripati* referred to.

JAWADUL HUQ *v.* RAMDAS SAHA ... ... XXIV 148

s. 25. See BENGAL TENANCY ACT, S. 5.

s. 25, cl. (*a*). See LIMITATION ACT, ART. 32.

ss. 27 and 29. *Landlord and Tenant—Suit for rent—Enhancement of rent—Enhancement of rent by a registered kabuliyat within 15 years from a previous oral agreement to pay enhancement of rent, Effect of.* By an oral agreement in the year 1885 the tenant defendant agreed to pay an enhancement of rent, and he paid rent at that rate until subsequently he executed in the year 1893 a registered *kabuliyat*, by which he agreed to pay a further enhancement of rent which was more than two annas in the rupee. Upon a suit for rent by the landlord based on the registered *kabuliyat*: *Held*, that, inasmuch as the enhancement of rent, in s. 29 of the Bengal Tenancy Act, refers to enhancement after the promulgation of the Act, if in this case the enhancement which was made in the year 1885 was before the Act came into force, it would not bar an enhancement during the period of fifteen years from the date thereof as contemplated by cl. (3) of s. 29. But if the said

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Bengal Tenancy Act—*(continued.)*

VIII of 1885—*(continued.)*

enhancement was made after the Act came into force, it would also not bar a subsequent enhancement within fifteen years from the date thereof, as the previous contract was only an oral one and was not effectual and binding upon the defendants. *Held*, also, that having regard to cl. (*b*) of s. 29, as the enhancement was more than two annas in the rupee, the registered *kabuliyat* was bad in law, if the rent then agreed to be paid was an enhanced rent. The *kabuliyat* would also be bad in law, if the rent agreed to be paid is partly enhanced and partly increased rent. *Held*, further, that having regard to proviso (1) of s. 29, as also the provisions of s. 27, the plaintiff would at any rate (*i.e.*, failing the *kabuliyat*) be entitled to recover rent at the rate paid by the defendant for more than three years.

MOTHURA MOHUN LAHIRI *v.* MATI SARKAR ... ... XXV 781

s. 29. See LANDLORD AND TENANT.

ss. 44, 45. See LANDLORD AND TENANT.

s. 50. See EVIDENCE.

s. 50. *Presumption—Occupancy raiyats—Raiyats holding at fixed rent—Incidents of tenancy—Transferability of tenure—Alienation of part of a tenure—Suit for khas possession and for declaration that alienation was invalid—Form of decree.* In a suit brought in 1893 for declaration that a holding was not transferable and that the alienation of a portion thereof was invalid, and also for *khas* possession of the land on the ground of such alienation, it was found that the rate of rent payable for the holding had never been changed since 1831, and that there was nothing to rebut the presumption raised by s. 50 of the Bengal Tenancy Act (VIII of 1885). *Held*: (1) That the alienation did not work a forfeiture, and the plaintiffs were not entitled to *khas* possession, but they were entitled to the declaration that the alienation was not binding upon them. (2) That the presumption created by s. 50 does not operate to convert an occupancy raiyat into a raiyat holding at fixed rates, nor does it render the tenancy subject to the incidents of a holding at fixed rates as prescribed by s. 18 of the Act.

BANSI DAS *v.* JAGDIP NARAIN CHOWDHRY ... ... XXIV 152

s. 50. *Record of rights—Presumption from twenty years' uniform payment of rent—Raiyats holding at fixed rates.* In a proceeding for record of rights under Ch. X of the Bengal Tenancy Act (VIII of 1885), it having been found that certain *raiyats* were holding their lands at rates which had not been changed during twenty years before the institution of the proceeding, the Settlement Officer recorded them as "*raiyats* holding at fixed rates." In second appeal, *held*, that under s. 50 of the Bengal Tenancy Act, the Settlement Officer was right in giving effect to the presumption that the *raiyats* were holding at fixed rates of rent and in recording them as "*raiyats* holding at fixed rates." *Bansi Das* v. *Jagdip Narain Chowdhry* dissented from.

DULHIN GOLAB KOER *v.* BALLA KURMI ... ... XXV 744

s. 53. See 'RES JUDICATA'

ss. 56, cl. 4, 187, cl. 3, and 188. *Joint landlords—Authorised Agent—Receipt given by Agent—Presumption under s. 56, cl. (4) of Act VIII of 1885.* In a case where there are several joint landlords, it is necessary for the Court, before giving effect to a presumption under s. 56, cl. (4) of the Bengal Tenancy Act, to find affirmatively that the agent was authorised by them all, either verbally or in writing.

GOPINATH CHAKARVARTI *v.* UMAKANTA DAS ROY ... ... XXIV 169

s. 61. See LANDLORD AND TENANT.

s. 65. See RIGHT OF OCCUPANCY.

s. 67 and s. 178. *Payment of interest—Rate of interest specified in kabuliyat—Sale for arrears of rent of right of defaulting tenant who has held over—Purchaser of tenure, Rights of.* In execution of a decree for arrears of rent against a tenant whose term under a *kabuliyat* had expired but who had held over, the plaintiff put up the tenure for sale, and the defendant purchased it. The plaintiff afterwards sued the defendant for interest at the rate and according to the instalments specified in the *kabuliyat*. *Held*, reversing the decision of the Subordinate Judge, that the defendant was liable only for interest at the rate specified in s. 67 of the Bengal Tenancy Act. *Ishan Chunder Chowdhury* v. *Chunder Kant Roy* distinguished.

ALIM *v.* SATIS CHANDRA CHATURDHURIN ... ... XXIV 37

ss. 72, 73. See LANDLORD AND TENANT.

s. 73. See RIGHT OF OCCUPANCY.

ss. 79, 82, 85. See BENGAL TENANCY ACT, S. 20.

s. 88; 89. See LANDLORD AND TENANT.

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Bengal Tenancy Act—*(continued.)*

VIII of 1885—*(continued.)*

ss. 103, 143. *Rules framed under s. 189 of the Bengal Tenancy Act—Whether proceedings under s. 103 of the Bengal Tenancy Act are suits between landlord and tenant—Code of Civil Procedure (Act XIV of 1882)—Review of judgment.* Proceedings under s. 103 of the Bengal Tenancy Act are suits between landlord and tenant within the meaning of s. 143, by virtue of the rules framed under s. 189 of that Act; therefore the provisions of the Code of Civil Procedure relating to review of judgment are applicable to such proceedings.

ACHHA MIAN CHOWDHRY *v.* DURGA CHURN LAW ... ... XXV 146

s. 104; 104, 106, 108; 105, 106, 108 (3). See SECOND APPEAL.

ss. 121 and 140. *Suit for compensation for illegal distraint.* A suit for compensation for illegal distraint under s. 121 of the Bengal T [illegible] 1885) was brought by one of two persons jointly entitled to the crops distrained: *Held*, that s. 140 of the Bengal Tenancy Act did not exclude a suit of this kind.

JAGDEO SINGH *v.* PADARATH AHIR ... ... XXV 285

s. 143. See BENGAL TENANCY ACT, S. 103.

s. 153. See LANDLORD AND TENANT: 'RES JUDICATA.'

s. 155. See LIMITATION ACT, ART. 32.

s. 157. See LANDLORD AND TENANT.

s. 158. *Tenure, Incidents of—Application against same tenant holding two or more tenancies—Form of petition.* *Held* by PETHERAM, C.J. and BANERJEE, J. (RAMPINI, J., *dissenting*), that under s. 158 of the Bengal Tenancy Act the landlord is authorized to include in one application two or more tenancies held by the same tenant. *Golap Chand Nowlakha* v. *Ashutosh Chatterjee* referred to.

DIJENDRA NATH ROY CHOWDHRY *v.* SOYLENDRA NATH ROY CHOWDHRY. XXIV 197

s. 160, sub-secs. (*c*) and (*e*). See BENGAL TENANCY ACT, S. 20.

ss. 161, 167. See SALE FOR ARREARS OF RENT.

s. 167. *Effect of service of notice—Annulling of incumbrance—Property in possession of a person other than the purchaser.* Service of notice under s. 167 of the Bengal Tenancy Act has the effect of annulling an incumbrance. It is not necessary for the purchaser to bring a declaratory suit to have it declared that the incumbrance is annulled. The incumbrance would be annulled even if the property be not at the time of the service of the notice under s. 167 in the possession of the purchaser but of somebody else.

PEARI LAL ROY *v.* MOHESWARI DEBI ... ... XXV 551

s. 171. *Payment by person interested to prevent sale—Mortgage—Incumbrance.* A mortgage created by the operation of s. 171 of the Bengal Tenancy Act (VIII of 1885) is not an incumbrance within the meaning of s. 161 of that Act, and is not liable to be annulled as such at the instance of a purchaser of a holding at a sale in execution of a decree for arrears of rent.

PASUPATI MOHAPATRA *v.* NARAYANI DASSI ... ... XXIV 537

s. 173. See LIMITATION ACT, ART. 178: SECOND APPEAL.

s. 174. See SALE FOR ARREARS OF RENT.

s. 178. See BENGAL TENANCY ACT, SS. 5; 67.

s. 181. See LANDLORD AND TENANT.

ss. 187 (3) and 188. See BENGAL TENANCY ACT, S. 56.

s. 188. See LANDLORD AND TENANT.

s. 188. *Right of fractional co-sharer to maintain a suit for enhancement of rent—Agreement with fractional co-sharer to pay rent separately, Effect of—Joint landlords.* A fractional shareholder cannot bring a suit for enhancement of rent. Under the provisions of s. 188 of the Bengal Tenancy Act, where there are several joint-landlords, they must all join in bringing a suit for enhancement of rent; an agreement in a *kabuliyat* by one tenant to pay an enhanced rent to some of the landlords, if, on measurement, the *jama* of his *jote* is increased, does not create a right to maintain such a suit by those landlords. Such a suit cannot be brought otherwise than under the terms of the Bengal Tenancy Act. An agreement by a tenant with some of several joint-landlords to pay his share of the rent separately, does not create a separate tenancy. *Gopal Chunder Das* v. *Umesh Narain Chowdhry* and *Hari Charan Bose* v. *Runjit Singh* approved of. *Panchanan Banerji* v. *Raj Kumar Guha* and *Tejendro Narain Singh* v. *Bakai Singh* distinguished.

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s. 189. See BENGAL TENANCY ACT, S. 103.

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VIII of 1885 -*(concluded.)*

sch. III, art. 3. *Limitation—Suit by occupancy raiyat for possession.* Article 3 of sch III of the Bengal Tenancy Act (VIII of 1885), prescribing a limitation of two years, is not restricted to suits against the landlord alone; it applies to a suit brought against a tenant with whom the land was settled by the landlord. *Ramjanee Bibee* v. *Amoo Beparee*, and *Chunder Kishore Dey* v. *Rajkishore Mozumdar* distinguished.

BHEKA SINGH *v.* NAKCHHED SINGH... ... ... XXIV 40

Bequest—

Contingent. See HINDU LAW, WILL.

Bill of Lading-

Shipping Company, Liability of. A Shipping Company is *primâ facie* bound to deliver goods in good order and condition, but this obligation is subject expressly to the conditions inserted in the bill of lading. Where a cask of brandy was shipped at Madras in good order and condition, but on arrival at Calcutta was found to be empty: *Held*, that the Company were protected by the special words inserted in the bill of lading "Hogshead brandy covered with gunny, not responsible for condition and contents."

CUTLER PALMER & CO. *v.* BRITISH INDIA STEAM NAVIGATION CO. LTD. XXV 654

Boat Traffic -

At landing place Regulation of See NUISANCE

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Construction of See LIMITATION ACT, ART 132 MORTGAGE

Bought and Sold Notes

See CONTRACT

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See CONTRACT.

Building–

Restoration of old. See BENGAL MUNICIPAL ACT, s. 204.

Burial Ground –

See CALCUTTA MUNICIPAL CONSOLIDATION ACT ss. 381, 382.

Burmah Courts Act -

XVII of 1875—

s. 19. See APPEAL.

Butwara Khasra—

See EVIDENCE ACT, s. 35.

Calcutta Municipal Consolidation Act

Bengal Act II of 1888—

s. 87 and sch. II, Rule 7, cl. (6). *License tax—Liability to tax of Company carrying on business through Agents in Calcutta and not having a registered place of business.* A joint stock company carrying on money-lending business through Agents in Calcutta, where it has no registered place of business, is liable to pay license tax under s. 87 and sch. II of the Calcutta Municipal Act of 1888. *Corporation of Calcutta* v. *Standard Marine Insurance Company* distinguished.

CORPORATION OF CALCUTTA *v.* EASTERN MORTGAGE AGENCY CO. LTD. XXV 483

ss. 307, 335, 336, sch. II, Rule 6. *Liability for keeping animals without license—Penalty, to whom attached—Owner—Lessee.* The petitioners, as owners, let out a stable on hire, where *ticca gharries* and horses were kept by the lessee without taking out a license from the Municipal Commissioners. The petitioners were convicted under ss. 307 and 336 of the Calcutta Municipal Act, (II of 1888) for having permitted offensive matters, etc., and animals to be kept on the premises in contravention of the provisions of s. 335 of the Act: *Held*, that the convictions were bad, the lessee alone being answerable in such a case for disregarding the provisions of the Act. The penalty, under s. 336 of the Calcutta Municipal Act of 1888, attaches to the owner of any land for permitting any animals to be kept thereon, when he has direct possession of the land, and not when he has leased it out to another.

ABHOY CHARAN DASS *v.* MUNICIPAL WARD INSPECTOR ... ... XXV 625

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Calcutta Municipal Consolidation Act—*(continued.)*

Bengal Act II of 1888—*(continued.)*

ss. 335, 336. *Date of taking out license.* In a case where the owner of a cowshed delayed taking out a license under s. 335 of the Calcutta Municipal Consolidation Act (Bengal Act II of 1888) until the end of the month of May: *Held* that under the section as it stands there is nothing to compel a licensee to take out his license before 1st June in every year.

AUKHOY CHANDRA HAZI *v.* CALCUTTA MUNICIPAL CORPORATION ... XXIV 360

ss. 381, 382. *Burial ground—Certificate for closing a burial ground. Requisites of.* The Municipal authorities issuing a certificate under the provisions of s. 381 of the Calcutta Municipal Act (Bengal Act II of 1888) prohibiting the use of a burial ground must definitely specify the point of time from which the period fixed by them under that section is to run.

LUTFUR RAHMAN NUSKER *v.* MUNICIPAL WARD INSPECTOR ... XXV 192

Carriers Act—

III of 1865.

ss. 6, 8. *Negligence. Accident. Loss by. Special contract. Suit for damages.* The plaintiffs delivered to the defendants certain goods for carriage to Calcutta in a flat belonging to the defendants. The goods were carried under the terms of a special contract or forwarding note signed by the shipper. One of the conditions of the forwarding note was as follows: "The Company will not be under any liability for damages or compensation in respect of loss of or damage to goods ... except such liability as they are or may be subject to under the provisions of any law for the time being in force or of any contract other than this for the time being in existence between the Company and the shipper." While on board the defendants' flat the goods were destroyed by fire. At the trial of the case the defendants gave evidence showing the state of things before the fire occurred, the circumstances leading to the discovery of the fire (but not the cause or origin of it) and the measures taken to extinguish the fire. *Held* that the occurrence of a fire under the circumstances disclosed in the case without any explanation as to the origin of it was itself evidence of negligence. *Held* also, reversing the decision of SALE, J., that the defendants had not discharged the onus cast upon them by law of showing that there was no negligence. *Central Cachar Tea Company v. Rivers Steam Navigation Company* explained. *Held* on the construction of the above clause (*per* SALE, J., in the Court below, and *per* TREVELYAN, J., in the Court of Appeal) that the words "any law for the time being in force" must be taken to refer not to the common law, but to the law as laid down in the Carriers Act (III of 1865), and that unless their liability was enlarged by express contract, the defendant Company were liable only for loss or damage of which under section 6 of that Act they were not allowed to relieve themselves, that is only for loss occasioned by the negligence or criminal acts of themselves, their servants or agents. The decision of HILL, J., in *Central Cachar Tea Company v. Rivers Steam Navigation Company* followed. *Semble* on appeal (*per* MACPHERSON, J., MACLEAN, C.J., *doubting*) that the above construction of the clause was correct.

CHOUTMULL DOOGUR *v.* RIVERS STEAM NAVIGATION COMPANY ... XXIV 786

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See EJECTMENT, SUIT FOR. INJUNCTION: LIMITATION ACT, ART. 132.

Causes of Action

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See COSTS.

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See INTEREST ACT.

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See BENGAL CESS ACT.

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See SALE FOR ARREARS OF RENT.

Charge

Form of charge—Criminal breach of trust—Penal Code (Act XLV of 1860), s. 408—Form of indictment—Practice. Where the first two counts of an indictment charged the prisoner under s. 408 of the Penal Code with criminal breach of trust in respect of two sums of money *viz.*, Rs. 23-7 and Rs. 850, respectively, and the third and last count charged him with criminal breach of trust in respect of a sum of Rs. 9,168-6, which last-mentioned sum, as appeared from the depositions, represented a general deficiency in the prisoner's account. *Held*, the third count must be struck out.

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Charge to Jury

See JURY.

Misdirection—Criminal Procedure Code (Act X of 1882), s. 423—Setting aside verdict of the jury—Power of Appellate Court to deal with the case. It is the duty of the Judge to call the attention of the jury to the different elements constituting the offence, and to deal with the evidence by which it is proposed to make the accused liable. Failure to do so amounts to misdirection. *Queen-Empress* v. *Balya Somya* followed. Statements by some of the accused persons, which do not amount to a confession, and which do not in any way incriminate them, are not admissible in evidence against any persons other than those making them. Omission to direct the jury that in dealing with the evidence against the accused other than those making the statements they are not to take into consideration such statements, also amounts to misdirection. If the verdict of the jury is set aside on any of the grounds mentioned in cl. (*d*) of s. 423 of the Criminal Procedure Code (Act X of

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Charge to Jury—(*continued*)

1882) then there is no restriction on the powers of the Appellate Court to deal with a case of which it has complete seizin in any of the manners provided in that section The law nowhere lays down that when the verdict of the jury is set aside the Court must necessarily direct a new trial *Wafadar Khan* v *Queen Empress* dissented from The course adopted in *Queen Empress* v *O'Hara Regina* v *Naoroji Dadabhai* and *Queen Empress* v *Hambole Chunder Ghose* followed

TAJU PRAMANIK *v* QUEEN EMPRESS XXV 711

Misdirection—Erroneous verdict owing to misdirection—Failure of justice Criminal Procedure Code (Act X of 1882) ss 418 423 (d) and 537 On a charge of rape the Judge in his charge to the jury said "You will observe that this sexual intercourse was against the girl's will and without her consent etc" instead of saying, as he ought to have done "you will have to determine upon the evidence in this case whether the intercourse was against the girl's will etc", and the charge went on in the same style of stating to the jury what had been proved instead of leaving to them to decide what in their opinion was proved In the concluding sentence of the charge the Judge said "You have seen the witnesses and I have no doubt that you will return a just verdict" *Held* that such a charge amounted to a clear misdirection and that the verdict was erroneous owing to such misdirection Even the concluding sentence did not satisfy the requirements for a proper charge The provisions in s 423 (*d*) and s 537 of the Criminal Procedure Code do not require that the Court is to go through the facts and find for itself whether the verdict is actually erroneous upon the facts

ALI FAKIR *v* QUEEN EMPRESS XXV 230

Misdirection Explaining the law—Evidence Act (I of 1872) s 126 Communications to pleaders Privileged Communications—Admission of inadmissible evidence In charging a jury it is incumbent on the Judge to explain the law to them in order to assist them in applying the law to the facts of the case Mere reference to sections of the Penal Code defining the offence is not sufficient The restrictions imposed by s 126 of the Evidence Act in respect of what are known as privileged communications extend also to communications made to *mukhtears* when acting as pleaders for their clients In cases tried by jury it is the duty of the Judge to prevent the production of inadmissible evidence whether it is or is not objected to by the parties Evidence relating to proposals of compromise ought not in the exercise of a proper discretion to be allowed to go in as evidence of guilty knowledge against the accused

ABBAS PEADA *v* QUEEN EMPRESS XXV 736

Chota Nagpur Landlord and Tenant Procedure Act—

Bengal Act I of 1879

ss 37 cl 4 and 39 See APPEAL

s 121 See JAGIR TENURE

ss 1,7 13) See APPEAL

Circular Order of High Court

No 9 of 6th September 1861 See MAGISTRATE JURISDICTION OF

Civil Court

Powers of See PUBLIC DEMANDS RECOVERY ACT s 2

Civil Procedure Code

Act XIV of 1882

See BENGAL TENANCY ACT s 103

s 11 See JURISDICTION OF CIVIL COURT

s 13 See FOREST ACT RES JUDICATA RIGHT OF SUIT

s 15 See SALE IN EXECUTION OF DECREE

s 16A See JURISDICTION

s 25 See HIGH COURT JURISDICTION OF

ss 26 and 30 See PARTIES

s 32 See PARTIES

ss 42 45 See PLAINT

s 53 See PLAINT

s 108 See RIGHT OF SUIT

s 108 *Ex parte Decree—Effect of a decree set aside at the instance of some only of several defendants against whom the decree passed ex parte Meaning of the words "the decree"* The words "the decree" in s 108 of the Code of Civil Procedure mean the whole decree made in the suit Therefore in a case where a

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Civil Procedure Code—*(continued.)*

Act XIV of 1882—*(continued.)*

decree has been passed *ex parte* against some only of several defendants, the effect of its being set aside on their application under s. 108 of the Code of Civil Procedure is that the whole decree made in the suit is set aside, notwithstanding that some of the defendants had entered appearance at the original hearing.

MAHOMED HAMIDULLA *v.* TOHURENNISSA BIBI ... ... XXV 155

ss. 147, 149. See RAILWAYS ACT, S. 77.

s. 205. See LIMITATION ACT, ART, 179.

s. 206. See DECREE: LIMITATION ACT, ART. 179.

s. 209. See INTEREST.

s. 211. See MESNE PROFITS.

s. 212. See COURT FEES ACT, S. 11.

s. 222. See INTEREST.

s. 223. See LIMITATION ACT, ART. 180: EXECUTION OF DECREE: SECOND APPEAL.

ss. 224, 228. See SECOND APPEAL.

ss. 227. See LIMITATION.

s. 230. See LIMITATION: LIMITATION ACT, ART. 180.

s. 230. *Decree for payment of money—Decree for sale of hypothecated property, which also made the defendant personally liable in case of insufficiency—Mortgage decree.* A decree, which directs the realization of the decretal amount from the hypothecated property, and if insufficient, makes the defendant remain personally liable, is a mortgage decree, and not a "decree for the payment of money" within the meaning of s. 230 of the Code of Civil Procedure. *Ram Charan Bhagat* v. *Sheobarat Rai* followed. *Hart* v. *Tara Prasanna Mukherji*, distinguished. *Jogemaya Dassi* v. *Thackomoni Dassi* referred to.

FAZIL HOWLADAR *v.* KRISHNA BUNDHOO ROY ... ... XXV 580

ss. 231, 235, 248. See LIMITATION ACT, ART. 179.

s. 235. See LIMITATION ACT, ART. 179.

s. 244. See APPEAL: LIMITATION: RIGHT OF SUIT: SECOND APPEAL.

s. 244. *Question for Court executing decree—Issue raised by defendant in separate suit.* Section 244 of the Civil Procedure Code bars a suit brought for the determination of certain questions specified therein, but does not bar the trial of any issue involved in those questions if the issue is raised at the instance of a defendant in a suit brought against him. *Basti Ram* v. *Fattu* distinguished.

BHIRAM ALI SHAIK SHIKDAR *v.* GOPI KANTH SHAHA ... ... XXIV 355

s. 244. *Question in execution of decree—Order absolute for sale—Transfer of Property Act (IV of 1882), s. 88—Question arising as to the order absolute for sale.* When an order absolute for sale of mortgaged property has been made, any question that arises as to that order absolute for sale is not a question relating to the execution of the decree within the meaning of s 244 of the Code of Civil Procedure. *Ajudhia Pershad* v. *Baideo Singh*, *Tiluck Singh* v. *Parsotein Proshad*, *Tara Prosad Roy* v. *Bhobodeb Roy*, and *Ranbir Singh* v. *Drigpal* followed. *Kedar Nath* v. *Lalji Sahu*, *Oudh Behari Lal* v. *Nageshar Lal* dissented from.

AKIKUNNISSA BIBEE *v.* ROOP LAL DAS ... ... XXV 138

s. 244. *Representative of judgment-debtor—Purchaser at execution sale—Purchaser's right to be heard in support of his objections to the sale.* The term 'representatives,' as used in s. 244 of the Code of Civil Procedure, when taken with reference to the judgment-debtor, does not mean only his legal representative, that is, his heir, executor, or administrator, but it means his representative in interest, and includes a purchaser of his interest, who, so far as such interest is concerned, is bound by the decree. There is no reason for excluding from its signification an execution-purchaser of the judgment-debtor's interest. *Held*, therefore, by the Full Bench that the cases of *Gour Sundra Lahiri* v. *Hem Chunder Chowdhury* and *Narain Acharjee* v. *Gregory*, so far as they decide that a purchaser at an auction sale of the equity of redemption in mortgaged properties cannot come in in execution proceedings under a decree upon the mortgage as a representative of the judgment debtor under s. 244 of the Code, are not rightly decided.

ISHAN CHUNDER SIRKAR *v.* BENI MADHUB SIRKAR ... ... XXIV 62

s. 244. *Suit for declaration that the defendant is a mere benamidar for plaintiff—Parties to suit—Question arising in execution of decree.* A suit brought by A to obtain a declaration that a decree originally obtained by B against C and another which had been purchased in the name of D had really been purchased by the plaintiff for his own benefit was held not to be barred by s. 244, cl. (c) of the Civil

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Civil Procedure Code—*(continued.)*

Act XIV of 1882—*(continued.)*

Procedure Code, as the question raised was not one arising between the parties to the suit in which the decree was passed, or their representatives, but one that arose between two parties, each of whom claimed to be the representative of one of the parties to the suit, *viz.*, B, the party in whose favour the decree was passed.

GOUR MOHUN GOULI *v.* DINONATH KARMOKAR ... ... XXV 49

ss. 244 and 258. *Uncertified adjustment—Separate suit—Suit by judgment-debtors to recover back their property which the decree-holder obtained possession of, in execution of his decree, whether maintainable.* One M obtained a decree for possession of a *jote* and for mesne profits against the plaintiffs. Subsequently, by a registered *ekrarnamah*, the decree-holder having received from the judgment-debtors (the plaintiffs) the amount due on account of mesne profits, and also a further consideration of Rs. 156, relinquished an eight anna share of the *jote* in favour of them. The remaining eight anna share of the *jote* was also sold by the decree-holder by a registered *kobala* to the judgment-debtors. The heirs of the decree-holder on his death applied for execution of the decree, but notwithstanding the judgment-debtor's objection that the decree could not be executed, it having been satisfied by virtue of the aforesaid *ekrarnamah* and *kobala* they obtained possession of the *jote*; the adjustment not having been certified, was not taken into account by the Court executing the decree. On a regular suit by the judgment-debtors for a declaration of title to, as well as for the recovery of possession of the *jote*, the defence mainly was that under s. 244 of the Code of Civil Procedure no separate suit would lie. *Held*, that such a suit was maintainable, and that s. 244 of the Code of Civil Procedure was no bar to it. *Azizan* v. *Matuk Lall Sahu* distinguished.

ISWAR CHANDRA DUTT *v.* HARIS CHANDRA DUTT ... ... XXV 718

s. 248. See LIMITATION ACT, ART. 179.

s. 248A. See LIMITATION ACT, ART. 180.

ss. 257A, 258. See EXECUTION OF DECREE.

s. 258. See CIVIL PROCEDURE CODE, S. 244.

s. 265. See PARTITION.

s. 266, cl. (*h*). See ATTACHMENT.

s. 273. See LIMITATION ACT, ART. 179.

s. 280. See CLAIM TO ATTACHED PROPERTY.

ss. 285; 291. See SALE IN EXECUTION OF DECREE.

s. 293. See APPEAL.

s. 310A. See SALE IN EXECUTION OF DECREE.

s. 310 A. *Civil Procedure Code Amendment Act (V of 1894)—Amount payable incorrectly calculated by an officer of the Court.* The judgment-debtor within thirty days from the date of sale deposited in Court, under s. 310A of the Code of Civil Procedure, the amount calculated in the office of the Munsif as payable under the section. The Munsif set aside the sale. On appeal to the High Court by the auction-purchaser on the ground that the amount deposited by the judgment-debtor was not in compliance with s. 310A, and that before the sale could be set aside it was necessary for the judgment-debtor to pay, in addition to what he deposited, a sum equal to five per cent. of the purchase money: *Held*, that when the amount payable by the judgment-debtor under s. 310A of the Code of Civil Procedure has been calculated by an officer of the Court, and has been deposited, an order setting aside the sale must be made by the Court as a matter of right; the Munsif therefore was justified in setting aside the sale. *Ugrah Lall* v. *Radha Pershad Singh* referred to.

MAKBOOL AHMED CHOWDHRY *v.* BAZLE SABHAN CHOWDHRY ... XXV 609

s. 310A. *Sale in execution of mortgage decree—Application by mortgagor under s. 310A, Civil Procedure Code—Transfer of Property Act (IV of 1882), s. 104, Rules framed under Civil Procedure Code Amendment Act (V of 1894). Held*, (by the Full Bench). Section 310A of the Civil Procedure Code (Act XIV of 1882, as amended by Act V of 1894) does not apply to sales of mortgaged property under the Transfer of Property Act (IV of 1882). The rules framed by the High Court (Circular Order No. 13, dated 27th April 1892) under the provisions of s. 104 of the Transfer of Property Act do not make s. 310A applicable to such sales. *Ashruf Ali Chowdhry* v. *Net Lal Sahu* overruled; *Rajaram Singhji* v. *Chunni Lal* dissented from. *Quære.*—Whether a rule by the High Court under s. 104 of the Transfer of Property Act making s. 310A of the Civil Procedure Code applicable to sales of mortgaged property under the said Act would not be *ultra vires*.

KEDAR NATH RAUT *v.* KALI CHURN RAM ... ... XXV 708

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Civil Procedure Code—*(continued.)*

Act XIV of 1882—*(continued.)*

s. 311 See RIGHT OF SUIT: SALE IN EXECUTION OF DECREE: SECOND APPEAL.

ss. 312, 314, 316. See SALE IN EXECUTION OF DECREE.

s. 313. See APPEAL.

s. 316. See SECOND APPEAL.

ss. 318, 319. See LIMITATION ACT, ART. 144.

s. 373. See SMALL CAUSE COURT, PRESIDENCY TOWNS.

s. 375. See COMPROMISE OF SUIT.

ss. 383, 390 See PARDANASHIN LADY.

s. 396 See PARTITION.

ss 409, 410, 413 See LIMITATION ACT, S. 4.

s. 424. *Suit against public officer in respect of acts done by him in his official capacity Notice of suit—Suit for damages against a public officer—Trespass Joinder of causes of action Amendment of plaint* The plaintiff sued the defendant, a public officer, to recover damages for two distinct acts (*viz*, wrongful arrest and trespass) alleged to have been illegally and maliciously done by the defendant on two different occasions and claimed one lump sum as damages for both the acts, no permission to amend the plaint was asked for in the lower Court On the 21st of October 1895 the plaintiff instituted this suit having on the 18th of September 1895 served the defendant with a notice under s 424 of the Civil Procedure Code (Act XIV of 1882). *Held*, that the former act (*viz*, the plaintiff's arrest) was an act done by the defendant in his official capacity and was clearly of the kind contemplated by s 424 of the Civil Procedure Code, under which two months' notice to the defendant would be necessary previous to the institution of the suit, and that the suit was rightly dismissed by the lower Court for want of such notice. *Shahunshah Begum* v. *Fergusson* distinguished. *Quære* Whether the latter act (*viz*, the trespass into the plaintiff's house) on the allegations in the plaint was an act done by the Magistrate in his official capacity, and whether a notice under s. 424 of the Civil Procedure Code would be necessary previous to suing for damages for such an act. *Held*, further, that as the two acts were mixed up together in the plaint, and one lump sum claimed as damages for both, and as no permission to amend the plaint was asked for in the lower Court, so as to convert the suit into one for damages with reference to the trespass only, the plaint ought not to be allowed to be amended on appeal to the High Court

JOGENDRA NATH ROY BAHADUR *v.* PRICE .. .. XXIV 584

s. 424 *Suit against the Secretary of State for India in Council—Notice—Public Demands Recovery Act (Bengal Act VII of 1880), ss 8, 9, 20—Sale for default in payment of costs of realising Government revenue—Common ground of appeal—Code of Civil Procedure, s 544* Section 424 of the Civil Procedure Code provides that "No suit shall be instituted against the Secretary of State in Council, or against a public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of two months next after notice in writing has been in the case of the Secretary of State in Council, delivered to, or left at the office of Secretary to the Local Government or the Collector of the District," etc. The plaintiff had instituted a suit against the Secretary of State for India in Council to set aside a certain sale of the plaintiff's property (possession of which had been given to the purchaser), but had not given him the notice prescribed by s 424 of the Civil Procedure Code The first Court (AMEER ALI J) gave the plaintiff a decree. *Held* on appeal (reversing the decision of AMEER ALI, J.) that whether or not the words "in respect of an act purporting to be done by him in his official capacity" relate only to a public officer and not to the Secretary of State, no suit whatever is maintainable against the Secretary of State, unless the notice prescribed by s. 424 of the Code of Civil Procedure has been given, and that therefore the present suit could not be maintained

THE SECRETARY OF STATE FOR INDIA *v.* RAJLUCKI DEBI ... XXV 289

s. 443. See GUARDIAN.

ss. 499, 503 See PRACTICE.

ss. 521, 522. See APPEAL.

s. 522. See ARBITRATION.

ss. 525 and 526. *Arbitration award—Denial of reference to arbitration—Jurisdiction of Court to determine the factum of reference—Appeal.* *Held*, by a majority of the Full Bench (MACPHERSON, J., *dissenting*) that when an application has been made under s. 525 of the Code of Civil Procedure and notice has been given to the

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Civil Procedure Code—*(concluded.)*

Act XIV of 1882—*(concluded.)*

parties to the alleged arbitration, the jurisdiction of the Court to order the award to be filed and to allow proceedings to be taken under it, is not taken away by a mere denial of the reference to arbitration on an objection to the validity of that reference. *Amrit Ram* v. *Basrat Ram* followed. *Held*, also, that an order under s. 525 determining that there has been no valid reference to arbitration and rejecting the application is a "decree" within the meaning of s. 2, and an appeal lies from such order. *Kali Prosanno Ghose* v. *Rajani Kant Chatterjee* followed.

MAHOMED WAHIDUDDIN *v.* HAKIMAN ... ... XXV 757

s. 539. *Suit to remove a trustee and to recover possession of trust property in the hands of a third party—Right of suit—Limitation Act (XV of 1877), sch. II, art. 134—Statute 52 Geo. III, Cap. 101—Civil Procedure Code Amendment Act (VII of 1888)—Act XX of 1863, s. 14—Duty of Collector in sanctioning suit—Irregularity not affecting merits of suit—Civil Procedure Code, s. 578.* A suit for the dismissal of a trustee and for the recovery of trust property from the hands of a third party to whom the same has been improperly alienated is within the scope of s. 539 of the Civil Procedure Code—*Subbayya* v. *Krishna* followed. *Lakshman das Parashram* v. *Ganpatrav Krishna* distinguished. Article 134 of the second schedule of the Indian Limitation Act (XV of 1877) applies to such a suit. The difference between the provisions of s. 539 of the Civil Procedure Code and those of 52 George III, cap. 101 (Romilly's Act) pointed out. Persons having a right to worship in a temple are within the scope of s. 539. Under that section, as originally enacted, the words were "having a direct interest in the trust," and the word "direct" has been taken out by Act VII of 1888. The inference is that the Legislature intended to allow persons having the same sort of interest that is sufficient under s. 14 of Act XX of 1863 to maintain a suit under s. 539. The Collector in giving his consent to the institution of a suit under s. 539 has to exercise his judgment in the matter, and see not only whether the persons suing are persons having an interest in the trust, but also whether the trust is a public trust of the kind contemplated by the section, and whether there are *prima facie* grounds for thinking that there has been a breach of trust. But where the form of the permission showed that he had omitted to exercise his judgment in the matter of the interest of the plaintiffs in the trust such omission was held to be a mere irregularity and within the scope of s. 578 of the Civil Procedure Code.

SAJEDUR RAJA CHOWDHURI *v.* GOUR MOHUN DAS BAISHNAV ... XXIV 418

s. 544. See CIVIL PROCEDURE CODE, S. 421.
s. 546. See EXECUTION OF DECREE.
s. 551. See DECREE : JUDGMENT.
s. 559. See CONTRIBUTION, SUIT FOR.
ss. 562 ; 568. See SECOND APPEAL.
s. 574. See JUDGMENT.
s. 578. See CIVIL PROCEDURE CODE, S. 539. MISJOINDER OF CAUSES OF ACTION : PARDANASHIN LADY : VALUATION OF SUIT
s. 584, 585 ; 586 ; 587 ; 588 ; 591. See SECOND APPEAL.
s. 591 ; 595, 614. See APPEAL.
ss. 617, 618. See SMALL CAUSE COURT, PRESIDENCY TOWNS.
s. 622. See LUNATIC : SMALL CAUSE COURT, PRESIDENCY TOWNS.
ss. 623, 624. See LIMITATION ACT, ART. 179.
ss. 623 : 626. See REVIEW.
ss. 623 : 629. See SECOND APPEAL.
s. 629. See APPEAL.
s. 644. See INTEREST.
s. 649. See EXECUTION OF DECREE.
sch. IV, Forms 109, 128. See INTEREST.

Civil Procedure Code Amendment Act—

VII of 1888. See CIVIL PROCEDURE CODE, S. 539.
V of 1894. See CIVIL PROCEDURE CODE, S. 310A.

Christian Father—

Application by, to be guardian of Hindu son. See GUARDIAN.

Claim—

Changing shape of. See CONTRACT.

To attached property. Civil Procedure Code (1882), *s.* 280—*Claim by a Mokuraridar—Limitation Act (XV of 1877), sch. II, art.* 11. Upon attachment of immoveable

Claim—(*continued.*)

property in execution of decree a claim was made on the ground that the judgment-debtor had granted a *mokurari* in respect of the property in favour of the claimant. The claim was allowed, and the property was ordered to be sold with a declaration of the *mokurari*. More than a year after this order, the decree-holder who purchased at an execution sale, brought a suit for a declaration that the *mokurari* was fraudulent and *benami*, and for possession and mesne profits. *Held*, that the order was a judicial determination under s. 280 of the Civil Procedure Code (1882), and that, therefore, the suit was barred under art. 11 of the second Schedule of the Limitation Act (XV of 1877).

RAJARAM PANDEY *v.* RAGHUBANSMAN TEWARY ... ... XXIV 563

Transfer of. See TRANSFER OF PROPERTY ACT, S. 135.

Co-heiresses—

See HINDU LAW, INHERITANCE.

Collection of Assets—

Meaning of. See WILL.

Collector—

Duty of. See CIVIL PROCEDURE CODE, S. 539.
Effect of omission to give notice of succession to. See BENGAL TENANCY ACT, S. 16.
Unauthorized sale by. See SALE FOR ARREARS OF REVENUE.

Collision—

Damage by a ship under way colliding with another at anchor—Burden of justifying—Duty of ship at anchor. Where a ship under way comes into collision with another at anchor in a proper place and showing at night an anchor light, it is obvious that the burden of justifying is heavily cast on the ship under way. At the same time there is an obligation on the anchored ship to keep a competent watch to show an anchor light, and to do everything to avert a collision and lessen the damage from it. If, as was the case here, the damaged ship is placed in a difficulty entirely by the erroneous course or conduct of the other, and is obliged to take a step on the instant, she is entitled to claim from a Court a favourable consideration for her action, even if that should afterwards appear not to have been the best possible. A steamship, entering the fairway of a river with the tide flowing, collided with the promovent's tug at anchor in a proper place, and showing an anchor light. Near the tug was a pilot brig, astern of which the steamship wanted to round attempting to pass between the tug and the brig. She could, however, have taken a course astern of both. At the approach of the steamship both the anchored vessels, heading against the tide, hove on their anchors, and drifted back. The justification set up by the owners of the steamship was that she was misled by the pilot brig's drifting, the anchor light of the latter having been kept up. Blame to a third ship, if blame there were, was held to be no excuse for the colliding ship, as against the tug's complaint. The main charge against the tug was that she did not slack away chain as soon as there was danger, but hove on her anchor. It was found, however, that if the tug were already drifting when the collision took place, there was no reason to suppose that by slacking away chain at the earliest possible moment the collision would have been averted, or lessened in force. On the other hand, the facts against the impugnant's steamship were: (1) that her course could, without difficulty, have been directed so that, by going astern of the tug from the port side instead of crossing her bows, all risk of collision would have been avoided; (2) that there was a want of sufficient look-out on board the steamship, especially as regarded the tug; (3) that there was possibly also a miscalculation on the part of the steamship of the room to pass, with reference to the force and set of the tide. She was, accordingly, alone held to blame, and her owners liable in damages.

MARY TUG COMPANY *v.* BRITISH INDIA STEAM NAVIGATION COMPANY. XXIV 627

Commission—

Application to take evidence on. See PARDANASHIN LADY.
Right of Administrator-General to. See WILL.

Commission allowed to Trustees—

Calculation of. See WILL.

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Commission in Criminal Case—

Commission to examine witness—Purdanashin lady—Code of Criminal Procedure (Act X of 1882), *ss.* 6, 7, 503, 504, 505, 506, 507—*Presidency Magistrate, Power of.* It is doubtful if a Presidency Magistrate in the Town of Calcutta has power to issue a commission under ss. 503 to 507 of the Code of Criminal Procedure to examine a witness residing within his own jurisdiction; but there is nothing in the Code to prevent a Presidency Magistrate examining a witness within his jurisdiction at some place other than the Court House. Where a Presidency Magistrate, refused, on the ground of want of jurisdiction, to grant a commission for the examination of a *purdanashin* lady, but offered to take her evidence in his Court when cleared for the purpose, or in his private room in the Court house, and she applied to the High Court for a commission being granted, or for such other order as they might deem proper, the High Court on revision directed that if the lady would take a house or suite of rooms not far from the Magistrate's Court, and pay all the costs which the Magistrate deemed reasonable and proper, he should not enforce her attendance in Court, but examine her in the place so appointed, in the presence of the parties concerned, and in the manner in which *purdanashin* ladies are ordinarily examined.
HEM COOMAREE DASSEE *v.* QUEEN-EMPRESS ... ... XXIV 551

Commitment—

Power of. See MAGISTRATE, JURISDICTION OF.
Warrant of. See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO.

Common Object –

Causing grievous hurt in furtherance of. See RIOTING.

Compensation—

Award of. See LAND ACQUISITION ACT.

Compensation to accused in criminal case—Criminal Procedure Code (Act X of 1882), *s.* 560—*Separate charges—Complete discharge or acquittal.* The accused was charged under s. 352 and s. 379 of the Penal Code, but convicted under s. 352, being discharged under s. 379. The Magistrate ordered the complainant to pay compensation for bringing a frivolous and vexatious charge under s. 560 of the Criminal Procedure Code. The order for paying compensation was set aside on the ground that s. 560 could only operate when there was a complete discharge or acquittal.
MUKTI BEWA *v.* JHOTU SANTRA ... ... XXIV 53

For land. See LAND ACQUISITION ACT.
For use and occupation of land. See SECOND APPEAL.

Complaint –

Dismissal of. Revival of proceedings—Criminal Procedure Code (Act X of 1882), *ss.* 202, 203, 437—*Final disposal of case—Want of jurisdiction—Conviction.* Where an original complaint is dismissed under s. 203 of the Criminal Procedure Code, a fresh complaint on the same facts before the same Magistrate cannot be entertained, so long as the order of dismissal is not set aside by a competent authority. *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* followed.
KOMAL CHANDRA PAL *v.* GOUR CHAND ANDHIKARI ... ... XXIV 286

Dismissal of. Revival of proceedings—Right of appeal—Criminal Procedure Code (Act X of 1882), *ss.* 423, 439—*Presidency Magistrate, Jurisdiction of.* Where a complaint was dismissed by an Honorary Magistrate and an application was made to a Presidency Magistrate on the same facts and materials for a fresh summons. *Held*, that as a Presidency Magistrate has co-ordinate jurisdiction with an Honorary Magistrate, there was no right of appeal to the Presidency Magistrate from the order of the Honorary Magistrate. The proper course would be to apply to the High Court under ss. 423 and 439 of the Criminal Procedure Code to set aside the order and direct a retrial. *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* approved. *Virankutti* v. *Chiyamu* and *Opoorba Kumar Sett* v. *Probod Kumary Dassi* discussed.
GIRISH CHUNDER ROY *v.* DWARKA DASS AGARWALLAH ... ... XXIV 528

Compromise—

See HINDU LAW, INHERITANCE.
Without knowledge of attorney. See COSTS.

Compromise of Suit—

Recording compromise—Agreement made out of Court, and comprising also matters not the subject of suit—Code of Civil Procedure (Act XIV of 1882), *s.* 375. *Held* by the majority of the Full Bench, MACLEAN, C.J., and TREVELYAN and BANERJEE, JJ.,

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Compromise of Suit *(continued)*

(O'KINEALY and BEVERLEY, JJ, *dissenting*) that where the parties to a suit have by an agreement adjusted the subject matter of the suit the Court can, by an order made in the suit under s 375 of the Code of Civil Procedure, direct such agreement to be recorded, and make a decree in accordance therewith, even if one of the parties to the agreement object. *Held* (*per* O'KINEALY and BEVERLEY, JJ) that the Court could not make such an order the case not being one to which s 375 applied *Per* O'KINEALY, J —The High Court, on its Original Side exercising the equitable jurisdiction of the High Court of Chancery would not on a contested motion give a decree of this nature. *Per* BEVERLEY, J – Section 375 only applies to cases where the adjustment or satisfaction is made *in* Court, and should not be extended to cases adjusted out of Court
BROJODURLABH SINHA v RAMANATH GHOSE XXIV 908

Concurrent Decrees

Execution of See SALE IN EXECUTION OF DECREE

Concurrent Judgments on Facts

See PRIVY COUNCIL PRACTICE OF

Condition

Repugnant See WILL

In restraint of lease See CONTRACT

Consent Decree

See RES JUDICATA

Consideration

Right of plaintiff to return of money deposited in part payment of See SPECIFIC PERFORMANCE

Constructive Possession

See LIMITATION

Contempt of Court

Order refusing to commit for See [illegible] HIGH COURT [illegible]

Contract

Action on the See MINOR

Appropriation by vendor — Passing of property — Power of re-sale — Contract Act (IX of 1872) s 107 and ss 77 78 79 82 and 83 Measure of damages Changing shape of claim Evidence Amendment of plaint The plaintiff under several contracts with the defendant produced by manufacture goods answering to the description of the contracts and appropriated them to the several contracts On notice of the production of the goods being given to the defendant he directed the goods so appropriated to be marked and despatched for shipment according to certain instructions The plaintiffs carried out these instructions but the goods could not be shipped as the vessels in which they were to be shipped were not available at their usual place *Held* the ownership in the goods was transferred to the defendant and the plaintiffs became entitled under s 107 of the Contract Act after due notice to re-sell them on the defendant's refusal to take delivery and to recover as damages the difference between the contract price of the goods and the price at which they were resold *Semble* —The proper course to be adopted when it is sought to shape a claim for damages differently from what appears in the plaint is to amend the plaint and add a claim for damages on the basis of that amendment Then at the trial evidence may be given in support of the amended statement But that course ought not to be allowed to be adopted after the plaintiffs have once closed their case and the defendants have been called on to meet the claim as originally framed in the plaint *Yule & Co v Mahomed Hossain* followed
CLIVE JUTE MILLS CO LIMITED v EBRAHIM ARAB XXIV 177

Appropriation by vendor — Sale of unascertained goods — Passing of property — Breach of contract — Power of re-sale — Contract Act (IX of 1872) s 107 — Measure of damages The contract was for sale by description of 15 bales of grey shirtings (to arrive) at an agreed price It was found that the 15 bales which were tendered by the plaintiff did answer the description, but the defendants refused to accept them, alleging that they were wrongly marked Under the contract of sale the plaintiffs had an express power of re-sale After giving notice to the defendants they had the goods re-sold at auction and bought them in themselves as the highest bidders. Then they brought an action for the difference between the contract price and the price

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Contract—(*continued*)

realized at the re-sale, framing the suit as for loss on re-sale and not for damages for breach of the contract. *Held*, the defendants having refused to accept the goods, the property in them remained in the vendors (plaintiffs) and the re-sale had no effect whatever. To such a case as this neither s. 107 of the Contract Act, nor the proviso for re-sale in the contract itself, can have any application. Such power is required when the property in the goods has passed to the purchaser, subject to the lien of the vendor for the unpaid purchase money. The plaintiffs were entitled to receive only the difference between the market price of the day and the contract price, and that was the true measure of damages.
YULE & CO. v. MAHOMED HOSSAIN . XXIV 124

Denial of, by defendant. See SPECIFIC PERFORMANCE.

Hindu widow—Reversioners—Settlement of dispute—Ikrarnamah—Condition in restraint of lease—Transfer of Property Act (IV of 1882), ss. 10 and 15. In an *ikrarnamah* executed by a Hindu widow on the one side and her husband's cousins on the other in settlement of disputes regarding her husband's estate, one of the conditions agreed upon was that if either of the parties should want to execute a lease jointly or individually "it would be executed and delivered by mutual consultation of both the parties," and if "the document be not signed and consented to by both parties, it shall be null and void." In a suit brought on the basis of the *ikrarnamah* to set aside a lease granted by the widow: *Held*, there is nothing in any statute law which renders such a provision inoperative; neither ss. 10 and 15 of the Transfer of Property Act (IV of 1882) nor any principle underlying them is applicable to it; it is not an unreasonable provision, there was no absence of equity in the arrangement, and effect should be given to it.
KULDIP SINGH v. KHETRANI KOER XXV 869

Sale of goods—Brokers' bought and sold notes—Special place of delivery "to be mentioned hereafter"—Disclosure of principal—Assessment of damages—Contract Act (IX of 1872), ss. 49, 94, 231—Damages. Bought and sold notes of Purneah indigo seed provided: "The seed to be delivered at any place in Bengal in March and April 1891." It was added: "the place of delivery to be mentioned hereafter." The buyer made mention of this on the 20th March 1891 in a letter to the broker for both parties. This letter specifying Howrah Railway station as the place was forwarded to the vendor, who replied that he would deliver at his own godowns at Sulkea. This the buyer declined. The vendor and the buyer each insisting that the place named by him was the proper one for delivery, the buyer refused to accept at the vendor's godowns or at any place other than Howrah station. The vendor remained for a certain time ready and willing to deliver at his godowns at Sulkea, and the buyer not accepting delivery at that place, the vendor declared the contract cancelled. The buyer then sued him for breach of the contract to deliver at the place mentioned by the buyer. On the question whether the vendor had discharged his liability by readiness and willingness to deliver at his own godowns at Sulkea: *Held*, that the choice of place given originally by the contract to the buyer, subject only to the express contract that it must be in Bengal and to the implied one that it must be reasonable, had not been converted by the words about "mention thereafter" into a deferred question to be settled by a subsequent agreement. The buyer, according to the contract already subsisting, had the right to fix the place. There was a special promise in the contract as to the delivery, and to complete its terms nothing more was required than a mention by the buyer of a reasonable place within Bengal. This had been made by him. The contract, therefore, did not fall within s. 94 of the Indian Contract Act (IX of 1872) dealing with cases where there has been no special promise as to delivery and fixing the place of production as the place for delivery, but rather resembled what was contemplated in s. 49. And the buyer was entitled to damages on the contract.
GRENON v. LACHMI NARAIN AUGURWALA XXIV

Sale of unascertained goods—Breach of contract—Power of re-sale—Contract Act (IX of 1872), s. 107—Damages. The plaintiffs sold to the defendant under an "indent" contract ten cases of tobacco at an agreed price. On arrival the defendant refused to pay for and take delivery of the goods on the ground that they were not the goods contracted for. After notice to the defendant the plaintiffs re-sold the goods and sued to recover the expenses of the re-sale, and the difference between the price realized and the contract price with interest. *Held*, that cl. 1 of the "indent" contract gave the plaintiffs a right to re-sell the goods, and sue for the damages mentioned therein. Section 107 of the Contract Act had no bearing on the case. *Yule & Co. v. Mahommed Hossain* dissented from.
MOLL SCHUTTE & CO v. LUCHMI CHAND .. ... . XXV 505

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Suit for Contract Act (IX of 1872) s 70 Money deposited by the plaintiffs to save the property of which they were co-sharers from being sold for arrears of revenue—Personal liability—Appeal Power of the Appellate Court to add parties as respondents Code of Civil Procedure (Act XIV of 1882) s 559 In a suit for contribution by the plaintiffs against the defendants the Court of First Instance gave the plaintiffs a decree against one defendant and exonerated the others On an appeal by the defendant against whom the decree was passed the Appellate Court directed the defendants exonerated by the first Court to be added as respondents set aside the decree against the appealing defendant and passed a decree against the defendants who were added as respondents as representatives of one S and ordered the amount so decreed to be recovered from the estate of her (S's) husband On appeal to the High Court by the defendants who were thus made liable on the grounds that they were wrongly made parties and no decree could be passed against them and that the liability to contribution being the personal liability of S they not being heirs to her *stridhan* were not liable for the plaintiffs claim *Held* that there was nothing wrong in the course adopted by the lower Appellate Court and by s 559 of the Code of Civil Procedure the defendants were rightly made parties *Alma Ram v Balkishen* dissented from *Held* also that inasmuch as a claim for contribution creates only a personal liability against the co-sharer on account of whose share the payment has been made and does not create a charge on the estate the persons liable would not be the reversionary heirs to S's husband's estate but those who would inherit her *stridhan*
UPENDRA LAL MUKERJEE v GIRINDRA NATH MUKERJEE XXV 565

Suit for Joint wrong doers Decree for costs—Evidence Proceedings in former case not between same parties—Admissibility of finding in former case S granted to G and A a *putni* of certain lands in a zamindari and thereupon P brought a suit against G S and A for specific performance of an agreement to grant to him (P) a *putni* of the same lands That suit was decreed with costs the whole of which were realized from G In a suit for contribution brought by G against S and A the lower Appellate Court found that G S and A had conspired in setting up a false defence in the former suit in order to defeat P's claim *Held* in second appeal that assuming such collusion were proved the suit for contribution was not maintainable G S and A being joint wrong doers *Vaymanna Vidika Vittil Minji v Pariyeri Pelingu Kuruppath Kaduchen Nayar* followed *Brojendro Kumar Roy Chowdhry v Rash Behari Roy Chowdhry* distinguished The only evidence on which the lower Appellate Court had acted as establishing such collusion was the finding of the Court in the former suit (gathered from the grounds of appeal in that suit) *Held* that that finding was inadmissible in evidence as laid down in *Surendra Nath Pal Chowdhry v Brojo Nath Pal Chowdhry* being the finding in a case in which G S and A were all co-defendants and a third party the plaintiff and the case was remanded for the determination of the question whether G S and A were wrong doers and were as such held liable for the costs of the former suit
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Application for stay of execution—Practice. Where the defendant in an original suit applied to the Appellate Court for stay of execution of the decree pending the appeal: *Held* (BANERJEE, J., *dissenting*) that the applicant who asked for the indulgence must pay the costs of the application.
CHUNI LAL *v.* ANANTRAM ... ... XXV 893

Attorney's lien for costs—General jurisdiction of High Court over all suitors—Compromise by parties without knowledge of attorney—Lien, Notice of—Attorney and Client. The decree obtained by the plaintiff in a suit was satisfied by defendant behind the back of the plaintiff's attorney, although he had notice of the lien for costs of the plaintiff's attorney. The plaintiff's attorney thereupon applied for an order upon the plaintiff and the defendant, or either of them, to pay his costs: *Held*, that the High Court has general jurisdiction over its suitors; that although a defendant has the right to compromise with a plaintiff without the knowledge of the plaintiff's attorney, such compromise must be made with the honest intention of ending the litigation, and not with any design to deprive the attorney of his costs, and he cannot make a payment to the plaintiff under that compromise, if he has notice of the lien for the costs of the plaintiff's attorney.
KHETTER KRISTO MITTER *v.* KALLY PROSUNNO GHOSE ... ... XXV 887

Decree for. See CONTRIBUTION, SUIT FOR: EXECUTION OF DECREE.

For Paper Book, Failure to deposit. See REVIEW.

Liability to pay. See ADMINISTRATOR-GENERAL'S ACT, S. 35.

Of petitioner. See PRACTICE.

Order for and assessment of. See CRIMINAL PROCEDURE CODE, S. 148.

Presidency Small Cause Courts Act (XV of 1882), s. 22—Presidency Small Cause Courts Act (I of 1895) s. 11—Suit brought before, but determined after, the passing of Act I of 1895—Certificate for costs—General Clauses Consolidation Act (I of 1868), s. 6. The plaintiff, before the passing of Act I of 1895, instituted in the High Court a suit to recover from the defendant a sum of over Rs. 2,000, which was reduced to a sum of less than Rs. 2,000 before the hearing and therefore below the limit for suits cognizable by the Small Cause Court. At the time of its institution Act XV of 1882 was applicable, by s. 22 of which Act a plaintiff was deprived, in a suit cognizable by the Small Cause Court, of his costs if he obtained a decree "for less than 2,000 rupees" unless the Judge who tried it certified it was a fit case to be tried in the High Court. The suit was not determined until after the passing of Act I of 1895, s. 11, of which the deprivation of costs applied to cases in which the plaintiff obtained a decree for less than 1,000 rupees. The Judge made a decree in favour of the plaintiff, and, without certifying that the case was one fit to be brought in the High Court, he allowed the plaintiff the costs of the suit. *Held*, on appeal, that the case was governed by s. 6 of the General Clauses Consolidation Act (I of 1868). Act I of 1895 was not applicable, and the plaintiff was not entitled to his costs of suit. The principle of *Deb Narain Dutt v. Narendra Krishna* applied.
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Costs of second. See TAXATION OF COSTS.

Court Fee—

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Court Fees Act—

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s. 11. Suit for possession and mesne profits—Code of Civil Procedure (Act XIV of 1882), s. 212—Assessment of mesne profits—Dismissal of suit—Application for execution. Where, upon the application of the decree-holder, the Court executing the decree has assessed the amount of mesne profits, but the necessary Court fees have not been deposited within the time fixed by the Court as provided by s. 11 of the Court Fees Act (VII of 1870), the suit, that is, the claim in respect of those mesne profits, must be dismissed; after such dismissal no application for execution of the decree for mesne profits can be entertained, as no such decree is in existence. The word "suit" in the last part of para. 2 of s. 11 of the Court Fees Act does not mean the entire suit; it means the claim in respect of the mesne profits.
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sch. I, art. 11. Probate fee—Doubtful debt. The uncertainty of recovering a debt due to the estate of a deceased person is not a sufficient ground for a proportionate reduction of the fee payable in respect of probate of a will.
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See LETTERS OF ADMINISTRATION.
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Co-widows –
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Criminal Procedure Code -
Act X of 1872, s. 318. See REFORMATORY SCHOOLS ACT.
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s. 3. See ACT XIII OF 1859, REFORMATORY SCHOOLS ACT.
ss. 6, 7. See COMMISSION IN CRIMINAL CASE.
s 35. *Sentence Concurrent sentences of imprisonment—Penal Code (Act XLV of 1860), s. 409.* Sentences of imprisonment passed for distinct offences to run concurrently are not warranted by law. *Queen Empress* v. *Wazir Jan* referred to.
DAITARI DAS v. QUEEN-EMPRESS ... ... XXV 557
ss. 76, 81, 90. See WARRANT OF ARREST.
ss. 106; 107. See RECOGNIZANCE TO KEEP PEACE.
ss. 107 and 118 *Wrongful act likely to occasion a breach of the peace—Practice—Rule issued upon the Magistrate—Right to appear of a party interested in the result.* The granting of lease to tenants of land not in one's possession does not constitute a wrongful act such as s. 107 of the Criminal Procedure Code (Act X of 1882) contemplates. Where the notice directs a person to show cause why he should not be bound down to keep the peace, it is improper to make an order directing him to execute bonds for his good behaviour. When a rule is issued upon the Magistrate to show cause and the order sought to be set aside is one that is only intended to secure the peace of the District by binding down the petitioner, the Magistrate is the only party entitled to be heard. Any other party interested in the result of the order cannot appear.
DRIVER v. QUEEN-EMPRESS ... . XXV 798
ss. 107, 145. *Dispute concerning land—Procedure—Recognizance.* Where a dispute likely to cause a breach of the peace exists concerning possession of land, proceedings under s. 145, and not under s. 107, of the Criminal Procedure Code should be instituted.
DOLEGOBIND CHOWDHRY v. DHANU KHAN ... ... XXV 559
ss. 110. See SECURITY FOR GOOD BEHAVIOUR.
s. 118. See CRIMINAL PROCEDURE CODE, SS. 107 AND 118.
s. 123. See SECURITY FOR GOOD BEHAVIOUR.
ss. 133; 133, 137; 137; 140; 144. See NUISANCE.
s. 145. See CRIMINAL PROCEDURE CODE, SS. 107 AND 145; POSSESSION, ORDER OF CRIMINAL COURT AS TO.
s. 145. *Possession, Order of Criminal Court as to—Parties to proceedings—Manager in possession.* A person who is in possession of land merely as manager for the actual proprietor should not be made a party to proceedings under s. 145 of the Criminal Procedure Code. *Behari Lall Trigunait* v. *Darby* followed.
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Act X of 1882—*(continued.)*

s. 148. *Order for, and assessment of, costs—Power of Magistrate—Delay—Notice to parties.* An order for, and the assessment of, costs under s. 148 of the Criminal Procedure Code should be made at the time of passing the decision under s. 145 of the Code in the presence of the parties. Such costs should not be ordered and assessed by the Magistrate after a long interval, and without allowing all the parties affected an opportunity to appear and show cause.

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ss. 155, 156; 165. See DAMAGES, SUIT FOR.

s. 160. See WARRANT OF ARREST.

s. 177. See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO.

s. 182. See JURISDICTION OF CRIMINAL COURT.

ss. 202; 203. See COMPLAINT.

ss. 202; 254. See MAGISTRATE, JURISDICTION OF.

s. 297. See JURY, VERDICT OF.

ss. 306, 307. See JURY.

ss. 337, 339. See PRACTICE.

s. 350. See WITNESS.

s. 364. See MAGISTRATE, JURISDICTION OF.

s. 399. See REFORMATORY SCHOOLS ACT.

ss. 404, 520, 522. See APPEAL IN CRIMINAL CASE.

s. 418. See CHARGE TO JURY.

s. 423. See COMPLAINT.

s. 423, cl. (*b*), sub-sec. 3. *Penal Code (Act XLV of 1860)*, ss. 147, 379—*Enhancement of sentence.* In a case where the accused were convicted by a Deputy Magistrate of the offence of rioting under s. 147 and theft under s. 379 of the Penal Code and sentenced to four months for the first and two months for the latter offence, but on appeal the District Magistrate, considering the case to be one of theft rather than rioting, abandoned the sentence under s. 147, but upheld the conviction under s. 379 of the Penal Code and sentenced them to six months' rigorous imprisonment. *Held*, that what the District Magistrate had in effect done was to enhance the sentence under s. 379 of the Penal Code, which he had no power to do under s. 423, cl. (*b*), sub-sec. 3 of the Code of Criminal Procedure.

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s. 423 (*d*). See CHARGE TO JURY.

s. 437. See COMPLAINT: NUISANCE.

s. 439. See COMPLAINT.

s. 488. See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO.

ss. 503, 507. See COMMISSION IN CRIMINAL CASE.

s. 514. See RECOGNIZANCE TO KEEP PEACE.

s. 517. *Order as to disposal of property as to which no offence has been committed—Property found by Police in possession of accused—Magistrate, Power of.* The accused was convicted of criminal breach of trust in respect of certain money belonging to the complainant, and on his conviction the Magistrate made an order under s. 517 of the Code of Criminal Procedure, directing that an amount equal to the moneys embezzled should be repaid to the complainant out of certain sums of money found by the Police on the person of the accused. *Held*, that the Magistrate had no power to make the order under s. 517 of the Criminal Procedure Code, there being nothing to show that any offence had been committed with regard to the property, or that it had been used for the commission of any offence.

QUEEN-EMPRESS v. FATTAH CHAND ... ... XXIV 499

s. 522. *Restoration of possession of immoveable property—Dispossession by use of criminal force.* The words "an offence attended by criminal force" in s. 522 of the Criminal Procedure Code (Act X of 1882) mean an offence of which criminal force forms an ingredient. Section 522 is not applicable to cases where there has been no conviction for criminal force, either separately or as an ingredient of the offence of which there is a conviction, and where there is no finding that any person has been dispossessed of any immoveable property by criminal force. *Luchmi Dass* v. *Pullat Lall*, and *Soshi Bhusan Dutt* v. *Pyari Kishore Biswas* followed.

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s. 526, cl. (*e*). See TRANSFER OF CRIMINAL CASE.

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s. 537. See CHARGE TO JURY: FACTORIES ACT: WITNESS.

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s. 540. See MAGISTRATE, JURISDICTION OF: WITNESS.
s. 555. See MAGISTRATE, JURISDICTION OF.
s. 560. See COMPENSATION.

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Adding parties during course of. See POSSESSION, ORDER OF CRIMINAL COURT AS TO.
Commencement of. See WITNESS.
Revival of. See COMPLAINT.

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Suit for damages for distraint of. See SECOND APPEAL.

Cross-examination of Witness—

Called by Court. See WITNESS.

Cruelty to Animals—

See PREVENTION OF CRUELTY TO ANIMALS ACT.

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Damage—

By ship under way colliding with another at anchor. See COLLISION
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For theft or misappropriation, Decree for. See HINDU LAW, JOINT FAMILY.
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Measure of and Assessment of. See CONTRACT.
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Suit for. Opium (Act I of 1878), s. 9—Act XIII of 1857—Wrongful entrance and illegal search, Liability of Police Officer for—Code of Criminal Procedure (Act X of 1882), ss. 155, 156 and 165—Non-cognizable offence. An offence under s. 9 of the Opium Act (I of 1878), and not coming under s. 14 of that Act, is a non-cognizable offence and is therefore one for which by s. 4 of the Criminal Procedure Code a Police Officer cannot arrest without warrant; and he has therefore under s. 155 of the Code no authority to investigate such an offence without the order of a Magistrate; nor under s. 165 can he make a search in respect of it. The power of arrest without warrant referred to in cl. (q) of s. 4 of the Criminal Procedure Code is an unqualified power, and not a conditional power, as in s. 24 of Act XIII of 1857, which only gives the right to a Police Officer to arrest without warrant in case the accused does not furnish the security required by that section. Where a Police Officer, therefore, in respect of an offence under s. 9 of the Opium Act, not coming under s. 14 of that Act, made a search in the house of the accused without an order of a Magistrate: *Held* that his action could not be justified, either under s. 24 of Act XIII of 1857, or under the Code of Criminal Procedure, and that he was liable in an action, for damages for the illegal search.

BAHADAL SHAH *v.* TARAK NATH CHOWDHRY ... ... XXIV 691

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Meaning of. See LIMITATION ACT, ART. 179.

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Uncertainty of recovering. See COURT FEES ACT, SCH. I, ART. 11.

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Suit for. Specific Relief Act (I of 1877), s. 42—Suit for declaration that the defendant is a mere benamidar for plaintiff. In a suit by A to obtain a declaration that a decree originally obtained by B against C and another, which had been purchased in the name of D, had really been purchased by the plaintiff for his own benefit: *Held*, that inasmuch as it was not necessary to ask for an injunction, the suit was not barred by the proviso to s. 42 of the Specific Relief Act.
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Amendment or alteration of decree—Power of the High Court to amend decree of lower Court improperly drawn—Civil Procedure Code (Act XIV of 1882), ss. 206, 551—Effect of dismissal of appeal—Practice. The order of dismissal of an appeal under s. 551 of the Civil Procedure Code, being a final determination of, and an adjudication on, the questions raised in the appeal, is a "decree"; and in this respect there is no distinction between an appeal which is dismissed under s. 551 of the Civil Procedure Code, and an appeal which is dismissed under any other section of the Code after full hearing. *Royal Reddi* v. *Linga Reddi* referred to. When an appeal is dismissed under s. 551 of the Civil Procedure Code, or in the case of a second appeal when the decree is one of dismissal, the effect practically is to make the decree which is confirmed the final decree to be executed in the suit; and the High Court making such order has power to amend the decree of the lower Court which has been in effect confirmed by it, so as to bring it in conformity with the judgment which is also confirmed.
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Consent, setting aside. See PRACTICE.
Dismissing party from suit. See 'RES JUDICATA.'
Execution of, not materially defective, Application for. See LIMITATION ACT, ART. 179, CLS. 4 AND 2.
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Ex parte, Suit to set aside. See RIGHT OF SUIT.
For damages for theft or misappropriation. See HINDU LAW, JOINT FAMILY.
Form of. See BENGAL TENANCY ACT, S. 50: INTEREST · LEASE.

Form of decree—Suit for arrears of rent—Failure of plaintiff to prove alleged rate of rent—Ascertainment of proper rate—Duty of Court. In a suit for arrears of rent at certain alleged rates in which the plaintiff fails to prove the rates alleged by him, it is not the duty of the Court to ascertain what were the fair rates, unless it is asked to do so. The case of *Punnoo Singh* v. *Nirghin Singh* does not lay down a contrary rule.
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For money. See EXECUTION OF DECREE.
For payment of money. See CIVIL PROCEDURE CODE, S. 230.
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Not subsisting at time of sale. See SECOND APPEAL.
Passed by Recorder of Rangoon. See APPEAL.

Possessory decree—Specific Relief Act (I of 1877), s. 9. Where a decree was passed under s. 9 of the Specific Relief Act (I of 1877) giving the plaintiff possession, and also directing that the costs of removing huts and filling up excavations should be paid by the defendant under this decree: *Held*, that the latter portion of the decree was beyond the scope of a possessory decree under s. 9 of the Specific Relief Act and must be set aside.
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See REGISTRATION ACT S 35

Denial of Title

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In part payment of consideration Right of plaintiff to return of See SPECIFIC PERFORMANCE

Deposit of Title-deeds

Transfer of Property Act (IV of 1882) s 59 Equitable mortgage—Immoveable properties situated partly outside the limits of Calcutta—Transaction in Calcutta Decree for sale Practice The defendant borrowed moneys from the plaintiff in Calcutta by deposit of title deeds relating to immoveable properties situate partly inside and partly outside the limits of the town of Calcutta In a suit by the plaintiff it was held that the transaction having taken place in Calcutta the mortgage was valid as an equitable mortgage under s 59 of the Transfer of Property Act though some of the properties were situated outside the limits of the town and that according to the practice of the Court the appropriate remedy in such a mortgage suit is a decree for sale

SRINATH ROY v GODADHUR DAS XXIV 348

Discharge or Acquittal

Complete See COMPENSATION

Discretion

Of Taxing Officer See TAXATION OF COSTS

Dismissal of Appeal

See JUDGMENT

Dismissal of Suit

See COURT FEES ACT S 11 RES JUDICATA SPECIFIC PERFORMANCE

Disposal of Property

In which no offence has been committed See CRIMINAL PROCEDURE CODE S 517

Disqualification to try Case—

See MAGISTRATE JURISDICTION OF

Distraint

Suit for compensation for illegal See BENGAL TENANCY ACT SS 121 AND 140

Distraint of Crops

Suit for damages for and for money paid See SECOND APPEAL

District Judge—

Jurisdiction of See HIGH COURT, JURISDICTION OF LUNATIC PROBATE

Withdrawal of appeal from See HIGH COURT JURISDICTION OF

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Authority of See POSSESSION

Division Court—

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Divorce—
See MARRIAGE

Divorce Act—
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Execution of See PARDANASHIN LADY WILL
Power of Court to inquire into genuineness as well as validity of See REGISTRATION ACT s 77
Unregistered See FORGERY

Documents
See INSPECTION OF DOCUMENTS

Ejectment—
Liability to See LANDLORD AND TENANT
Suit for See LANDLORD AND TENANT RIGHT OF SUIT
Suit for *Suit against several defendants Parties Joinder of Cause of action* In a suit for ejectment against several defendants who set up various titles to different parts of the land claimed there is only one cause of action not several distinct and separate causes of action So *held* setting aside the decree of the District Judge who had dismissed the suit for misjoinder of causes of action
ISHAN CHUNDER HAZRA v RAMESWAR MONDOL XXIV 831
Suit for and for recovery of See LIMITATION ACT ART 32

Election of Municipal Commissioners
See JURISDICTION OF CIVIL COURT

Encroachment
See LANDLORD AND TENANT LIMITATION ACT ART 121

Endowment
See HINDU LAW ENDOWMENT
Succession in management of See LIMITATION ACT ART 124

English Law
How far English law is applicable in Calcutta English law relating to personalty Term of years — Armenians Construction of power in deed of trust The English law relating to personalty applies to personalty in India held by British subjects and others to whom the English law is applicable A term of years is therefore personalty in India as it is in England Armenians in India are subject to the English law A power contained in a trust deed to invest Rs 20,000 in or upon any real or Government securities or in or upon any public funds at interest is of an optional character and not imperative and does not alter the character of the original property so as to convert it from personalty into realty
NICHOLAS v ASPHAR XXIV 216

Enhancement of Rent—
Suit for See BENGAL TENANCY ACT s 158 EVIDENCE LANDLORD AND TENANT

Entire Estate
See ASSAM LAND AND REVENUE REGULATION SALE FOR ARREARS OF REVENUE

Entry—
Made in measurement papers See EVIDENCE ACT s 35

Equitable Mortgage—
See DEPOSIT OF TITLE DEEDS MORTGAGE

Equity and Good Conscience—
See SPECIFIC PERFORMANCE

Estates Partition Act -
Bengal Act VIII of 1876
See PARTITION
s 54 See EVIDENCE ACT s 35
ss 116, 150 See LIMITATION ACT ART 14
s 123 See SALE FOR ARREARS OF REVENUE

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Evidence—

See CHARGE TO JURY CONTRACT SALE IN EXECUTION OF DECREE WILL

Additional evidence in Appellate Court See SECOND APPEAL

Admissibility of See CONTRIBUTION, SUIT FOR

Question of See SMALL CAUSE COURT, PRESIDENCY TOWNS

Rejected by first Court but accepted on appeal See PRIVY COUNCIL, PRACTICE OF

Rent Receipts proof of genuineness of—Onus of proof—Bengal Tenancy Act (VIII of 1885) s 50—Suit for enhancement of rent—Appellate Court Power of In a suit for enhancement of rent the defendant produced certain *dakhilas* and deposed to having received them on payment of rent *Held* that this was sufficient evidence to prove them *Held* further that it was perfectly open to the lower Appellate Court which had to deal with the facts of the case to say whether taking the receipt which extended over a number of years together and having regard to the fact that the receipts did not specify the years to which the amounts related, the amounts paid in any particular year were partly for the rents of that year and partly for the arrears due in respect of previous years To entitle the plaintiff to a decree for enhancement of rent on the ground of an alteration in the area of the defendant's holding the plaintiff must show that the defendant is holding lands in excess of what he is paying rent for and in order to do that he must show for what quantity of land the defendant is paying rent

SURJA KANTA ACHARJEE v BANESWAR SHAHA XXIV 251

Evidence Act—

I of 1872

ss 11 and 13 *Judgment not inter partes Admissibility in evidence of judgment in former case The subject matter of the former suit not being identical with that of the latter suit judgment irrelevant* The rule laid down in the cases of *Gujju Lall* v *Fatteh Lall* and of *Surendra Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry* has been materially qualified by the decisions of the Privy Council in the cases of *Ram Ranjan Chakerbati* v *Ram Narain Singh* and *Bitto Kunwar* v *Kesho Persad* Under certain circumstances in certain cases the judgment in a previous suit to which one of the parties in the subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit In a case where the previous suit was to recover a two thirds share of the property in question and the subsequent suit was by a different plaintiff to recover the remaining one third share of the same property *Held* in the subsequent suit the judgment in the previous suit was not admissible in evidence the subject matter in the two suits not being identical

TEPU KHAN v RAJANI MOHUN DAS . XXV 522

ss 11 cl. 2 and 21 cl 3 *Admissibility of petition and written statement filed in a previous proceeding* Where the plaintiffs and some of the defendants were co owners of certain properties the question at issue being whether there was a partition between them and whether under that partition the defendants came to be in possession of a specific property in lieu of their shares in all the properties a petition and a written statement filed by the defendant in certain previous suits admitting the partition and the exclusive acquisition of the specific property were put in but objected to as inadmissible in evidence *Held*, that the documents were admissible against those defendants under ss 11 cl (2) and 21 cl (3) of the Evidence Act *Naro Vinayak* v *Narhari* relied upon

GYANNESSA v MOBARAKANNESSA XXV 210

s 27 *Information received from the accused Statement leading to the discovery of a fact—Admissibility of such statement* If the statement of an accused person in the custody of the Police is a necessary preliminary of the fact thereby discovered, it is admissible under s 27 of the Evidence Act, it is immaterial whether the statement is sufficient to enable the Police to make the discovery by themselves or is only of such a nature as to require further assistance of the accused to enable them to discover the fact *Empress of India* v *Pancham* dissented from *Queen-Empress* v *Nana* followed *Adu Shikdar* v. *Queen-Empress* referred to

LEGAL REMEMBRANCER v CHEMA NASHYA XXV 413

s. 32, sub-sec 5 *Statements as to existence of relationship Proof of age and order of birth of children* Case in which the plaint in a former suit verified by a deceased member of the family, and as such having special means of knowledge, was held admissible under s 32, sub sec 5 of the Evidence Act (I of 1872), to prove the order in which certain persons were born and their ages

DHANMULL v. RAMCHUNDER GHOSE .. .. .. XXIV 265

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Evidence Act—*(continued.)*
I of 1872—*(continued.)*
s 35 *'Butwara Khasra'' Estates Partition Act (Bengal Act VIII of 1876), s 54—Measurement papers, Entry made in "Record"* A *butwara khasra* or measurement paper prepared under s 51 of the Estates Partition Act (Bengal Act VIII of 1876) is not a record within the meaning of s 35 of the Evidence Act I of 1872 An entry made therein of the name of a tenant in possession is not admissible in evidence under that section *Mohi Choudhury* v *Dhiro Misram* referred to
PERMA ROY *v* KISHEN ROY XXV 90
s 85 See PRACTICE
s 92 See LEASE
s 92 *Mortgage—Sale Conduct of parties—Oral Evidence when admissible to prove that an apparent sale is a mortgage Admissibility of parol evidence to vary a written contract* Oral evidence of the acts and conduct of parties which is oral evidence that possession remained with the vendor notwithstanding the execution of a deed of out and out sale is admissible to prove that the deed was intended to operate only as a mortgage
PRIONATH SHAHA *v* MADHU SUDAN BHUIYA XXV 603
s 92 prov 3 *Parol evidence qualifying an engagement in a written document—Admissibility of such evidence—Real intention of question is to the admissibility of evidence* The proper meaning of proviso 3 to s 92 of the Evidence Act (I of 1872) is that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect and that it was to impose no obligation at all until the happening of a certain event may be proved An oral agreement purporting to provide that the promise to pay on demand in a promissory note though absolute in its terms was not to be enforceable by suit until the happening of a particular event and that the legal obligation to perform the promise was to be postponed is not an agreement that falls within the proviso 3 to s 92 of the Evidence Act *Jarat mund Missir* v *Narahan Singh* and *Cohen* v *Bank of Bengal* followed Questions as to the admissibility of evidence should be decided as they arise and should not be reserved until judgment in the case is given *Jadu Rai* v *Bhol Lu m Nandy* followed
RAMJIPUN SEROWGY *v* OGHORI NATH CHATTERJEE XXV 401
s 115 See MINOR
s 126 See PRIVILEGED COMMUNICATION
s 165 See WITNESS

Exchange
See TRANSFER OF PROPERTY ACT, s 118
Rate of See EXECUTION OF DECREE

Exciseable Article
Definition of See BENGAL EXCISE ACT s 4

Execution of Decree
See LIMITATION ACT ART 179 180 SECOND APPEAL
Adjustment or satisfaction of decree Civil Procedure Code (Act XIV of 1882) ss 257 A 258—Sanction of Court to agreements for satisfaction of decree Payments by judgment debtor under void agreement Effect of uncertified payments to decree holder A sum paid under an agreement void under s 257 A of the Civil Procedure Code cannot be acknowledged or recognised in execution of a decree under s 258 of the Code unless it has been certified within the proper time Agreements for the satisfaction of a judgment debt not sanctioned under s 257 A of the Civil Procedure Code are void, but, if sanctioned they may be carried out in execution
DURGA PRASAD BANERJEE *v* LALIT MOHAN SINGH ROY XXV 86
Application for See COURT FEES ACT s 11 LIMITATION LIMITATION ACT, ART 179, CL 3
Application for stay of See COSTS
Charge—Attachment without sale—Transfer of Property Act (IV of 1882), ss 67, 99, 100—Res judicata The plaintiff, a judgment creditor had in the High Court obtained a decree against the defendant, whereby it was ordered that the defendant should pay to the plaintiff a sum of Rs 1,68 123, and that the said sum should be a charge on certain immoveable properties situated in the mofussil and specified in a schedule to the decree. In August 1894 the plaintiff obtained an order for transfer of the decree to a mofussil Court and sent a copy of the decree

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Execution of Decree—*(continued)*

for execution there He obtained in that Court an order for attachment and sale of the property, but that order was reversed on appeal in May 1895 the High Court holding that the properties could not be sold in execution of the decree, but that a separate suit must be brought under S 67 of the Transfer of Property Act The plaintiff then applied to the Court that passed the decree for an order for transmission of the decree to the mofussil Court with a view to execution That application was refused by SALE, J who held that the decision of May 1895 was conclusive as to the plaintiff's right to attach the property as distinct from a sale or to sell it except after a suit under s 67 of the Transfer of Property Act *Held* on appeal (reversing the decision of SALE J) that the application was not *res judicata* *Held* also that an order for attachment only as distinct from a sale could be made *Aubhoyessury Babee* v. *Gouri Sunkar Panday* explained *Chundra Nath Dey* v *Burroda Shoondury Ghose* referred to
GOURI SUNKER PANDAY v ABHOYESWARI DABEE XXV 262

Code of Civil Procedure (Act XIV of 1882) ss 223 and 649 Bengal North Western Provinces and Assam Civil Courts Act (XII of 1887), s 13—Redistribution of local areas Effect of—Jurisdiction of Munsif A obtained a decree against B in the Court of the first Munsif at Howrah After the decree the local area within which the cause of action arose and the judgment debtor resided was transferred from the first to the second Munsif On an application by A for the execution of his decree in the Court of the second Munsif which allowed execution *Held* that the second Munsif had no jurisdiction to entertain the application and allow execution and that the application ought to have been made in the Court of the first Munsif which passed the decree
KALI PADO MUKERJEE v DINO NATH MUKERJEE XXV 315

Effect of striking off application for See LIMITATION

Mode of execution—Mortgage—Subsequent mortgagee Execution against properties outside the local jurisdiction of the High Court—Leave to sue—Letters Patent High Court 1865 cl 12 Application of restrictive words of that clause Properties within Calcutta were mortgaged to the plaintiff and these properties together with other properties out of Calcutta were mortgaged to a second mortgagee In a suit against the mortgagor and the second mortgagee it was *held* that after the usual mortgage decree was made the second mortgagee had the right to proceed against the properties out of Calcutta for the realization of any balance of the mortgage money that might remain due to him The restrictive words of cl 12 of the Letters Patent 1865 apply to the case of a plaintiff but there is no similar restraining provision applicable to a case where the person seeking the exercise of the Court's jurisdiction is the defendant
KISSORY MOHUN ROY v KALI CHURN GHOSE XXIV 190

Order of Privy Council Decree for costs—Rate of exchange In converting into Indian currency the amount of costs expressed in sterling in an order of Her Majesty in Council the rate of exchange is the rate which prevailed at the time when the order was made *Dikhina Mohan Roy Chowdhry* v *Saroda Mohun Roy Chowdhry* followed
MAHOMED ABDUL HYE v GAJRAJ SAHAI XXV 283

Proceedings and orders in See LIMITATION
Question arising in See CIVIL PROCEDURE CODE S 244
Question for Court in See CIVIL PROCEDURE CODE S. 244

Stay of execution Decree for arrears of rent Decree for money—Code of Civil Procedure (Act XIV of 1882) s 546 A decree for arrears of rent is a "decree for money" within the meaning of s 546 of the Code of Civil Procedure
BANKU BEHARY SANYAL v SYAMA CHURN BHUTTACHARJEE XXV 322

Execution of Document—
Denial of See REGISTRATION ACT S 35

Executor—
See HINDU LAW WILL WILL
Commission to See MAHOMEDAN LAW
Costs of See PROBATE
Mismanagement by See PROBATE

Ex parte Hearing of Case—
See PRIVY COUNCIL PRACTICE OF

Facsimile of Name—
Execution of will by impression of See WILL

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Fact—

In issue not finally decided. See 'RES JUDICATA.'

Factories Act—

XV of 1881 (as amended by Act XI of 1891) —

ss. 15 *(g)* and Proviso (1), 17. *Bengal Municipal Act (Bengal Act III of 1884), ss.* 320, 321—*Liability for neglecting to keep a factory in a cleanly state—Criminal Procedure Code (Act X of* 1882), *s.* 537 —*Nuisance—Sanction.* The Inspector of factories having found the latrines of the Hastings Mill within the Serampore Municipality in a filthy state instituted a prosecution against the manager of the mill, but the prosecution failed. He then prosecuted, as representing the Municipal Commissioners of Serampore, the Chairman of the Municipality, who, on conviction, was fined Rs. 200 for "neglecting to keep the factory free from effluvia arising from a privy" under the provisions of the Factories Act and of the Bengal Municipal Act, s. 320 : *Held*, that the conviction of the Chairman was unsustainable on the finding that the Municipality and the occupier of the factory were jointly responsible. *Held*, further, that it lay upon the occupier of the factory as being primarily liable for breach of any of the provisions of the Factories Act to give the strictest proof of circumstances exonerating himself from the liability in order to fix it on any other person.

CHAIRMAN OF THE SERAMPORE MUNICIPALITY *v.* INSPECTOR OF FACTORIES, HOOGHLY ... ... XXV 454

Fees to Collector—

Effect of non-payment of. See BENGAL TENANCY ACT, S. 16.

Ferry—

Compensation for loss of. See LAND ACQUISITION ACT

Findings of Fact—

See SECOND APPEAL.

On evidence after remand. See SECOND APPEAL.

Fishery—

Right of. See JURISDICTION.

Suit for rent of. See JURISDICTION.

Foreclosure—

Decree absolute for. See MORTGAGE

Suit for. See RIGHT OF SUIT

"Foreign Exciseable Article"

See BENGAL EXCISE ACT, S. 4

Forest Act—

VII of 1878—

Ch. IX, ss. 45 to 56. *Drift and stranded timber, Right of Government, under s. 45, to collect and store, with obligation to notify—Meaning of "julkur"—Test of* Res judicata—*Civil Procedure Code (Act XIV of* 1882), s. 13. The object of Ch. IX of the Indian Forest Act, 1878, is to regulate the rights of owners, and not to deprive them of their property in drift and stranded timber and wood Section 45 of that Act does not divest the owner of, or transfer to the Government, any right therein. Nor does anything in the Act affect the right of the Government to take possession and dispose of timber and wood whereof they are the undisputed owners. But, upon certain conditions only, the Government have a right to the possession of any drift and stranded timber and wood, collected by their officers, which, however, may be claimed by the true owner, who may be a person holding a *julkur*, or water right, comprehending those things. The conditions are that the officers of Government shall store the timber in the manner, and issue the notifications, required by the Act. In case of such procedure not being followed, and the wood being treated as the property of the Government, the latter are, in the event of the wood being found not to belong to them, in no better position than any other trespasser. The title to collect given to the Government by the Act is coupled with and dependent upon, the duty of giving notice to the public, in order that the true owner, whether he be a person from whom the wood has drifted away, or the owner of a *julkur*, or however he may be entitled, may claim the drifted timber in the manner, and within the time, prescribed by the Act. There is no presumptive ownership of the Government save where their officers collect, and hold, for the true owner, in the first instance, subject to the statutory duty of giving notice The Government having taken

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Forest Act—*(continued.)*

VII of 1878—*(continued.)*

possession of drift timber in the river Teesta as having an absolute right thereto, the zamindar owning land on the bank asserted by this suit his right to it, on the ground of his owning the *julkur* where the river passed by, and through his lands. This *julkur*, as he showed, had been decreed in 1882 to his predecessor in estate, in a suit against the Government. *Held*, that this term, signifying water-right, was aptly used to include the right to drift and stranded timber as well as to fishings, or other interest of a similar kind in the produce of the river—a right decreed in the above suit. The rule is that where a final decree is couched in general terms, the extent to which it ought to be regarded as *res judicata* can only be determined by ascertaining what were the real matters of controversy in the cause. That the question of the right to drift and stranded timber was included in the *julkur*, decreed in 1882, was, in their Lordships' opinion, established by intrinsic evidence in the record of that suit. They concurred with the High Court that correspondence and orders by officers, of dates subsequent to the former decree, could not be received as aids to its construction. But the record showed that the right was in controversy before the judge, and that he meant to include it in the *julkur*, which he decreed. The zamindar's claim was, therefore, adjudged to be established.

AMRITESWARI DEBI *v.* THE SECRETARY OF STATE FOR INDIA ... XXIV 504

Forfeiture of Tenure—

See LANDLORD AND TENANT.

Forgery -

Abetment of forgery by writing out the deed--Unregistered document purporting to be a valuable security—Penal Code (Act XLV of 1860), ss. 109, 114, *and* 467. The accused was not only the writer but also took an active part in the preparation of a document, the alleged executant of which was dead before the date of the document, and the person who really had an interest under the document was convicted under s. 82 of the Registration Act (III of 1877). But evidence was wanting to show that the accused took any part in the forgery of the name of the alleged executant: *Held*, that the accused could not be convicted of the offence of forgery under s. 467 of the Penal Code. There being nothing on the record to show that the accused was a party to, or took any part in, the actual forgery of the document, or that he was present on the occasion when it was forged, the proper section to convict him under would be s. 457/109, that is of abetment of forgery, and not s. 467/114. An unregistered document, though it may not be a valuable security until the registration is completed, "still" purports to be a valuable security within the meaning of s. 467 of the Penal Code. *Queen-Empress* v. *Ramasami* approved of.

KASHI NATH NAEK *v.* QUEEN-EMPRESS ... ... XXV 207

Using a forged document—Penal Code (Act XLV of 1860), *ss.* 463, 471—"*Fraudulently,*" *Meaning of.* Deprivation of property, actual or intended, is not an essential element in the offence of fraudulently using as genuine a document which the accused knew or had reason to believe to be false. *Queen-Empress* v. *Haradhan* overruled.

QUEEN-EMPRESS *v.* ABBAS ALI ... ... XXV 512

Fraud—

See RIGHT OF SUIT.

Suit for relief on ground of. See LIMITATION ACT, ART. 120.

Fraudulent Representation--

As to age. See MINOR.

Full Bench—

Reference to power of a single Judge sitting alone to refer a case in which the value of the subject matter in dispute does not exceed Rs. 50—*Division Court—Rules of the High Court, Ch. V., Rule* 1, *Ch VI, Rules* 1 *and* 6—*Statute* 24 *and* 25 *Vic., cap.* 109, *s* 13. A reference to the Full Bench cannot be made a Judge of the High Court sitting alone to hear cases in which the value of the subject-matter in dispute does not exceed Rs. 50.

NABU MONDUL *v.* CHOLIM MULLIK ... ... XXV 896

Further Inquiry—

See NUISANCE.

Evidence on. See SECURITY FOR GOOD BEHAVIOUR.

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Gambling Act—

Bengal Act II of 1867—

s. 6. *Common gaming house—Cowries—Instruments of gaming.* *Cowries* may be treated as instruments of gaming where they are used as counters or as a means to carry on gaming. The finding of *cowries* in a house upon search made under a warrant will under s. 6 of the Gambling Act (Bengal Act II of 1867) raise a rebuttable presumption that the house is used as a common gaming house.

QUEEN-EMPRESS *v.* MAKUND RAM ... ... XXV 432

General Clauses Consolidation Act—

I of 1868—

s. 6. See COSTS.

X of 1897—

See REFORMATORY SCHOOLS ACT.

Gift—

See MAHOMEDAN LAW.

Absolute. See HINDU LAW, WILL.

Of share of profits in Talukdari Estate. See WILL.

To idol not in existence at testator's death. See HINDU LAW.

Gift over—

See HINDU LAW, WILL.

Good Faith—

Meaning of. See TRANSFER OF PROPERTY ACT, s 53.

Government—

Right of, to collect and store drift and stranded timber. See FOREST ACT.

Grievous Hurt

Causing, in furtherance of common object. See RIOTING.

Ground of Appeal—

See SECOND APPEAL.

Grounds of Appeal—

See APPEAL.

Guardian—

Appointment of guardian—Guardians and Wards Act (VIII of 1890), ss. 9 and 17—Application by a Christian father to be appointed guardian of his Hindu minor son—Matters to be considered by the Court in appointing guardian. A, who was originally a Hindu, but afterwards became a Christian and abandoned his family residence, applied to be the guardian of the person of his minor son. On the objections of the paternal and maternal uncles of the boy that, under the circumstances of the case, the father was not a fit and proper person to be appointed the guardian of the minor. *Held*, although the father is *primâ facie* entitled to the custody of his infant child, he can be deprived of such parental right if the circumstances justify it; therefore in a case where a child who was brought up as a Hindu, and who expressed a desire to remain a Hindu, and was living with his Hindu relation, who was maintaining him and was looking after his education properly, it would not be to the welfare of the child that he should be handed over to the father and brought up in the Christian faith, and that the Court below, under the circumstances of the case, was right in dismissing the application.

MOKOOND LAL SINGH *v* NOBODIP CHUNDER SINGHA ... ... XXV 881

Execution of Conveyance by, contrary to permission granted. See REGISTRATION ACT, S. 77.

Guardian ad litem—*Guardians and Wards Act (VIII of 1890), s. 53—Civil Procedure Code, s. 443, as amended by s. 53 of Act VIII of 1890—Minor, Representation of, in suit.* Section 53 of Act VIII of 1890, amending the Code of Civil Procedure, expressly requires the appointment of a guardian *ad litem*, whether or not a guardian is appointed under Act VIII of 1890. In a suit against a minor, the summons was attempted to be served on his guardian appointed under Act VIII of 1890, but no guardian *ad litem* was appointed in the suit. The suit was decreed *ex parte*, no one having appeared for the minor. *Held*, that the decree must be set aside and the case sent back in order that the minor might be represented in accordance with law and the case retried.

DAKESHUR PERSHAD NARAIN SINGH *v* REWAT MEHTON... .. XXIV 25

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Guardian—(*continued.*)

Of lunatic's person. See LUNATIC.

Power of guardian to mortgage minor's property—Act XL of 1858, *s.* 18—*Guardians and Wards Act VIII of* 1890, *s.* 30, *read with s.* 2, *Retrospective effect of—Mortgage without sanction of Court.* A mortgage of a minor's property, made by his guardian holding a certificate under Act XL of 1858, without obtaining sanction of the Court as required by s. 18 of the Act, is absolutely null and void. Section 2 of the Guardians and Wards Act (VIII of 1890) does not give retrospective effect to s. 30, which, therefore, does not apply to a mortgage executed before the Act came into operation, so as to destroy its void character and render it merely voidable.

LALA HURRO PROSAD *v.* BASARUTH ALI ... ... XXV 909

Uncertificated, Powers of. See LUNATIC.

Guardians and Wards Act—

VIII of 1890—

See GUARDIAN.

s. 30. See REGISTRATION ACT, S. 77.

s. 53. See GUARDIAN.

High Court—

Jurisdiction of. See COSTS.

Jurisdiction of. District Judge, Jurisdiction of—Appeal—Appeal withdrawn from the District Court—Civil Procedure Code (Act XIV of 1882), *s.* 25. An appeal, the subject-matter of which was over Rs. 5,000 in value, was wrongly presented and filed in the District Judge's Court, and was subsequently upon application by the appellant withdrawn by the High Court under s. 25 of the Civil Procedure Code and registered as an appeal to that Court. The order of withdrawal left it open to the respondent to raise objection on the score of want of jurisdiction of the District Court at the time of hearing of the appeal. *Held*, that when an appeal is transferred under s. 25 of the Civil Procedure Code, it must be heard subject to all the objections which could be taken before the Court from which it has been transferred. The High Court, therefore, had no jurisdiction to hear the appeal. *Peary Lall Mozoomdar* v. *Komal Kishore Dassia*, and *Ledgard* v. *Bull* referred to.

RAM NARAIN JOSHY *v.* PARMESWAR NARAIN MAHTA ... ... XXV 39

Jurisdiction of, Properties outside. See EXECUTION OF DECREE.

Power of. See DECREE.

Power of interference of. See REVISION.

Power of, on revision. See NUISANCE.

Hindu Law—

See PRIVY COUNCIL, PRACTICE OF.

Adoption. See LIMITATION ACT, ART. 119.

Adoption. Widow—Direction to accumulate—Second adoption. Where a power to adopt was given by a testator to his widow, who was also the executrix of his will and to two other executors conjointly: *Held*, that such power was bad. Under Hindu law power to adopt can be given to a widow only, and she has no capacity to adopt save under the express permission of her husband given in his lifetime. *Per* TREVELYAN, J.—A Hindu testator cannot direct the accumulation of the income of his estate for an indefinite period, if there is no beneficial interest created in the property in order to render the gift whether under the will or *inter vivos* valid. By a second adoption a widow divests herself of the mother's estate in the same way that she divests herself of her widow's estate on the first adoption.

AMRITO LALL DUTT *v.* SURNOMONI DASI ... ... XXV 662

Endowment. See LIMITATION ACT, ART. 124.

Endowment. Alienation by de facto Manager of an endowment—Limitation Act (XV of 1877), *sch. II, art.* 91. The principles of *Hunooman Persaud Pandey's* case apply to the alienation of property by the *de facto* manager of an Hindu endowment. The possession of such manager cannot be treated as adverse to the endowment. *Semble*—Article 91 of sch. II of the Limitation Act (XV of 1877) has no application to a suit to set aside such alienation. *Unni* v. *Kunchi Amma* and *Sikher Chund* v. *Dulputty Singh* cited.

SHEO SHANKAR GIR *v.* RAM SHEWAK CHOWDHRI ... ... XXIV 77

Inheritance. Bengal school of Hindu Law—Co-heiresses—Compromise—Reversioners. According to the law of the Dayabhaga, when several daughters inherit the estate of their father, they are competent to enter into any arrangement regarding their

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Hindu Law—*(continued.)*

respective rights in that estate, provided that such arrangement does not interfere with the rights of the reversionary heirs except by way of accelerating their succession.

KAILASHCHANDRA CHUCKERBUTTY *v.* KASHI CHANDRA CHUCKERBUTTY. XXIV 339

Inheritance. Letters of administration—Probate and Administration Act (V of 1881)—Prostitute—Succession to property of degraded woman. In the absence of any local custom or usage to the contrary, a woman of the town is no heir to her deceased sister, who was also a woman of the town. *Sivasangu* v. *Minal* distinguished. A woman of the town, who is a Hindu by birth does not cease to be a Hindu by reason of her degradation, and succession to her property is governed by Hindu law.

SARNA MOYEE BEWA *v.* SECRETARY OF STATE FOR INDIA ... ... XXV 254

Joint family. Joint Hindu family under Mitakshara law—Sale of joint property in execution of decree against father—Decree for damages for theft or misappropriation—Antecedent debt—Pious duty of sons to pay father's debt—Bonâ fide purchaser, Equities of. In execution of a decree for damages for theft or misappropriation against M and S, two of the members of a joint Hindu family under the Mitakshara Law, ancestral property of the family was sold, and the purchasers took possession. In a suit by the sons of M and S, and several other members of the family for recovery of their interests in the property. *Held*, that there was no "debt antecedent" to the decree in this case; that even if the right to obtain damages for the theft or misappropriation could be said to have created a "debt," the debt was tainted with illegality or immorality, the sons were not under a pious duty to pay the debt, and the interests of the sons did not pass by the sale. *Held*, also, that the purchasers in this case were not entitled to the equities of a *bonâ fide* purchaser, as the decree, if examined, would have put them upon inquiry.

PAREMAN DASS *v.* BHATTU MAHTON ... ... XXIV 672

Stridhan. Inheritance and devolution of stridhana property—Hindu law, Marriage—Presumption as to form of marriage. Under the Hindu law of the Benares School, in the absence of any evidence to the contrary, a marriage must be presumed to have taken place in one of the approved forms; therefore the heir of a woman to her *stridhana* property is the nearest kinsman of her husband and not of her father—*Thakoor Deyhee* v. *Rai Baluk Ram*, *Gojabai* v. *Shahajirao Malaji Raje Bhosle*, and *Gridhari Lal* v. *Government of Bengal* referred to. The Virmitrodaya cannot be referred to where the Mitakshara is clear.

JAGANNATH PRASAD GUPTA *v.* RUNJIT SINGH ... ... XXV 354

Will. Construction of Will—Adoption—Power to adopt—Validity of power to widow and executors to adopt—Exercise of such power by widow with consent of the surviving executor—Direction for accumulation with proper limitation—Right of adopted son to the corpus and surplus income during the lifetime of the adoptive mother. The testator by his will authorised and empowered his wife to adopt a son in the following words: "I hereby authorize and empower my wife and executrix, and my executors and trustees, to whom I give full permission and liberty to adopt after my decease a son, and in case of his death during his minority or on attaining his full age, and without leaving male issue to adopt a second son and in case of his death during minority or on attaining such age and without leaving male issue to adopt a third son, and no more, etc. *Held*: The power of adoption was valid. The testator associated the other executors with his wife for the purpose of ensuring a wise exercise of her discretion in the selection of a son for adoption and not with the intention of making it an essential condition of adoption that they should take a part in the ceremony of adoption from which under the Hindu law they were precluded. *Held* also: The power was given to the executors *quâ* executors, and therefore survived to the holders for the time being of the office of executors; the death of one of them before the power was exercised did not therefore render the power void. The power was validly exercised by the wife adopting with the consent of the surviving executor. The mere fact of the surviving executor not having actually and physically taken in adoption was not a failure to comply with the terms of the power. In the ninth clause of the will the testator, after directing certain payments to be made out of the income of the estate, proceeded as follows: "But in no case shall such adopted son have or exercise any control or dominion over my estate and effects until the death of my wife; after which event I direct my said executors and trustees to make over the whole of my estate and effects, both real and personal, moveable or immoveable, whatsoever and wheresoever and of what nature or quality soever, to such adopted son who shall survive my wife, if he shall have attained his age of

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Hindu Law—*(continued.)*

eighteen years during the lifetime of my wife or on his so attaining such age after her decease to whom and his heirs I give, devise and bequeath the same" *Held* The second adopted son was not presently entitled to the surplus income or profits of the properties until the death of his adoptive mother, not to have the *corpus* (even after provision being made for the payments mentioned in the will) of the estate made over to him It is not incompetent for a Hindu testator with proper limitation to direct an accumulation of the income of property which under his will vests in his executors or trustees In the absence of special provision the limit must be that which determines the period during which the course or devolution of property can be directed and controlled by a testator.

AMRITO LALL DUTT *v.* SURNOMOYEE DASSEE . XXIV 589

Will Construction of Will—Devise of immoveable property—Bequest to widows—Life interest—Succession Act (X of 1865) s 82—Hindu Wills Act (XXI of 1870) s 3—Gift over A Hindu testator gave a twelve annas share of his property to his two wives by cl 2 of his will which was as follows My first and second wives shall together be entitled to twelve annas of all the properties left by me and D and R sons of my father's sister's sons R,N,C deceased who have been living in commensality from the time of my predecessor shall be entitled to a four annas share in equal shares according to the following rules Clause 4 was as follows If there should be any dispute or disagreement between my two wives or if there being any disagreement between either or both of them and the executors abovenamed she or they live in my family dwelling house or according to the rules of Hindu religion in some holy place maintaining a good character then each of them shall receive a monthly allowance of Rs 10 for maintenance but if otherwise he shall be entirely deprived of her right Clause 9 provided that no person of the family of the fathers of his two wives should be able to exercise any control over the money and property left by the testator Clause 5 provided for the education of the testator's sister's son. The gift over was to the effect that any one acting contrary to the terms of the will should be deprived of his interest which should in due course devolve on the other heirs It was found on the evidence that forfeiture under cl 4 of the will had been incurred by the defendant B the younger widow of the testator by reason of her having broken the condition relating to residence *Held* that s 82 of the Indian Succession Act (X of 1865) which enacts that "where property is bequeathed to any person he is entitled to the whole interest of the testator therein unless it appears from the will that only a restricted interest was intended for him applied to the case *Held* also that the will gave only a restricted interest to the widows and that cl 2 of the will should be construed as giving to the widows as joint tenants a life interest in a twelve annas share of the estate with the right of survivorship The clause in the will as to residence was valid and binding *Held* further that the plaintiff the son of testator's sister who was in existence at the date of the testator's death and who was the next reversionary heir after his widows was entitled to take under the gift over and not the heir to the *stridhana* of P the elder widow of the testator

BHOBA TARINI DEBYA *v.* PEARY LALL SANYAL .. . XXIV 646

Will Construction of Will Executory bequest Gift to an idol not in existence at the testator's death—Existence of idol Dedication No valid gift or dedication of property can be made by will to an idol not in existence at the time of the testator's death The power conferred by will to make a gift must be a power to convey property to a person in existence, either actually or in contemplation of law at the death of the testator *Bai Motivahoo v. Bai Mamoobai* relied upon

UPENDRA LAL BORAL *v.* HEM CHUNDRA BORAL XXV. 405

Will Construction of Will—"Malik" Meaning of as applied to female legatees—Contingent bequest—Gift absolute—Life estate—Indian Succession Act (X of 1865) ss 111 and 125—Direction against alienation A Hindu, survivor of two brothers in a joint family under the Mitakshara law, died, leaving a widow and two daughters, a brother's widow and three daughters of his brother In his will it was provided (*inter alia*) that his daughters, and brothers' daughters "shall be *maliks* and come in possession in equal shares of all the moveable and immoveable properties" It was also provided that in the event of any of the daughters of the testator or of his brother dying childless her share shall devolve in equal shares on the surviving daughters," but such share shall have no connection with her husband's family " The will made a further provision that the daughter should not have on any account the right to sell or alienate their

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Hindu Law—*(concluded.)*

shares *Held*, (1) The expression *malik* ordinarily implies an absolute gift, and there is no authority for introducing into the will the idea that a female ought not to obtain anything beyond an estate for her life time (2) Having regard to s 111 of the Indian Succession Act (applicable under the Hindu Wills Act 1870) and the Privy Council case of *Norendra Nath Sircar* v *Kamalbasini Dasi*, the provision of survivorship applied only to the case of a daughter dying during the life time of the testator and did not take effect in the present case the daughter whose share was in question having died several years after the testator's death (3) As to the direction against alienation, s 125 of the Indian Succession Act provides for a case like this, and the daughters receive their shares as if there was no such direction (4) The will was not open to the construction that there was a life estate only conferred by it on the daughters

LALA RAMJEWAN LAL v DAL KOER XXIV 406

Will *Construction of Will*—*Mitakshara family*—*Principles of construction of operative words in wills and documents*—*Effect of context upon technical or clearly disposing words used*—*Dispositions in accordance with the law of inheritance*—'Putra putradi krame' There are two cardinal principles in the construction of wills, deeds and other documents The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention The second is that technical words or words of known legal import must have their legal effect even though the testator uses inconsistent words unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not use the technical terms in their proper sense—*Doe d Gallini* v *Gallini* referred to and followed In a Hindu will an heritable and alienable estate is to be understood by the use of the words shall become *malik* unless the context indicates a different intention The words *putra putradi krame* have acquired a technical force and are used as meaning an estate of inheritance That a testator may have imperfectly understood the words which he has used or the effects of conferring an hereditary estate would not justify the giving an interpretation to his words other than their legal meaning A will contained the following in favour of the testator's sister's son that he 'becoming my *sthulabhishikto* (substitute) and becoming *malik* of all my estate and properties shall enjoy with son grandson and so on, in succession (*putra putradi krame*) the proceeds of my estate' Provisions followed for the maintenance of this nephew's widow and of his daughter should he die and a gift over that in the absence of the said nephew's son grandson great grandson and so on then of the sons born of my sisters, the eldest with son grandson and so on in succession shall receive the ownership On a claim by the nearest *gotra sapindas* of the testator against the nephew for the construction of the will *Held* that on the true construction of the entire will the *prima facie* legal meaning of the disposing words used was not controlled by the context so as to establish any contrary meaning by making it clear that the words were not used in their proper sense that there was no intention expressed to give a succession of life estates to the nephew and his male issue only — a disposition which would not have accorded with Hindu law but that an alienable and heritable estate was devised to him Specified property was given by the will in trust for the income to be expended for religious and charitable purposes with an express prohibition of alienation of this property There was also a gift of the testator's estates to Government for charitable purposes in the event of no one entitled to be the testator's *sthulabhishikto* remaining alive If expressed as to the heritable estate in which the beneficial interest accompanied the gift the prohibition of alienation would have been merely void, without any effect upon the disposition of that estate Made, however, as to property given for religious and charitable purposes it was valid by Hindu law No decision as to the effect of the gift over of the secular heritable estate was required inasmuch as the contingency upon which it was limited to go over had not occurred and might not occur

LALIT MOHUN SINGH ROY v CHUKKUN LAL ROY XXIV 834

Will *Executor*—*Position of an executor under a Hindu will before the Hindu Wills Act (XXI of 1870) came into force*—*Difference in position between an executor under a Hindu will and an executor under an English will*—*Probate and Administration Act (V of 1881)*, ss 2 4 *and* 90 An executor under a Hindu will before the Hindu Wills Act came into force is not in the same position as an English executor under an English will, and the property does not vest in him, he holds it only as manager

SARAT CHANDRA BANERJEE v. BHUPENDRA NATH BOSU . XXV 108

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Hindu Son—

Application by Christian father to be guardian of. See GUARDIAN.

Hindu Widow—

See CONTRACT.
Lease granted by. See LANDLORD AND TENANT.

Hindu Widows—

Bequest to. See HINDU LAW, WILL.

Hindu Wills Act—

XXI of 1870—

See WILL.
s. 3. See HINDU LAW, WILL.
Position of executor of Hindu will before passing of. See HINDU LAW, WILL.

Hospital—

Removal to, Refusal to allow. See PENAL CODE, S. 269.

Hundi—

Suit on. Money advanced on fraudulent misrepresentation—Suit before due date of Hundi. The defendants obtained advances of money on *hundis* by making untrue representations, knowing them to be untrue, and knowing that without them they could not have got the money. *Held,* that the plaintiffs were entitled to rescind the contract and claim immediate repayment before the due date of the *hundis*. There is no reason why the principle that fraud vitiates all agreements should not be applied to debts evidenced by *hundis*, promissory notes, or other negotiable instruments, if the facts show that the loans were contracted on the faith of fraudulent misrepresentations made by a debtor to a creditor.

BABOO LALL *v.* JOY LALL ... ... XXIV 533

Husband and Wife—

See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO.

Idol—

Gift to. See HINDU LAW, WILL. WILL.

Ikrarnamah—

See CONTRACT.

Immoveable Properties—

Situated partly outside jurisdiction. See DEPOSIT OF TITLE-DEEDS.

Immoveable Property—

Devise of. See HINDU LAW, WILL.
Suit for. See JURISDICTION.

Imprisonment in Default of Payment—

See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO.

Incumbrance—

See BENGAL TENANCY ACT, S. 171. LIMITATION ACT, ART. 121: SALE FOR ARREARS OF RENT.

Incumbrances—

Right to annul. See SALE FOR ARREARS OF REVENUE.

Indictment—

Form of. See CHARGE.

Infectious Disease—

Refusal to allow person suffering from, to be removed to hospital. See PENAL CODE, S. 269.

Inference of Law wrongly drawn from Facts—

See SECOND APPEAL.

Information from Accused—

See EVIDENCE ACT, S. 27.

Infringement—

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Inheritance—

See HINDU LAW, INHERITANCE.

Suit to determine right of. See LETTERS OF ADMINISTRATION.

Injunction—

Specific Relief Act (I of 1877), s. 54—Threatened damage—Damage occurring after suit—Cause of action—Digging so as to endanger neighbour's land. Where an act threatening danger to a person's land is such that injury will inevitably follow, a Court may grant a perpetual injunction restraining the continuance of that act, even though no damage has actually occurred before institution of suit. And where actual injury has occurred subsequently to the filing of the plaint, the plaint may be amended so as to show the nature and extent of such injury. *Pattisson* v. *Gilford* applied.

BINDU BASINI CHOWDHRANI v. JAHNABI CHOWDHRANI ... ... XXIV 260

Injury—

To neighbour's land. See INJUNCTION.

Insolvency Proceedings—

See TAXATION OF COSTS.

Insolvent—

Adverse possession of. See LIMITATION ACT, ART. 180.

Inspection of Documents—

Practice—Inspection by agent of a party. When under an order giving liberty to a party to a suit, his attorneys and agents, to inspect and peruse the documents produced by the opposite party, inspection by an agent is contemplated, the order should be read in such a way as would give the Court some control over the persons to be appointed to inspect the documents. Such an order contemplates that the agent will be a person standing in the position of the party for the purposes of the suit. *Held*, therefore that the Court ought not to permit a person formerly in the service of the defendant to inspect as the plaintiff's agent the defendant's books, which had been in his charge.

ENAMUL HUQ v. EKRAMUL HUQ ... ... XXV 294

Inspection of Property—

Form of order for. See PRACTICE.

Instalments—

Money payable by. See LIMITATION ACT, ART. 132.

Interest—

Amount of. See TRANSFER OF PROPERTY ACT, S. 135.

Mortgage—Construction of mortgage—Post diem interest where none is stipulated for in the deed. Where a mortgage-deed contained a covenant for payment of principal and interest at a fixed rate in two years and further covenants not to transfer the mortgaged property until payment of principal and interest, and also on failure of payment of interest for "one year" to treat the amount after the lapse of that year as principal: *Held*, upon the construction of the mortgage-deed, the parties intended that if the principal were not paid by the stipulated date interest should continue to run at the rate mentioned in the deed, and that the mortgagee was entitled to recover the principal with interest at the stipulated rate to the date of the decree of the first Court and at the rate of 6 per cent. thereafter. *Mathura Das* v. *Narindar Bahadur Pal* referred to.

SARALA DASI v. JOGENDRA NARAYAN BASU ... ... XXV 246

Mortgage—Interest on mortgage decree—Transfer of Property Act (IV of 1882), ss. 86, 87, 88, 90, 94, 97—Civil Procedure Code (Act XIV of 1882), ss. 209, 222, 644, sch. IV, forms 109, 128—Form of decree—Practice. The Court has power, under a decree in a mortgage suit under s. 86 of the Transfer of Property Act (IV of 1882), to allow interest subsequent to the date of decree and the date fixed by the decree for payment, until realization. *Amolak Ram* v. *Lachmi Narain* dissented from.

ACHALABALA BOSE v. SURENDRA NATH DEY ... ... XXIV 766

Paid on debt. See LIMITATION ACT, SS. 19 AND 20.

Payment of. See BENGAL TENANCY ACT, S. 67.

Transfer of Property Act (IV of 1882), s. 86—Mortgage by conditional sale—Interest after due date—Interest Act (XXXII of 1839)—Limitation Act (XV of 1877), sch. II, arts. 116, 132. Held, by a majority of the Full Bench (MACLEAN, C.J.,

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Interest—*(continued.)*

O'KINEALY, J. and MACPHERSON, J.) that when a mortgage bond contains no stipulation for the payment of interest after the due date, interest is payable by virtue of the Interest Act (XXXII of 1839). Article 116 of sch. II to the Limitation Act prescribes the period of limitation in such a case; and therefore only six years' interest after the due date at 6 per cent. per annum is recoverable. The mortgagor cannot redeem until he has repaid the principal sum with such interest and costs. *Gudri Koer* v. *Bhubaneswari Coomar Singh* approved. *Mathura Das* v. *Narindar Bahadur Pal*, *Cook* v. *Fowler* and *Bikramjit Tewari* v. *Durga Dyal Tewari* referred to. *Held* (by TREVELYAN and BANERJEE, JJ.,) that the interest after due date should be regarded as interest due on the mortgage within the meaning of s. 86 of the Transfer of Property Act (IV of 1882); and, that being so, that it becomes a charge on the mortgaged property, and the period of limitation applicable to the claim for such interest is twelve years, under art. 132 of sch. II to the Limitation Act (XV of 1877).

MOTI SINGH *v* RAMOHARI SINGH ... ... XXIV 699

Interest Act -

XXXII of 1839 -

See INTEREST.

s. 1. *Certificate of the Administrator-General registering a debt*—"*Written instrument.*" A certificate of the Administrator-General admitting a debt to be due is not such a "written instrument" as is contemplated by the Interest Act (XXXII of 1839), because the amount mentioned therein is not payable by virtue of the certificate which merely purports to certify the registration of the amount of the admitted debt for the purpose of convenience in administering the estate.

OMRITA NATH MITTER *v.* ADMINISTRATOR-GENERAL OF BENGAL ... XXV 54

Interlocutory Order—

See APPEAL.

Interlocutory Orders—

See WITNESS.

Investigation by Police -

See WARRANT OF ARREST.

Irregularity --

Affecting merits. See MISJOINDER OF CAUSES OF ACTION.
In criminal case. See WITNESS.
In sale. See SALE IN EXECUTION OF DECREE.
Not affecting merits of case. See PARDANASHIN LADY.
Not affecting merits of suit. See CIVIL PROCEDURE CODE, S. 539.

Irrigation—

Right to use of water for. See RIPARIAN OWNERS.

Issue—

Raised by defendant in separate suit. See CIVIL PROCEDURE CODE, S. 244.
Whether land is mal or lakhiraj. See 'RES JUDICATA.'

Issues-

Not raising actual rights. See RIPARIAN OWNERS.

Jagir Tenure—

Chota Nagpore Landlord and Tenant Procedure Act (Bengal Act I of 1879), *s.* 124 —*Incidents of Jagir and under-tenures—Decree for arrears of rent.* No decree for arrears of rent can be made against any person other than the actual tenant, or some one who may be security for him, and consequently there can be no decree for rent against persons holding subordinate interests in a *jagir tenure* which have been created by the *jagirdar*.

PERTAB UDAI NATH SAHAI DEV *v.* PARDHAN MOKAND SING ... XXV 399

Chota Nagpore Landlord and Tenant Procedure Act (Bengal Act I of 1879), *s.* 124—*Incidents of Jagir tenure—Sale in execution of a decree for rent—Right, title and interest of registered "ilakadar"—Joint-holders.* Where a suit was brought for the recovery of arrears of rent due in respect of a *jagir* tenure, the joint property of four brothers governed by the Mitakshara law, the arrears having accrued during the lifetime of their father, and a decree was obtained against the eldest brother, who was the sole registered *ilakadar*, or person held responsible in the zamindar's

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Jagir Tenure—(*continued.*)

book, it was *held* that the decree related to the arrears due in respect of the whole tenure and not merely of the judgment-debtor's individual interest, and that a sale of his right, title and interest under s. 124 of Bengal Act I of 1879 would, under the circumstances of the case and by the incidents attaching to such tenure, include the right, title and interest of any person claiming jointly with him, and whose interest was inseparably united with his.
MODHUSUDUN NATH TEWARI *v.* HIRU RAM PANDEY ... ... XXV 396

Joinder of Causes of Action—

See CIVIL PROCEDURE CODE, S. 424 : MISJOINDER OF CAUSES OF ACTION.

Joint Contractees—

See SPECIFIC PERFORMANCE.

Joint Debtors—

See LIMITATION ACT, SS. 19 AND 20.

Joint Family—

See HINDU LAW, JOINT FAMILY.

Joint Hindu Family—

Separation in. See LIMITATION ACT, ART. 62.

Joint-holders—

See JAGIR TENURE.

Joint Landlords -

See BENGAL TENANCY ACT, SS. 56 ; 188 : LANDLORD AND TENANT.

Joint Property -

Suit for share in. See LIMITATION ACT, ART. 62.

Joint Wrong-doers—

See CONTRIBUTION, SUIT FOR.

Judge of High Court--

Sitting alone, Powers of. See FULL BENCH, REFERENCE TO.

Judgment –

See LETTERS PATENT, HIGH COURT, CL. 15.

Contingent on opinion of High Court. See SMALL CAUSE COURT, PRESIDENCY TOWNS.

Form of judgment on appeal—Judgment not in conformity with law—Dismissal of appeal– Civil Procedure Code (Act XIV of 1882), *ss.* 551, 574 The lower Appellate Court, in disposing of an appeal from a decree of the Munsif, recorded the following judgment: "Suit laid at Rs. 480, value of buffaloes. Appeal rejected under s. 551 of the Civil Procedure Code." *Held*, that this was not a judgment in conformity with law. The dismissal of an appeal under s. 551 of the Civil Procedure Code by a Court whose decision may be the subject of an appeal does not relieve the Court from the necessity of writing a judgment which, according to the provisions of s. 574 of the Code, should show the points raised, the decision upon those points, and the reasons for deciding them.
RAMI DEKA *v.* BROJO NATH SAIKIA ... ... XXV 97

In accordance with award. See APPEAL.

Judgment-debtor--

Application for substitution of heirs of. See LIMITATION ACT, ART. 179.
Representative of. See CIVIL PROCEDURE CODE, S. 244.

Judicature Act—

Order 50, Rule 3. See PRACTICE.

Julkur—

Meaning of. See FOREST ACT.

Jurisdiction—

See RECORDER OF RANGOON, JURISDICTION OF : SALE IN EXECUTION OF DECREE : SMALL CAUSE COURT, PRESIDENCY TOWNS : VALUATION OF SUIT.

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Jurisdiction—(*continued.*)

Suit for rent of a fishery—Uncertainty as to jurisdiction—Code of Civil Procedure (Act XIV of 1882), *s.* 16 *A—Immoveable property—Right of fishery.* A suit for rent of a fishery is a suit for immoveable property within the meaning of s. 16 A of the Code of Civil Procedure. *Fadu Jhala* v. *Gour Mohun Jhala* referred to. A suit for rent of a fishery was brought in a certain Court, and there was reasonable ground of uncertainty as to the jurisdiction of that Court to entertain the suit. On an objection that the suit ought to fail for want of jurisdiction: *Held*, that the conditions required by s. 16A of the Civil Procedure Code had been satisfied in the case, and that the objection as to jurisdiction ought not to be entertained.

SHIBU HALDAR *v.* GUPI SUNDARI DASYA ... ... XXIV 449

Jurisdiction in Probate Cases—

See PROBATE.

Jurisdiction of Civil Court—

See ASSAM LAND AND REVENUE REGULATION: PARTITION: SALE FOR ARREARS OF REVENUE.

Civil Procedure Code (1882), *s.* 11 *-Bengal Municipal Act (Bengal Act III of* 1884)—*Ellection of Municipal Commissioners -Right to vote and stand as candidate at an election - Suit for declaratory decree Parties to suit—Magistrate.* At an election of Municipal Commissioners held under the Bengal Municipal Act (Bengal Act III of 1884), S, one of the candidates, was declared to have been elected: a poll was demanded, and S was again declared by the presiding officer to have been duly elected. An objection was then taken by the defeated candidates before the Magistrate of the district on the ground that some of the voters gave more votes than there were vacancies, and also on the ground that S was not qualified to be registered as a voter and to stand as a candidate for election. The Magistrate set aside the election on both grounds; and S brought a suit in the Civil Court for a declaration of his right to vote and stand as a candidate and for a declaration that he was duly elected. *Held* that the suit was one of a civil nature, and under s. 11 of the Code of Civil Procedure (XIV of 1882) such a suit would lie in the Civil Court. *Held*, also, that the Magistrate should not have been made a defendant in the suit, and that the plaintiff was not entitled to a declaration that the election of the plaintiff was good and valid; but that the decree of the first Court granting a declaration of plaintiff's right to vote and stand as candidate was correct.

SABHAPAT SINGH *v.* ABDUL GAFFUR ... ... XXIV 107

Right of suit—Suit for declaration of right to carry religious emblems in a procession and for damages. A suit for declaration of right to carry religious emblems in a procession through the streets of a village, and for damages for preventing the plaintiffs from doing so, lies in the Civil Court. In a case in which a Mahomedan of the *Shea* sect, claiming to be a part owner of a village, was prevented by a number of the rival sect of *Sunnis* from introducing the emblems of a standard and flags and a *massak* pierced by an arrow, in the procession of *tazias* during the Mohurrum, it was held that a suit of this description would lie, either on the footing that the roads were roads of which the public had the use, or on the footing that the plaintiff had a right as one of the sharers in the village.

MOHAMED ABDUL HAFIZ *v.* LATIZ HOSEIN ... ... XXIV 524

Sale for arrears of Revenue—Revenue Sale Act (XI of 1859), *s.* 33—*Sale for arrears not due—Suit to set aside sale—Appeal to Commissioner.* A suit may be brought in the Civil Court to set aside a sale held under Act XI of 1859, on the ground that no arrears were due, although such ground was not declared and specified in an appeal to the Commissioner as provided for in s. 33 of Act XI of 1859. *Baijnath Sahu* v. *Lala Sital Prasad* followed. *Gobind Lal Roy* v. *Ramjanam Misser* distinguished and explained.

HARKHOO SINGH *v.* BUNSIDHUR SINGH ... ... XXV 876

Jurisdiction of Criminal Court—

Criminal Jurisdiction along the Railway through Indian Independent State—Locality of crime—Illegal arrest on lands occupied by the Hyderabad State Railway. The authority for the exercise of criminal jurisdiction by the Government of India upon lands within the limits of the Hyderabad State Railway is derived from a grant to that Government in 1887 by His Highness the Nizam as ruler of the territory. The Railway lands remain part of his dominions. The grant of civil and criminal jurisdiction contained in the correspondence of that year between the Nizam's Minister and the Resident at Hyderabad is

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Jurisdiction of Criminal Court—*(continued.)*

expressed to be "along the line of Railway as is the case on other lines running through Independent States." This jurisdiction, notwithstanding any words in the Notification of the Government of India of the 22nd March 1888 (which could not of itself give any authority, or add to that granted by the Nizam), does not justify the arrest on the lands of the Hyderabad State Railway of a subject of the Nizam under the warrant of the Magistrate of a District in British India, on a charge of a criminal offence committed in British India, and unconnected with the Hyderabad Railway administration. The mere presence of the accused on the railway lands, over which criminal jurisdiction had been granted as above, was no legal ground for his arrest under the warrant of the Court in British India, his offence, if committed at all, not having been committed on those lands and not having been connected with the railway.

MUHAMMAD YUSUF-UD-DIN *v.* QUEEN-EMPRESS .. .. XXV 20

Criminal Procedure Code (Act X of 1882), s. 182—Local area—Uncertainty as to the situation of the scene of offence. When there is an uncertainty as to whether a particular spot, where an offence has been committed, is situated within one district or another the case is governed by s. 182 of the Criminal Procedure Code (Act X of 1882), and the offence is triable in the Court of either district. The expression "local area" includes, and was intended to include, a "district"

PUNARDEO NARAIN SINGH *v.* RAM SARUP ROY . ... .. XXV 858

Jurisdiction to try offence under Penal Code s. 486—Goods with counterfeit trade mark not intended to be sold within jurisdiction A Magistrate has jurisdiction to try an offence under s. 486 of the Penal Code if the accused be shown to be in possession of goods with a counterfeit trade mark for sale or any purpose of trade or manufacture, though the sale or the trade or the manufacture for the purpose of which the accused has the goods in his possession be not intended to take place within the jurisdiction of the Court in which the complaint is lodged.

YUSUF MAHOMED ABARUTH *v.* BANSIDHUR SIRAOGI ... ... XXV 639

Jury—

Irregularity in trial by jury—Trial by jury of an offence triable with assessors—Criminal Procedure Code (Act X of 1882), ss. 306 307, 536—Penal Code (Act XLV of 1860), ss. 240, 241—Government Notification of 1862. The accused was tried by a jury for an offence triable with the aid of assessors, and the jury by a majority found him "not guilty." The Sessions Judge, who disagreed with the verdict, convicted the accused, treating the verdict of the jury as the opinion of assessors. *Held*, that the conviction was bad, inasmuch as the case was validly "tried by a jury" within the meaning of s. 536 of the Criminal Procedure Code (Act X of 1882), and the trial was complete when the jury had returned their verdict; and that the Judge was bound, under the circumstances, either to give judgment in accordance with the verdict, or, if he disagreed with it, to submit the case for the orders of the High Court as provided by ss. 306 and 307 of the Code. *In the matter of Bhoot Nath Dey* followed. A reference under s. 307 of the Criminal Procedure Code should be made when the Judge is "clearly of opinion" that he should do so for the ends of justice.

SURJA KURMI *v.* QUEEN-EMPRESS ... ... XXV 555

Verdict of. Charge to jury—Misdirection—Criminal Procedure Code (Act X of 1882), ss. 297, 423 (d)—Effect of omission to explain the law to Jury—Penal Code (Act XLV of 1860), ss. 143, 147, 380, 395—Practice. In a trial by jury, the accused were charged with offences under the Penal Code. The Judge while charging the jury omitted to explain the law by which they were to be guided The jury returned a verdict of *guilty* on all counts except one, and the Judge agreeing with the verdict convicted the accused. *Held*, that the omission to explain the law to the jury amounted to a misdirection vitiating the verdict within the meaning of s. 423 *(d)*, Criminal Procedure Code. *Wafadar Khan v. Queen-Empress* relied upon. Some statement should appear in the record of a trial by jury to show that the law bearing upon the charges has been explained to the jury.

BIRU MANDAL *v.* QUEEN-EMPRESS ... ... XXV 561

"Just Cause"—

See PROBATE.

Kabuliyat—

Rate of interest specified in. See BENGAL TENANCY ACT, s. 67.

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Land Acquisition Act—

X of 1870

ss 13 24 and 25 *Valuation of land acquired for public purposes—Time of acquisition and of compensation* When land has been acquired under the provisions of the Land Acquisition Act 1870 changes in its condition between the time of such acquirement and that of the actual conclusion of the award of compensation, are not to increase or lessen the valuation. The provision in s 25 points to ascertaining the value at the time when the land is acquired the right to compensation being simultaneous with the right to the land attaching to the Government. At the time when, according to the claim the right to certain plots of land attached to the Government the sub soil had no market value because the surface was in use for public roads having been so for about half a century *Held* that even if the claimants had proved a title in themselves to the sub soil of the plots underneath the roads, still no market value had been shown to belong to that sub soil within the meaning of ss 13 and 24 of the Land Acquisition Act, 1870 at the time of the right thereto attaching to the Government for a public purpose therefore compensation has been rightly disallowed

MANMATH NATH MITTER v SECRETARY OF STATE FOR INDIA XXV 194

I of 1894

ss 6 18 23, cls 1 24 49 *Compensation Acquisition of land injuriously affecting other property Right to compensation for loss of a ferry by reason of acquisition of adjacent land—Land Clauses Consolidation Act (8 Vict c 18), s 63* The word acquisition is used in s 23 of the Land Acquisition Act includes the purpose for which the land is taken as well as the actual taking and the words at the time in cl 4 of the same section must be taken to mean the time when the damage takes place and the right to compensation arises *London and Bright n Railway Company v Truman Hopkins v Great Northern Railway Company Ricketts v Metropolitan Railway Company Cooper Essex v Acton Local Board* referred to The District Board of Dinagepore erected a bridge over the river Tulai in consequence of the erection of which a ferry which was within 100 cubits of the bridge and owned by the Maharajah of Dinagepore who was also the owner of the land taken for the construction of the bridge ceased to exist *Held* that the owner of the ferry was entitled under the Land Acquisition Act to compensation for the loss of the ferry

COLLECTOR OF DINAGEPORE v GIRIJA NATH ROY XXV 346

Land Registration Act

Bengal Act VII of 1876

ss 38 and 78 *Suit for rent Whether it is necessary to enable him to sue for rent that a patnidar should be registered under the Act* A patnidar is not a proprietor within the meaning of ss 38 and 78 of the Land Registration Act

SUKUR KULLAH KAZI v BAMA SUNDARI DASI XXIV 104

s 78 *Registration in respect of a share—Right to recover rent* When some out of several proprietors of an estate who collect the rent jointly have registered their names under the Land Registration Act all the proprietors are entitled to join in an action for the whole rent but a decree will be made only in respect of the rent proportionate to the share registered Under s 78 of the Land Registration Act the penalty of non registration is the forfeiture not of the whole rent but of the rent of the share in regard to which the landlord is unregistered

NILMADHUB PATRA v ISHAN CHANDRA SINHA HIKIM XXV 787

s 78 and s 42 *Suit for rent by unregistered proprietor—Transfer of proprietary right by succession* Section 78 of the Land Registration Act 1876 precludes a person claiming as proprietor from suing a tenant for rent unless his name has been registered as such under the Act It is immaterial how the transfer of proprietorship is effected whether it is a case of transfer by purchase or a case of transfer by succession Section 42 of the Act makes it clear that every person succeeding to the proprietary right in any estate must apply for registration of his name *Surjakanta Acharjya Bahadur v Hemanta Kumari* applied

PUNUK LALL MUNDAR v THAKUR PROSAD SINGH XXV 717

Landlord—

Application by to determine incidents of tenancy See BENGAL TENANCY ACT, s 158

Landlord and Tenant—

See BENGAL TENANCY ACT ss 27 AND 29 RES JUDICATA

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Landlord and Tenant—*(continued)*

Denial of title—Permanent lease—Forfeiture—Transfer of Property Act (IV of 1882) ss 105, 108 111 A lease notwithstanding that it is permanent is liable to forfeiture under the provisions of the Transfer of Property Act if the tenant denies the title of the landlord Leases which are permanent and which came into existence before the passing of the Transfer of Property Act are governed by the general rule that a tenant who impugns his landlord's title renders his lease liable to forfeiture, which rule is only a particular application of the general principle of law that a man cannot approbate and reprobate
KALLY DASS AHIRI *v* MONMOHINI DASSEE XXIV 440

Disturbance by Landlord of peaceable possession—Suspension and apportionment of rent Where the act of a landlord is not a mere trespass but something of a grave character interfering substantially with the enjoyment by the tenant of the demised property the tenant is entitled to a suspension of rent during such interference even though there may not be actual eviction If such interference be committed in respect of even of a portion of the property there should be no apportionment of rent where the whole rent is equally chargeable upon every part of the land demised But if the interference is in respect of only a certain portion of the demised property the rent for which is separately assessed there should be apportionment
DHUNPUT SINGH *v* MAHOMED KAZIM ISPAHAN XXIV 296

Encroachment by a tenant Effect of such encroachment Position of such tenant—Trespasser When a tenant encroaches upon the land of his landlord he does not by such encroachment become the tenant in respect of the land encroached upon against the will of the landlord
PROHLAD TEOR *v* KEDARNATH BOSE XXV 302

Notice to quit Bengal Tenancy Act (VIII of 1885)—Suit for ejectment Notice including some land of which the defendant is found to be not in possession A notice to quit is not bad in law simply because of a small error in the statement in such notice of the area of the land in consequence of which it included some land which the defendant was found not to hold under the plaintiff
SHAMA CHURN MITTER *v* WOOMA CHURN HALDAR XXV 36

Notice to quit Non-occupancy raiyat Bengal Tenancy Act (VIII of 1885) ss 44 *and* 45—*Suit for ejectment by a lessee against another holding over after expiry of his lease* Certain land was let by the zamindar to the defendants on lease for a term of eight years After the expiry of the lease the plaintiffs obtained a lease of the land and giving a month's notice to quit to the defendants who had remained in possession after their lease expired brought a suit to eject them *Held* that the defendants could not be considered as trespassers but that s 45 of the Bengal Tenancy Act applied to the case and that the plaintiffs not having complied with its provisions the suit was rightly dismissed for want of proper notice to quit.
GOBURDHONI SAHA *v* KARUNA BEWA XXV 75

Notice to quit—Suit for ejectment Tenancy reserving an annual rent What notice a raiyat holding on annual tenancy is entitled to In a tenancy created by a kabuliyat with an annual rent reserved a tenant is entitled to six months' notice expiring at the end of the year of the tenancy before he can be ejected
KISHORI MOHUN ROY CHOWDHRY *v* NUND KUMAR GHOSAL XXIV 720

Recognition of an under tenure by the Zamindar—Result of his receiving rent in respect of it Deposit of rent by tenure holder under Bengal Tenancy Act (VIII of 1885), s 61 *and acceptance by Zamindar Hindu widow Lease granted by a Hindu widow in possession of her husband's estate* A widow in possession of her widow's estate in a zamindari made a grant of a *putni* tenure under it to a lessee at a rent In this suit brought by the reversionary heir on her death with the object of having the grant set aside as invalid as against him the *putni* lease was not proved to have been made with authority or from necessity justifying the alienation by the widow *Held* that the *putni* was on the death of the widow only voidable and not of itself void so that the plaintiff the next inheritor of the zamindari might then elect to treat it as valid The plaintiff had done so He had accepted rent in respect of the tenure as that tenure was specified in a petition which accompanied the *putnidar*'s deposit of the rent in a Court under the Bengal Tenancy Act (VIII of 1885) s 61 This was *prima facie* an admission that the *putni* was still subsisting In the absence of evidence to put a different construction upon the plaintiff's act and to negative its effect there was a sufficient *prima facie* case of an election to affirm the validity of the *putni*
MODHU SUDAN SINGH *v* ROOKE XXV

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Landlord and Tenant—*(continued.)*

Suit for ejectment—Service tenure—Bengal Tenancy Act (VIII of 1885), *ss.* 89 *and* 181. Service tenures are excepted from the operation of s. 89 of the Bengal Tenancy Act.

MOKBUL HOSSAIN *v.* AMEER SHEIKH ... ... XXV 131

Suit for enhancement of rent—Bengal Tenancy Act (VIII of 1885), *s.* 29—*Enhancement of rent by contract by more than two annas in the rupee—Void agreement—Contract Act (IX of* 1872), *ss.* 23 *and* 24. A contract under s. 29 of the Bengal Tenancy Act, to pay an enhanced rent by more than two-annas in the rupee, is void.

KRISTODHONE GHOSE *v.* BROJO GOBINDO ROY .. ... XXIV 895

Suit for rent—Bengal Tenancy Act (VIII of 1885), *ss.* 72 *and* 73—*Rule* 3, *Ch.* 1 *of the Rules made by the Local Government under cl.* (2) *of s.* 189 *of the Bengal Tenancy Act—Liability for rent on change of landlord—Notice of transfer—Transfer of putni right over a specific area, whether valid—Regulation VIII of* 1819, ss. 3 *and* 6—*Transfer of Property Act (IV of* 1882), *s.* 6. *Putni* right over a specific area lying within a *putni* taluk is transferable. Sub-section 1 of s. 72 of the Bengal Tenancy Act does not require that the notice therein contemplated should be given in any particular manner.

MADHUB RAM *v.* DOYAL CHAND GHOSE ... ... XXV 445

Suit for rent Deposit of rent by a tenant through the transferee of the holding from him, whether valid—Bengal Tenancy Act (VIII of 1885), *s.* 61. A deposit of rent, though not made by a tenant himself, but made on his behalf by a transferee of the holding from him, is a valid deposit within the meaning of s. 61 of the Bengal Tenancy Act.

BEHARY LAL MOOKERJEE *v.* BASARAT MANDAL... ... ... XXV 289

Suit for rent—Sub division of tenancy—Rent receipt signed by the agent—Bengal Tenancy Act (VIII of 1885), *s.* 88. A receipt for rent granted by a landlord or his agent containing a recital that a tenant's name is registered in the landlord's *sherishta* as a tenant of a portion of the original holding at a rent which is a portion of the original rent, does amount to a consent in writing by the landlord to a subdivision of the holding and a distribution of the rent payable in respect thereof, within the meaning of s. 88 of the Bengal Tenancy Act.

PYARI MOHUN MUKHOPADHYA *v.* GOPAL PAIK ... ... XXV 531

Suit for rent—Tenant settled on the land by a trespasser, Position of -Joint landlords—Payment of rent by a tenant to some of the landlords, whether sufficient discharge from liability to other landlords—Bengal Tenancy Act (VIII of 1885), *ss.* 157 *and* 188 A suit was brought by the plaintiffs against a tenant for the entire rent, making the co-sharer landlords also defendants to the suit. The defence of the tenant, defendant No. 1, was denial of relationship of landlord and tenant, and payment to the co-sharer landlords. The co-sharer landlords *inter alia* pleaded that, as the tenant defendant was settled on the land by them at a time when they were claiming to be entitled exclusively to the possession thereof, under a title derived from their auction-purchase, they must be taken to have been trespassers on the land, so far as the plaintiffs' share was concerned, and that consequently defendant No. 1, who was settled on the land by them, must also be treated as a trespasser as against the plaintiffs : *Held*, that the defendant No. 1, could not be treated as a trespasser as against the plaintiffs, and that the plaintiffs were entitled to claim rent for use and occupation from the defendant No 1. *Nityanund Ghose* v. *Kissen Kishore*, *Lalun Monee* v. *Sona Monee Dabee*, *Lukhee Kanto Doss Chowdhry* v. *Sumeeruddin Lusker*, *Surnomoyee* v. *Deno Nath Gir*, and *Binad Lal Pakrashi* v. *Kalu Pramanik* referred to. *Held*, also, that the payment to the co-sharer landlords, defendants Nos. 2 and 3, was not sufficient to discharge the defendant No. 1 from liability to the plaintiffs. *Ahamudeen* v. *Grish Chunder Shamunt* distinguished.

AZIM SIRDAR *v.* RAMLALL SHAHA .. .. XXV 324

Suit for rent—Whether interest on rent is rent within the meaning of s. 3, *cl.* (5) *of the Bengal Tenancy Act (VIII of* 1885)—*Second appeal—Bengal Tenancy Act (VIII of* 1885), *s.* 153. Interest on rent is not rent within the meaning of s. 3, cl. (5), of the Bengal Tenancy Act. Therefore no second appeal would lie in a case where the question is only relating to rate of interest, and the value of the subject-matter of the suit is less than Rs. 100.

KOYLASH CHANDRA DE *v.* TARAK NATH MANDAL ... XXV 571 *note*

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Landlord and Tenant—(*concluded.*)

Suits between. See BENGAL TENANCY ACT, S. 103.

Transfer by tenant without consent of landlord—Original tenant remaining in possession as sub-tenant of the transferee—Abandonment of tenure—Liability to ejectment—Pleading—Parties. Where the defendants had purchased the rights of the original tenants of certain *jote* lands, without obtaining the consent of the landlord to the transfer of the tenures, and the original tenants had remained in possession as sub tenants of the transferees: *Held*, that the principle laid down in *Kabil Sardar* v. *Chunder Nath Nag Chowdhry* was not applicable, and that the landlord was entitled to a decree for ejectment against the transferees.

KALLINATH CHAKRAVARTI *v.* UPENDRA CHUNDER CHOWDHRY ... XXIV 212

Lands Clauses Consolidation Act—

8 Vict., C. 18, s. 63. See LAND ACQUISITION ACT.

Lawful Authority —

Resistance to. See PENAL CODE, S. 183.

Lease —

Condition in restraint of. See CONTRACT.

Granted by Hindu widow, whilst in possession of estate. See LANDLORD AND TENANT.

Permanent. See LANDLORD AND TENANT.

Subsequent written agreement to abate rent—Variation of lease—Transfer of Property Act (IV of 1882), s. 107—Evidence Act (I of 1872), s. 92—Registration Act (III of 1877), ss. 17 and 18—Form of decree. In the year 1879 the plaintiff granted a lease of certain lands to the father of the defendants. In May 1889 he agreed in writing to allow the defendants an abatement of rent to the extent of Rs. 100 per annum. This agreement was not registered, but was stated in the plaint in a previous suit brought by the plaintiff. He subsequently brought a suit against the defendants for the recovery of the entire amount of the original rent *Held*, that the defendants could rely on the agreement, and that s. 92 of the Evidence Act (I of 1872) did not apply to it. *Held*, also, that the agreement did not operate as a lease, but was merely a variation of the lease, and that, therefore, registration was not necessary. *Held*, therefore, varying the order of the District Judge, that the decree for the entire amount of the original rent must be set aside, and a decree made for the amount of rent due at the reduced rate.

SATYESH CHUNDER SIRCAR *v.* DHUNPUT SINGH ... XXIV 20

Leave to sue—

See EXECUTION OF DECREE.

Legacy—

See MAHOMEDAN LAW.

Legal Necessity—

Want of. See PRIVY COUNCIL, PRACTICE OF.

Legal Practitioners' Act —

XVIII of 1879—

ss. 27, 28, 29. *Suit by a pleader to recover fee from his client—Contract Act (XI of 1872), s. 70—Provincial Small Cause Courts Act, s. 25.* The Legal Practitioners' Act (XVIII of 1879), s. 28, debars a pleader from recovering a fee from his client when no contract in writing is made. *Rama* v. *Kunji*, and *Krishnasami* v. *Kesava* dissented from.

SARAT CHUNDER ROY CHOWDHRY *v.* CHUNDRA [illegible] ROY ... XXV 805

Legalised Nuisance —

See NUISANCE.

Lessee—

See CALCUTTA MUNICIPAL CONSOLIDATION ACT, S. 307.

Lessees —

Who are not raiyats. See BENGAL TENANCY ACT, S. 5.

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Letters of Administration—

See HINDU LAW, INHERITANCE.

Court of Wards—"Person." The Court of Wards is not a "person" and letters of administration cannot under the law be granted to it.

GANJESSAR KOER v. COLLECTOR OF PATNA ... ... XXV 795

Suit by unsuccessful claimant to letters of administration—Right of suit—Suit to determine right of inheritance or to be appointed shebait of temple. Where letters of administration were granted to the defendant, in preference to the plaintiff, the order granting the letters of administration is not a bar to the plaintiff bringing a suit for the purpose of determining any question of inheritance or of the right to be appointed as *shebait*, the decree in which will supersede the grant. *Arunmoyi Dasi* v. *Mohendra Nath Wadadar* referred to.

JAGANNATH PRASAD GUPTA v. RUNJIT SINGH ... ... XXV 354

Letters Patent, High Court, 1865

cl. 12. See EXECUTION OF DECREE.

cl. 13. See TRANSFER OF CIVIL CASE.

cl. 15. *Order refusing application to commit for contempt—Appeal—Judgment.* An appeal lies from an order refusing an application to commit for contempt of Court.

MOHENDRA LALL MITTER v. ANUNDO COOMAR MITTER ... ... XXV 236

Licensa-

Date of taking out. See CALCUTTA MUNICIPAL CONSOLIDATION ACT, SS. 335, 336.

License Tax—

See CALCUTTA MUNICIPAL CONSOLIDATION ACT, S. 87.

Lien—

Notice of. See COSTS.

Life-estate—

See HINDU LAW, WILL.

Limitation—

See BENGAL TENANCY ACT, SCH. III, ART. 3. PARTIES: PUBLIC DEMANDS RECOVERY ACT, S. 2.

Application for ascertainment of mesne profits—Decree for possession and mesne profits—Effect of striking off application for execution—What are proceedings and orders in "execution of decree." An application for delivery of possession of land decreed and for ascertainment of mesne profits was made in 1892, more than three years after a previous application for the same purpose, and was "struck off" for non-service of notice. On a fresh application for ascertainment of mesne profits in 1895, *held*, that that portion of the proceeding or order of 1892 which related to mesne profits was not one "in execution of decree;" that under the circumstances the present application was not barred by that proceeding or order; and that the application was not barred by limitation, although the claim to possession was barred. *Puran Chand* v. *Roy Radha Kishen* followed; *Bunsee Singh* v. *Nuzuf Ali Beg* distinguished.

PRYAG SINGH v. RAJU SINGH ... ... XXV 203

Mortgage decree—Transfer to High Court for execution—Application for execution by sale—Civil Procedure Code (Act XIV of 1882), ss. 227, 230, 244—Transfer of Property Act (IV of 1882), ss. 67, 99—Limitation Act (XV of 1877), sch. II, arts. 122, 179, 180. On the 29th September 1882 a decree was obtained against the defendant's husband in a suit on a mortgage by the latter, dated the 6th April 1880. On the 27th July 1883 an order was made for transfer of the decree to the High Court for execution. On the 8th April 1886 the mortgagee applied to the High Court for execution by attachment of the mortgaged properties, and in the same year an order for attachment was made. The mortgagee died in April 1892; and on the 20th August 1894 the plaintiff (his widow and administratrix) applied to the High Court for an order absolute for sale of the mortgaged properties under s. 89 of the Transfer of Property Act. On the 5th January 1895 the application was refused, on the ground that the mortgaged properties were outside the territorial jurisdiction of the High Court. The plaintiff then instituted the present suit, in which she sought (*inter alia*) administration of the estate of the mortgagor (who had died before the mortgage suit was filed) and asked for the sale of such properties as might be found subject to such mortgage. *Held* (affirming the

Limitation—(*continued*)

decision of SALE, J), that whether the plaintiff sued on the original debt or on the decree of the 29th September 1882, the suit was barred by limitation *Held*, also, that, even apart from any question of limitation, the suit was not maintainable by reason of the provisions of ss 230 244 of the Civil Procedure Code the questions arising in the suit being such as should have been determined in execution of the decree and not by a separate suit

JOGLMAYA DASSI v THACKOMONI DASSI XXIV 473

Public Demands Recovery Act (Bengal Act VII of 1880) ss 2 and 20 — Act XI of 1859 s 34 Section 2 of the Public Demands Recovery Act (Bengal Act VII of 1880) does not make the provision of limitation in s 34 of Act XI of 1859 applicable to the execution of a decree annulling a sale under s 20 of Bengal Act VII of 1880

MAHOMED ABDUL HAI v GAJRAJ SAHAI XXV 283

Waste land subsequently made cultivable —Presumption —Possession Onus Probandi —*Constructive possession* The doctrine of constructive possession applies only in favour of a rightful owner and must not (as a rule) be extended in favour of a wrong doer whose possession must be confined to land of which he is actually in possession In a suit for the possession of lands formerly uncultivable, but subsequently brought under cultivation the District Judge had allowed the plea of limitation to prevail against the plaintiff upon a finding based not upon evidence of actual possession by the defendants but upon an inference from part of the evidence —that the defendants had been in constructive possession for over 12 years prior to the suit *Held* that so far as the judgment and decree of the District Judge related to certain plots described as *patit* or uncultivable lands they must be set aside and the case remanded to the District Judge to determine (*a*) how far the presumption in favour of the plaintiff as to the continuance of the uncultivable state of the lands till within twelve years of suit applied and (*b*) how far that presumption had been rebutted by evidence of actual possession on the part of the defendants

MOHINI MOHAN ROY v PROMODA NATH ROY XXIV 256

Limitation Act—

XV of 1877—

s 4 *Application to sue in forma pauperis Refusal of application Extension of time granted for payment of Court fee Payment of Court fee after period of limitation —Civil Procedure Code (Act XIV of 1882) ss 409, 410 413* Where an application for permission to sue *in forma pauperis* is rejected and a full Court fee is paid for a suit for the same relief the suit must be considered for the purposes of limitation, to have been instituted only after the payment of the Court fee and not at the date of presentation of the petition to sue as a pauper Section 4 of the Limitation Act does not apply to such a case The plaintiff on 26th November 1890 applied for leave to sue *in forma pauperis* for the recovery of immoveable property His application was rejected in May 1891 and time was given him to pay the full Court fee and his petition was then treated as the plaint in the suit The period of limitation for the suit had then however, expired the cause of action being found to have arisen on 26th November 1878 *Held* that the suit was instituted not when the petition to sue as a pauper was presented but only on the payment of the full Court fee, and it was therefore barred by lapse of time *Keshab Ramchandra Deshpand* v *Krishnarao Venkatesh Inamdar*, *Narain Kuar* v *Makhan Lal* and *Abbasi Begam* v *Nanhi Begam* followed *Skinner* v *Orde* distinguished

AUBHOYA CHURN DEY ROY v BISSESSWARI XXIV 889

s 10 See PRACTICE

s. 13 *Absence of defendant from British India—Carrying on business in British India through an authorized agent* Section 13 of the Limitation Act which excludes the time during which a defendant has been absent from British India in computing the period of limitation for any suit applies even where to the knowledge of the plaintiffs the defendants partners in a firm are during the period of their absence carrying on business in British India through an authorized agent *Harrington* v *Gonesh Roy* overruled

POORNO CHUNDER GHOSE v SASSOON XXV 496

ss. 19 and 20 and sch II, art 61 *Acknowledgment of liability Interest paid on debt— Contribution—Joint debtors* By a payment into Court under an order on account of decrees for rent and revenue in arrear, due to the landlord zemindar

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Limitation Act –*(continued.)*

XV of 1877—*(continued.)*

from the joint owners of an under-tenure, their estate was saved from sale. In respect of a proportionate share of liability for money raised for this purpose one the joint owners became liable to be sued by another of them for contribution; and a question arose as to the application of art. 61 of sch. II of the Limitation Act, 1877. More than three years before this suit all the joint owners had filed in Court a petition for the appointment of a manager of their estate who should, out of its profits, pay debts and interest to creditors from whom had been borrowed the money for the payment into Court. *Held*, that this was an acknowledgment of the joint debt by the co-owner who had not contributed, within s. 19 of the Limitation Act; whence had followed the legal consequences, one of which was her liability to be sued within due time for contribution. Whilst the three years from the date of that acknowledgment were running, and at a date less than three years before this suit, interest on part of the money borrowed had been paid by the manager whom the appellant, jointly with the other co-owners of the estate, had authorized, as her agent, to pay it. *Held*, that this interest, being clearly a payment in exoneration, *pro tanto*, of the plaintiff's liability, was such a payment as was contemplated by s. 20, and gave a new departure for the period of limitation.

SUKHAMONI CHOWDHRANI *v.* ISHAN CHUNDER ROY ... ... XXV 844

s. 22. *Assignment* pendente lite—*Substitution of assignees as plaintiffs*. In a suit instituted within the period prescribed by the Law of Limitation, the plaintiff assigned over his interest, and the assignees were substituted on the record in place of the original plaintiff after the said period had expired. *Held*, that under s. 22 of the Limitation Act (XV of 1877) the suit was barred by limitation. *Suput Singh* v. *Imrit Tewari* distinguished.

HARAK CHAND *v.* DEONATH SAHAY ... ... XXV 409

s. 22. *Suit for damages for illegal distraint—Joinder of parties Party plaintiff joined beyond period of limitation*. A suit for compensation for illegal distraint of crops was brought by one of two persons jointly entitled to the crops distrained. Objection being taken on the ground of non-joinder of a party that party was on his own application added as a plaintiff, but his claim was then barred by limitation. *Held*, that the whole suit was not barred by limitation in consequence of the provisions of s. 22 of the Limitation Act (XV of 1877).

JAGDEO SINGH *v.* PADARATH AHIR ... ... XXV 285

Schedule II—

art. 11. See CLAIM TO ATTACHED PROPERTY.

arts. 12, 13. See SALE IN EXECUTION OF DECREE.

art. 14. *Estates Partition Act (Bengal Act VIII of* 1876), *ss.* 116, 150—*Right of suit –Suit for possession*. A suit for possession of lands of which the owners have been dispossessed in pursuance of an order of the Collector under s. 116 of the Estates Partition Act (Bengal Act VIII of 1876), will lie, even though no suit is brought to set aside the Collector's order under s. 150. Article 14 of sch. II of the Limitation Act (XV of 1877) does not bar such a suit.

LALOO SINGH *v.* PURNA CHANDER BANERJEE ... ... XXIV 149

art. 32. *Bengal Tenancy Act (VIII of* 1885), *s.* 25, *cl.* (*a*) *and s.* 155—*Suit for ejectment and removal of trees—Limitation Act (XV of* 1877), *sch. II, art.* 120. Article 32 of sch. II of the Limitation Act (XV of 1877) applies to a suit brought under cl. (*a*) of s. 25 and s. 155 of the Bengal Tenancy Act (VIII of 1885) for the ejectment of a tenant and removal of trees planted by him on land leased out for agricultural purposes. Article 120 does not apply to such a case. *Kedarnath Nag* v. *Khettur Paul Sritirutno*, and *Gunesh Dass* v. *Gondour Koormi* distinguished.

SOMAN GOPE *v.* RAGHUBIR OJHA ... ... XXIV 160

arts. 36, 39, 48. See LIMITATION ACT, ART. 49.

art. 49. *Suit for damages for cutting and carrying away crops—Act XV of* 1877, *sch. II, arts.* 36, 39, 48 *and* 109. In a suit for damages for cutting and carrying away crops: *Held*, by the Full Bench (RAMPINI, J., *dissenting*) such suit does not come within the terms of art. 36 of sch. II of the Limitation Act (XV of 1877). *Per* MACLEAN, C.J., (TREVELYAN, J., *concurring*): Assuming that the case does not come within the terms of art. 39, the case is governed by art. 49. The crops, though immoveable in the first place, become specific moveable property when severed, and the fact that the severance was a wrongful act, does not make any difference. *Per* MACPHERSON, J.—The case is governed by art. 49 or 48,

Limitation Act—*(continued)*

XV of 1877—*(continued)*

as the crops after they had been cut come under the description of specific moveable property Possibly also the case might be brought under art 109 if it is not brought under art 49 *Per* GHOSE J Article 49 applied to this case *Surat Lal Mondal* v *Uman Haji* followed *Per* RAMPINI J *(dissentiente)*—The suit as framed not being one for compensation for trespass art 39 does not apply Article 48 or 49 also does not apply as they deal with property which is *ab initio* moveable and cannot be held applicable unless the first wrongful act *viz* the conversion of the immoveable into moveable property be disregarded Article 109 also does not apply as it referred to a case in which possession of immoveable property was withheld Article 36 therefore applied to the case *Essoo Bhayyi* v *The Steamship Savitri* referred to *Pindah Gazi* v *Jennudi* dissented from by TREVELYAN J

MANGUN JHA *v* DOLHIN GOLAB KOER XXV 692

art 61 See LIMITATION ACT SS 19 AND 20

arts 62 127 *Separation in Joint Hindu family Suit for share in joint property* At the separation of members of a joint family governed by the Benares School of Hindu law in 1885 the unrealized debts of the family were left undivided The debts were subsequently realized by some of the members of the separated family In a suit brought by the other members in 1893 (*inter alia*) to recover their shares in the debts so realized *Held* that the claim of the plaintiffs could only be treated as coming under art 62 sch II of the Indian Limitation Act (XV of 1877) and the claim in respect of such of the debts as were realized more than three years before the institution of the suit was barred by limitation Article 127 of the same schedule will not apply to such a case *Thakur Prasad* v *Partab* referred to

BANOO TEWARY *v* DOONA TEWARY XXIV 309

art 91 See HINDU LAW ENDOWMENT

arts 92 93 and 118 *Suit to set aside adoption—Deed of permission to adopt* The merits of a claim depended upon the authenticity of an *anumati patro* (deed of permission to adopt) alleged to have been given to a widow by her husband who died in 1832 She first adopted in 1884 a boy who soon after died She then in 1887 adopted the appellant who set up title in the reversion as heir of her husband brought this suit in 1888 to have set aside *Held* that neither art 92 nor art 93 of sch II of the Limitation Act XV of 1877 was applicable to bar the suit There had been no issue of the instrument the *anumatipatro* within the meaning of the former article the term issue having no application to such a document There had not within the meaning of art 93 before this suit been any attempt to enforce the instrument against the plaintiffs Article 118 as the suit had been brought within due time after the adoption did not bar it

HURRI BHUSAN MOOKERJI *v* UPENDRA LAL MUKERJI XXIV 1

art 109 See LIMITATION ACT ART 49 MESNE PROFITS

art 116 See INTEREST

art 118 See LIMITATION ACT ARTS 92 93

art 119 *Suit for possession of immoveable property by a Hindu on the allegation that he was the reversionary heir by adoption of the last owner* In a suit brought by the plaintiff to recover possession of certain immoveable properties on the allegation that he was the great grandson by adoption of one R who was the brother of one S to whose adopted son the said properties originally belonged the defence was that the suit was barred by limitation under art 119 of sch II of the Limitation Act *Held* that art 119 of sch II applies only to a suit for a declaratory decree as to the validity of an adoption and that the present suit which was one for possession of immoveable property was not barred under that article notwithstanding that the plaintiff had to establish the validity of an adoption as the basis of his title *Parvathi* v *Saminatha* dissented from *Lala Parbhu Lal* v *Mylne Basdeo* v *Gopal Ganga Sahai* v *Lekhraj Singh Natthu Singh* v *Golab Singh Padajirav* v *Ramrav Fanninyappa* v *Manjaya Hebbar*, and *Hari Lal Pranlal* v *Bai Reva* referred to

JAGANNATH PRASAD GUPTA *v* RUNJIT SINGH XXV 354

art 120 See LIMITATION ACT, ART 12

art 120 *Suit for declaration that the defendant is a mere benamidar for the plaintiff—Suit for relief on ground of fraud—Limitation Act (XV of 1877) sch II, art 95* A suit brought by A to obtain a declaration that a decree originally

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Limitation Act—*(continued)*

XV of 1877—*(continued)*

obtained by B against C and another which had been purchased in the name of D had really been purchased by the plaintiff for his own benefit, the cause of action alleged being the wrongful execution of the decree by D is not a suit for relief on the ground of fraud within art 95 of sch II of the Limitation Act but is governed by art 120 of that schedule. Under the circumstances the suit was held not to be barred by limitation

GOUR MOHUN GOULI v DINONATH KARMOKAR . XXV 49

art 121 *Encroachment by a trespasser—Incumbrance—Adverse possession—Purchaser at sale of taluk for arrears of rent* Adverse possession is an incumbrance within the meaning of art 121, sch II of the Limitation Act (XV of 1877) *Lukhmeer Khan v Collector of Rajshahye, Romesh Chunder Gooptoo v Raj Narain Roy, Khantomoni Dasi v Bijoy Chand Mahatab Bahadur*, and *Karim Khan v Brojo Nath Das* referred to An auction purchaser of a *putni taluk* in its entirety gets the *taluk* free of all incumbrances therefore in a suit brought by the auction purchaser to recover possession of land situated within the *taluk* against a trespasser who was alleged to have held the disputed land adversely the period of limitation would begin to run from the date when the sale becomes final and conclusive

NUFFER CHANDRA PAL CHOWDHRY v RAJENDRA LAL GOSWAMI XXV 167

art 122 See LIMITATION

art 124 See RES JUDICATA

art 124 *Suit by reversionary heir to office of shebait Hindu Law—Endowment—Succession in management* When a *shebait* does not appoint his or her successor as provided in the will of the founder and where there is no other provision for the appointment of *shebait* the management of the endowment must revert to the heirs of the founder and the limitation applicable to a suit for possession of such an office is twelve years under art 124 and not six years under art 120 of the Limitation Act *Fa Limsi Kunwar v Chattardhari Singh* and *Gossamee Sree Greedhareejee v Ruman Lolljee* referred to

JAGANNATH PRASAD GUPTA v RUNJIT SINGH XXV 354

art 127 See LIMITATION ACT

art 132 See INTEREST

art 132 *Mortgage (usufructuary) mortgage Further mortgage of the same property—Destruction of mortgaged property by diluvion Transfer of Property Act (IV of 1882) s 68 Right to sue under Limitation* Plaintiffs advanced money on an usufructuary mortgage of certain land in Magh 1280 (January 1873), and subsequently advanced another sum of money in Srabun 1280 (July 1873) on the security of the same land The land was washed away in 1892 In an action brought in 1894 under s 68 of the Transfer of Property Act (IV of 1882) for the money of both the mortgages on the ground that the defendants declined to give fresh security the defendants objected that the claim as regards the mortgage of Srabun 1280 was barred before the institution under art 132 sch II of the Limitation Act (1877) the money being due on the date of the bond *Held* overruling the objection of Limitation (1) with reference to the terms of the mortgage of Srabun 1280 that it was intended to add the money to the amount of the previous mortgage and to place it on the same conditions and that the plaintiffs were therefore equally entitled to sue for the money upon this mortgage as upon the other (2) That assuming that there was a right to sue for the money it did not follow that the plaintiffs were not entitled to have substituted for the security the money which took the place of the security (3) That on the happening of the event provided for in s 68 the plaintiff who were admittedly entitled to remain in possession of the property until the money was had been repaid were clearly entitled to have the money substituted for the property

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art 132 *Suit for money due on mortgage bond Money payable by instalments—Default in payment of instalment Right to sue for entire amount due on default of payment of any instalment* Where by a mortgage bond (hypothecating immoveable property) executed by the defendants a sum of money was made payable by four instalments the plaintiff to be at liberty in case of any default to sue either for the amount of that instalment or for the whole amount due on the bond. *Held*, that limitation ran from the date of the first default

SITAB CHAND NAHAR v. HYDER MALLA ... ... XXIV 281

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Limitation Act—*(continued.)*

XV of 1877—*(continued.)*

art. 132. *Suit for money lent on mortgage—Cause of action—Bond, Construction of.* In a mortgage bond, dated 14th June 1876, it was stipulated that the money advanced should be repaid "in the month of Jeyth 1289 Fusli, being a period of six years." The last day of Jeyth 1289 answered to the 1st June 1882, and the period of six years from the date of the bond ended on the 14th June 1882. In a suit brought upon the bond on the 12th June 1894: *Held*, (AMEER ALI, J., *dubitante)* that the money sued for became due on the 14th June 1882, and the suit was in time. *Rungo Bujaji* v. *Babaji*, *Almas Banee* v. *Mahomed Ruja*, and *Gnanasammanda Pandaram* v. *Palaniyandi Pillai* referred to by BEVERLEY, J.

LATIFUNNESSA *v.* DHAN KUNWAR ... . XXIV 382

art. 134. See CIVIL PROCEDURE CODE, S. 539.

art. 138. See LIMITATION ACT, ART. 144.

art. 144. *Suit for possession of land by an auction-purchaser, who obtained symbolical possession—Code of Civil Procedure (Act XIV of 1882), ss. 318 and 319—Limitation Act, art. 138.* In a suit for possession of land by an auction-purchaser, who had obtained symbolical possession, the defendant objected that the suit was barred by limitation, it not having been brought within twelve years from the date of the auction purchase. *Held*, that art. 144, sch. II of the Limitation Act (XV of 1877) applied to the case, and that as the suit was brought within twelve years from the date when the auction-purchaser obtained symbolical possession it was not barred by limitation.

HARI MOHAN SHAHA *v.* BABURALI ... ... XXIV 715

art. 166. See LIMITATION ACT, ART. 178.

art. 178. *Application to set aside a sale by a person interested in the sale—Bengal Tenancy Act (VIII of 1885), s. 173—Limitation Act, art. 166—Code of Civil Procedure (Act XIV of 1882), ss. 311 and 244—Second appeal.* An application to set aside a sale under s. 173 of the Bengal Tenancy Act is governed by art. 178, sch. II of the Limitation Act, and should be made within three years from the date when the right to apply accrues.

CHAND MONEE DASYA *v.* SANTO MONEE DASYA... ... ... XXIV 707

art. 179. See LIMITATION.

art. 179. *Meaning of the words "date of the decree"—Execution of decree—Code of Civil Procedure (Act XIV of 1882), ss. 205 and 235.* The words "date of the decree" in sch. II, art. 179 of the Limitation Act, mean the date the decree is directed to bear under s. 205 of the Code of Civil Procedure, and that is the date on which the judgment was pronounced; therefore an application to execute a decree, if not made within three years from the date when the judgment was pronounced, is barred by limitation. *Bani Madhub Mitter* v. *Matungini Dassi* referred to.

GOLAM GAFFAR MANDAL *v.* GOLJAN BIBI ... ... XXV 109

art. 179, cl. 3. *Execution of decree—Order allowing amendment of a decree—Review of judgment—Code of Civil Procedure (Act XIV of 1882), ss. 623, 624 and 206.* An order granting an application for amendment of a decree under s. 206 of the Code of Civil Procedure is an order passed upon review of judgment within the meaning of art. 179, sch. II, cl. (3) of the Limitation Act; therefore an application for execution of a decree within three years from such an order is not barred by limitation. *Kishen Sahai* v. *The Collector of Allahabad* referred to.

KALI PROSUNNO BASU ROY *v.* LAL MOHUN GUHA ROY ... ... XXV 258

art. 179, cl 4. *Step in aid of execution of decree—Application for substitution of the heirs of the deceased judgment-debtor—Application in accordance with law—Code of Civil Procedure (Act XIV of 1882), ss. 234, 235, 2[illegible] and 2[illegible].* An application by the judgment-creditor for substitution of the [illegible] of the deceased judgment-debtor, though disallowed, is an application in ac[illegible] with law to take some step in aid of execution of the decree within the [illegible] of sub sec. 4 of art. 179 of the Limitation Act. An application by the judgment creditor for the execution of his decree, which has been attached, as well as an application by him to execute another decree which he had attached in execution of his own decree, though disallowed, are applications in accordance with law.

ADHAR CHANDRA DAS *v.* LAL MOHUN DAS ... ... XXIV 778

art. 179, cls. (4) and (2). *Execution of decree not materially defective, Application for—Application returned for amendment—Code of Civil Procedure (Act XIV of 1882), ss. 235 and 248—Decree against joint defendants—Appeal by one of several defendants against part of the decree.* The plaintiff obtained a joint decree against

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Limitation Act—*(concluded.)*

XV of 1877—*(concluded.)*

defendants for possession of immoveable property and damages on 21st May 1886. Against that decree all the defendants, except defendant No. 1, appealed, and on 2nd July 1887 so much of the decree was reversed as made the appealing defendants liable for damages, but was affirmed in all other respects. A second appeal by the plaintiff from the decree of the Appellate Court was dismissed by the High Court on 9th July 1888. An application for execution of the decree was made by the plaintiff on 7th July 1891 within three years from the date of the final decree, dated 9th July 1888. The prayer was for issue of notice on the judgment-debtor for delivery of possession, for attachment and sale of certain immoveable properties, for realization of costs and damages decreed. Notice under s. 248 of the Code of Civil Procedure was issued on the judgment-debtors on 8th September 1891. The judgment-debtors, except defendant No. 1, objected that, as the application did not contain the right number of suit and date of decree, it was not in accordance with law, and as no other application had been made within three years from date of decree, the execution was barred by limitation. Defendant No. 1 objected that limitation as against him would run from 21st May 1886, there being no appeal by or against him from the decree of that date. *Held*, that material defects only could vitiate an application, and as the defects in the present application for execution were not material, it was not barred by limitation. *Asgar Ali* v. *Troilokya Nath Ghose* and *Gopal Shah* v. *Janki Koer* distinguished. *Held*, also, that even if such application was defective as an application for execution of decree it was still an application to take some step in aid of execution, namely, to issue a notice under s. 248, which was necessary, the decree having been passed more than a year before; and such notice having been issued, it kept the decree alive. *Behari Lal* v. *Salik Ram*, and *Dhonkal* v. *Phakkar* referred to. *Held*, further, that limitation against defendant No. 1 would run from date of the decree in appeal, therefore the application for execution was not barred by limitation. *Gunga Moyee* v. *Shib Sunker* followed. *Moshiat-un-nissa* v. *Rani* distinguished.

GOPAL CHUNDER MANNA *v.* GOSAIN DAS KALAY ... ... XXV 594

art. 180. See LIMITATION.

art. 180. *Execution of decree—Revivor—Civil Procedure Code (Act XIV of 1882), ss. 223, 230, 248 (a)—Insolvent, Adverse possession of—Attachment.* A creditor obtained a decree against his debtor on the Original Side of the High Court on the 19th December 1881. On the 11th December 1893, the judgment-creditor applied to the Court, under s. 223 of the Code of Civil Procedure, for "transmission of a certified copy of the decree to the District Judge's Court of the 24-Pergunnahs, with a certificate that no portion of the decree has been satisfied by execution within the jurisdiction of the High Court," and alleging that the judgment-debtor had no property within its jurisdiction, but had property in the 24-Pergunnahs. The application was headed as an application for execution and was in a tabular form Upon this a notice was issued under s. 248 (*a*) of the Code, and, the judgment-debtor not having shown any cause, on 19th December 1893 a certified copy of the decree was ordered to be issued. The certified copy of the decree having been transmitted, the judgment-creditor on the 1st March 1894 applied for the execution of the decree to the District Judge. On the objections of the judgment-debtor that the execution was barred by limitation, and that he having been declared an insolvent, and the properties having vested in the Official Assignee, the attachment was contrary to law, *held*, that the execution was not barred by limitation, as the order of the 19th December of 1893 was an order for execution, and operated as a revivor of the decree within the meaning of art. 180, sch. II of the Limitation Act. *Held*, also, that the judgment-debtor having been in possession of the property for more than 12 years, the Official Assignee not having taken possession of it, he had a title by adverse possession which was capable of being attached. *Ashootosh Dutt* v. *Doorga Churn Chatterjee* and *Futteh Narain Chowdhry* v. *Chandrabati Chowdhrain* followed.

SUJA HOSSEIN *v.* MONOHUR DAS ... ... XXIV 244

Lis pendens—

See SALE IN EXECUTION OF DECREE.

"Living"—

Meaning of. See WILL.

Local Area—

See JURISDICTION OF CRIMINAL COURT.

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Local Areas—

Effect of re-distribution of. See EXECUTION OF DECREE.

Lower Burma Courts Act—

XI of 1889—

s. 40. See APPEAL.

s. 42. See RECORDER OF RANGOON, JURISDICTION OF.

Lunatic—

Act XXXV of 1858—*Uncertificated guardian, Powers of—Manager of Joint Hindu Family, Powers of—Guardian—Sale by de facto guardian of lunatic's share.* Act XXXV of 1858 does not affect the general provisions of Hindu law as to guardians who do not avail themselves of the Act, and the managing member of a joint Hindu family, one of the members of which is a lunatic, may, in case of necessity, sell joint family property including the lunatic's share, although he does not hold a certificate under the said Act. *Ram Chunder Chuckerbutty* v. *Broja Nath Mozoomdar* followed in principle. *The Court of Wards* v. *Kupulmun Singh* disapproved.

KANTI CHUNDER GOSWAMI *v.* BISHESWAR GOSWAMI ... ... XXV 585

Residence—Lunatic resident in mofussil—Guardian of lunatic's person—Position of guardian towards local Court appointing him—Temporary suspension of guardian—Jurisdiction of District Judge—Irregularity—Act XXXV of 1858, *ss.* 10, 18 *and* 22—*Superintendence of High Court—Civil Procedure Code (Act XIV of* 1882), *s.* 622. Although Act XXXV of 1858 contains no express provisions as to the place of residence of a lunatic governed by the Act, it contemplates that he shall reside within the jurisdiction of the Court that has found him to be a lunatic. The guardian of such a lunatic's person is, in matters connected with the guardianship, subordinate to the District Court which appointed him. A guardian, having obtained leave from the District Judge to take the lunatic out of the jurisdiction for a specified time, was, at the expiration of that time, ordered to return with the lunatic to his residence within the local jurisdiction. He failed to comply with the order. Without further notice, the District Judge, by certain orders which he gave by letter and telegram through the manager of the lunatic's estate, suspended the guardian from his office, and directed him to make over the custody of the lunatic to the manager. The guardian made over the custody accordingly; and then applied to the High Court under s. 622 of the Code of Civil Procedure, to set aside those orders, and restore the custody of the lunatic to him at Calcutta (outside the jurisdiction of the Court to which the lunatic was subject). The High Court declined to interfere, even though the orders were made irregularly; because no case for its intervention had been made out, and because the lunatic ought not to be removed out of the local jurisdiction.

IN RE BASHARAT ALI CHOWDHRY ... ... XXIV 133

Magistrate—

See JURISDICTION OF CIVIL COURT.

Jurisdiction of. See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO: NUISANCE: RECOGNIZANCE TO KEEP PEACE.

Jurisdiction of. Disqualification of Magistrate to try case—Criminal Procedure Code (Act X of 1882), *ss.* 202, 540, 555—*Summons case.* Where a Magistrate before whom a complaint was made held an inquiry under s. 202 of the Criminal Procedure Code for the purpose of ascertaining the truth or falsehood of the complaint before issuing process, and, after holding such inquiry, summoned the accused, examined witnesses on both sides, and, after a short adjournment examined a witness called by himself, and found the accused guilty under s. 341 of the Penal Code. *Held*, that there is nothing in the Criminal Procedure Code which disqualifies a Magistrate who holds a preliminary inquiry under s. 202 from trying the case himself, and that the provisions of s. 555 had no application, inasmuch as the Magistrate had not initiated or directed the proceedings against the accused person nor taken an active part in the arrest or collection of evidence against such person: *Held*, also that the Magistrate was strictly within his rights under s. 540 of the Criminal Procedure Code in receiving fresh evidence, after evidence on both sides had been taken, and the case adjourned for judgment, inasmuch as the case was still a pending case when such evidence was taken.

IN RE ANANDA CHUNDER SINGH *v.* BASU MUDH ... ... XXIV 167

Jurisdiction of. Disqualification of Magistrate to try case—Witness—Omission to record statement of accused under Code of Criminal Procedure (Act X of 1882), *s.* 364. Where a Magistrate before whom an accused person is brought omits to

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Magistrate –(*continued.*)

record (as provided by s. 364 of the Criminal Procedure Code), statements made by the accused, he does not thereby make himself a witness, and so become disqualified from trying the case.

QUEEN-EMPRESS *v.* FATTAH CHAND ... ... XXIV 499

Jurisdiction of. Power of commitment to Sessions Judge—Code of Criminal Procedure (Act X of 1882), s. 251—Penal Code (Act XLV of 1860), s. 147—Circular Order No. 9 of 6th September 1869—Rioting. The commitment of a case under s. 147 of the Penal Code to the Court of Session by a Deputy Magistrate is not necessarily illegal. Although the case is shown to be triable only by a Magistrate under the second schedule of the Criminal Procedure Code there is nothing in s. 254 of the Criminal Procedure Code which prevents a Magistrate committing a case under s. 147 of the Penal Code to the Court of Session, provided he finds that the accused has committed an offence which, in his opinion, cannot be adequately punished by him. The instructions contained in Circular No. 9 of 6th September 1869 are to be read subject to the provisions of the Criminal Procedure Code.

QUEEN-EMPRESS *v.* KAYEMULLAH MANDAL ... ... XXIV 429

Power of. See CRIMINAL PROCEDURE CODE, SS. 148 ; 517 : POSSESSION, ORDER OF CRIMINAL COURT AS TO.

Rule issued upon. See CRIMINAL PROCEDURE CODE, SS. 107 AND 118.

Mahomedan Law

Custom. See 'RES JUDICATA.'

Rights of widow under. See MARRIAGE.

Will—Right of childless widow—Administration of the estate of a Shiah Mahomedan under his will—Alleged gift—Claims as between his childless widow and the estate—Right of the widow to maintenance—Legacies chargeable on one-third only of the estate—Commission to executor. A Mahomedan of the Shiah sect, dying without issue, left a widow. She, as his childless widow, was entitled to one-fourth of his estate other than land. On the administration of his estate the following matters arose, and were decided. The handing over, with formal words of gift by the testator to the widow, of deposit receipts, with intent afterwards to transfer the money into her name at the Bank, which transfer was not effected, would not constitute a gift. A commission of three per cent. on the proceeds of the sale of the testator's property, directed, by his will was bequeathed to the executor. This was by way of remuneration but was in no sense a debt. As a legacy it was payable only out of one third of the estate which passed by the will. A Mahomedan widow is not entitled to maintenance out of the estate of her late husband, in addition to what she is entitled to by inheritance, or under his will—Hedaya, Book IV, chap. 15, s. 3, Mahomedan law, Imamia, by N. E. Baillie, p. 170, referred to. No contract could be implied that this widow should pay an occupation rent on account of her *having continued* to occupy a house belonging to the testator's estate, for eleven months after his death. Her occupation was referable to her position, and no notice was given to her that rent would be charged. A Mahomedan childless widow is not by Shiah law entitled to share in the value of land forming the site of buildings that belonged to her husband's estate Her one-fourth includes, as was admitted, a share in the proceeds of sale of the buildings. The text quoted in Book VII, chap. IV., p. 293 of Baillie's Mahomedan Law, Imamia, is not to be construed as referring only to agricultural land.

AGA MAHOMED JAFFER BINDANIM *v.* KOOLSOM BEEBEE ... ... XXV 9

Maintenance—

See MAHOMEDAN LAW.

Order of Criminal Court as to—Criminal Procedure Code (Act X of 1882), s. 488—Imprisonment for default of payment of maintenance—Warrant of commitment—Procedure. An order of commitment to prison for default in payment of a wife's maintenance allowance cannot be made without proof that the non-payment was due to wilful neglect of the person ordered to pay. *Sidheswar Teor* v. *Gyanada Dasi* followed. The law contemplates a single warrant of commitment in respect of the arrears due at the time of its issue. Where six months' arrears were due, an order for separate warrants of commitment awarding a separate sentence of imprisonment of one month on each warrant was, therefore, held to be bad in law. As to the mode of computing the term of imprisonment, the case of *Allapichai Ravuthar* v. *Mohidin Bibi* followed.

BHIKU KHAN *v.* ZAHURAN ... ... XXV 291

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Maintenance—*(continued.)*

Order of Criminal Court as to. Criminal Procedure Code (Act X of 1882), ss. 488 and 177—Complaint by a wife against her husband for maintenance—Issue of summons—Jurisdiction of Presidency Magistrate. If a person neglects or refuses to maintain his wife, the proper Court to take cognizance of the complaint of the wife is the Court within the jurisdiction of which the husband resides.
BENBOW v. BENBOW ... ... XXIV 638

Malik—
Meaning of. See HINDU LAW, WILL.

Manager of Endowment—
Alienation by. See HINDU LAW, ENDOWMENT.

Manager of Railway—
Agent of. See RAILWAYS ACT, s. 77.

Manager under Court of Wards—
Suppression of facts by. See MINOR

Marginal Notes—
To Sections of Act See STATUTES, CONSTRUCTION OF

Marriage—
Dissolution of, Withdrawal of petition for See PRACTICE
Personal status—Christian marriage followed by Mahomedan marriage—Rights of widow under Mahomedan law—Divorce In a suit to obtain a widow's share under Mahomedan law in the estate of the deceased, it was proved that the plaintiff and deceased had been married in 1855 as professed Christians in a church at Meerut, that subsequently, having reverted to Mahomedanism, they were married a second time according to Mahomedan law in *nikah* form, which second marriage had not been dissolved by a Mahomedan divorce In 1886 the husband died, leaving a will excluding the wife from all participation in his estate. *Held*, that the personal status of the deceased being at the time of his death that of a Mahomedan and the plaintiff's personal status being that of his wife under the same law, she was entitled to a share in his estate notwithstanding his will, which purported, but under Mahomedan law was inoperative, to exclude her *Quære*—Whether in the case of spouses remaining domiciled in India, where religious creed affects the rights incidental to marriage, such as that of divorce, a change of religion made honestly after marriage with the assent of both spouses, without any intent to commit a fraud on the law, affects any change in those rights.
ROBERT SKINNER v. CHARLOTTE SKINNER ... ... XXV 537
Presumption as to form of Hindu See HINDU LAW, STRIDHAN.

Measurement Papers—
Entry made in See EVIDENCE ACT, s 35

Medicinal Preparation—
Containing alcohol. See BENGAL EXCISE ACT, s 53

Mesne Profits—
Application for ascertainment of See LIMITATION
Assessment of See COURT FEES ACT, s 11.
Limitation Act (XV of 1877), sch II, art 109—Wrong doers independent of the defendant Civil Procedure Code (1882), s 211 In a suit brought on 26th September 1893 for mesne profits of land, for the possession of which a decree had been previously obtained against the defendant, the plaintiff claimed damages in respect of the Fusli years 1297—1300, the year 1297 F, ending on the 28th September 1890. The defendant objected (*inter alia*) that the claim in respect of the period beyond three years before the date of suit was barred by limitation, and that she was not liable for profits of the lands from which she had been dispossessed by others *Held*. (1) Under art. 109, sch II of the Limitation Act the defendant is liable for the mesne profits received by her or which she might have with due diligence received *during* the three years before the date of suit and not *before* The period of three years fixed has no reference to the time when rents fall due. *Bujnath Persad* v. *Badhoo Singh*, *Thakoor Dass Acharjee Chuckerbutty* v. *Shoshee Bhoosun Chatterjee* and *Thakoor Dass Roy Chowdhry* v. *Nobin Kristo Ghose* distinguished; (2) in the case of every wrong the liability of the defendant is limited to damages for the wrong which he has himself done. With reference to the definition of mesne profits in s. 211 of the Civil Procedure Code,

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Mesne Profits—*(continued.)*

if the defendant was excluded from possession, she could not be said to have actually or even impliedly received the profits, nor could she with ordinary or extraordinary diligence have received them ; the case was remanded to determine what mesne profits were payable between the 26th September 1890 and the date, if any, when dispossession was proved.
ABBAS *v.* FASSIH-UD-DIN ... ... XXIV 413

Suit for possession and for. See COURT FEES ACT, S. 11.

Metropolis Management Amendment Act—
1862 (25 and 26 Vict., c. 102)—
s. 75. See BENGAL MUNICIPAL ACT, S. 204.

Military Officer—
In Indian Staff Corps, Pay of. See ATTACHMENT.

Minor—
See GUARDIAN.

Fraudulent representation by minor that he was of age—Mortgage. A sum of money was advanced to a minor by a mortgagee, secured by a mortgage of house property, on the representation by the minor that he was of age, and the mortgagee was deceived by such false representation: *Held*, that the mortgagee was entitled to a mortgage decree against the property of the infant. *Dhanmull* v. *Ram Chunder Ghose* distinguished and doubted. *Nelson* v. *Stocker per* TURNER, L.J. applied.
SARAL CHAND MITTER *v.* MOHUN BIBI ... ... XXV 371

Mortgage by minor—Voidable mortgage—Estoppel — Evidence Act (I of 1872), s. 115—Fraud—Contract Act (IX of 1872), s. 64—Restoration of benefit by minor. The general law of estoppel as enacted by s. 115 of the Evidence Act (I of 1872) will not apply to an infant unless he has practised fraud operating to deceive. A Court administering equitable principles will deprive a fraudulent minor of the benefit of a plea of infancy ; but he who invokes the aid of the Court must come with clean hands and must establish, not only that a fraud was practised on him by the minor, but that he was deceived into action by the fraud. *Gunesh Lalu* v. *Bapu* dissented from. *Sarat Chunder* v. *Gopal Chunder Laha*, *Mill* v. *Fox*, *Wright* v. *Snow* and *Nelson* v. *Stocker* discussed. If money advanced to an infant on a mortgage declared void is spent by him, then there is no benefit which he is bound to restore under the provisions of s. 64 of the Contract Act (IX of 1872).
DHURMO DASS GHOSE *v.* BRAHMO DUTT ... ... XXV 616

Representation as to age known to be false—Liability in equity—Action on the contract—Action framed in tort—Costs. Where an infant obtained a loan upon the representation (which he knew to be false) that he was of age : *Held* that no suit to recover the money could be maintained against him, there being no obligation binding upon the infant which could be enforced upon the contract either at law or in equity, but that the defendant should not be allowed costs in either Court.
DHANMULL *v.* RAM CHUNDER GHOSE ... ... XXIV 265

Representation of, in suit. See GUARDIAN.

Wrongful admission of title against a minor—Suppression of facts by a manager appointed by the Court of Wards—Order of Settlement Court cancelled. At a settlement of a district in Oudh a sub-settlement was decreed in conformity with Act XXVI of 1866, which legalizes rules as to claims in respect of subordinate rights to land. The claimant alleged himself to be, in virtue of a *birt* tenure held by him, under-proprietor of a village within the *taluk* of a *talukdar* then a minor, whose estate was under charge of the Court of Wards, whose representative, the Deputy Commissioner of the District, had appointed a manager of the estate. This manager having reported favourably on the claim, the Deputy Commissioner sanctioned its admission ; whereupon a decree for sub-settlement was made on the 30th June 1871. The present suit was brought by the *talukdar*, after attaining full age, to have that decree set aside as having been obtained by fraud and collusion. That the manager was brother of the alleged *birt*-holder, and that he was family shareholder with him in the village—facts which the manager had suppressed, were facts proved in this suit. The defendants attempted, but failed, to establish by evidence the existence of the alleged *birt*. *Held*, that the admission in the Settlement Court in 1871 was not binding on the plaintiff, and that, even assuming that the defendants' ancestor had been in some way in occupancy before 1857, the evidence was quite insufficient to show that a grant of a perpetual under-proprietary right had been obtained. The decree of the Lower Appellate Court, cancelling the Settlement Court's order, was therefore upheld.
RAM AUTAR *v.* MAHAMMAD MUMTAZ ALI ... ... XXIV 853

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Misdirection—
See CHARGE TO JURY: JURY, VERDICT OF.

Misjoinder of Causes of Action—
See CIVIL PROCEDURE CODE, S. 424.

Joinder of several plaintiffs in respect of separate causes of action—Contribution, Suit for—Civil Procedure Code (Act XIV of 1882), s. 578—Irregularity affecting merits. The plaintiffs, who were husband and wife, brought a suit to recover a certain sum of money, part of which was alleged to have been paid by plaintiff No. 1, who was a co-sharer with the defendants in two *putnis*, to save the *putnis* from being sold for arrears of rent; and the remainder by plaintiff No. 2, who alleged that she had a subordinate *miras taluk* under the two *putnis* granted to her by plaintiff No. 1 and that the sale would have resulted in the cancellation of her *miras taluk*. In second appeal it was contended by the respondent, in support of the decree made by the Court below dismissing the claim of plaintiff No. 2, that the claim was liable to dismissal by reason of its involving the misjoinder of plaintiffs with different causes of action. This objection had been raised in the written statement, and the Court was asked to raise an issue on the point. In answer to this contention it was urged by the appellants that as the respondents went to trial upon the merits, it was not open to them to urge any objection like this to the frame of the suit on second appeal. *Held*, that the suit was bad for misjoinder of plaintiffs, as the suit of plaintiff No. 2 ought properly to have been brought against all the holders of the *putnis*, including plaintiff No. 1, and not merely against the defendants in the suit. *Held*, further that it was open to the respondents to raise the objection as to misjoinder in second appeal. *Tarinee Churn Ghose* v. *Hunsman Jha* distinguished; *Smurthwaite* v. *Hannay* referred to.
MOHIMA CHANDRA ROY CHOWDHRY *v.* ATUL CHANDRA CHAKRAVARTI CHOWDHRY ... ... XXIV 540

Misrepresentation—
See HUNDI, SUIT ON: MINOR.

Mistake of Fact—
See WRONGFUL RESTRAINT.

Mokuraridar—
Claim by. See CLAIM TO ATTACHED PROPERTY.

Money—
Advanced on fraudulent misrepresentation. See HUNDI, SUIT ON.
Decree for. See EXECUTION OF DECREE.
Lent on mortgage. See LIMITATION ACT, ART. 132.
Paid and damages incurred by distraint of crops, Suit for. See SECOND APPEAL.
Payable by instalments. See LIMITATION ACT, ART. 132.

Mortgage—
See BENGAL TENANCY ACT, S. 171: EXECUTION OF DECREE: INTEREST: LIMITATION ACT, ART. 132: MINOR: SALE FOR ARREARS OF RENT: TRANSFER OF PROPERTY ACT, S. 135
By conditional sale. See INTEREST.
By guardian of minor's property. See GUARDIAN.
By minor. See MINOR.
Construction of. See INTEREST.

Decree absolute for foreclosure—Transfer of Property Act (IV of 1882), ss. 87 and 88—Whether time to redeem would run from the date of the preliminary decree, or from the date of the decree of the Appellate Court, when it simply confirms the decree of the first Court. Where, in a suit on a mortgage, the decree of the Appellate Court simply dismisses the appeal, leaving the decree of the first Court untouched, the time for redemption would run from the date of the decree of the first Court.
BHOLA NATH BHUTTACHARJEE *v.* KANTI CHUNDRA BHUTTACHARJEE. XXV 311

Further advances—Equitable mortgage on title-deeds already deposited under previous mortgage. The defendants had executed a mortgage in favour of the plaintiff, and handed him the title-deeds of the mortgaged property. Subsequently the plaintiff advanced a further sum to the defendants, who agreed that the plaintiff should retain the title-deeds already held by him as a security for the re-payment of the further advances. There was no fresh deposit of the deeds. *Held*, that the plaintiff was entitled to be declared an equitable mortgagee in respect of such further advance. *Ex parte Kensington* applied. *In re Beetham* referred to.
GIRENDRO COOMAR DUTT *v.* KUMUD KUMARI DASI ... ... XXV 611

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Mortgage—(*continued.*)

Money lent on. See LIMITATION ACT, ART. 132.

Usufructuary mortgage—Sudbharna bond—Covenant to repay—Construction of bond—Suit for money and for sale—Transfer of Property Act (IV of 1882), s. 67. In a *sudbharna* mortgage bond it was stipulated, "having paid the principal money in the month of Chait 1297 we shall take back the document and the land. In case we fail to repay the principal money on due date the *sudbharna* bond shall remain in force." *Held*, that there was in this contract no agreement to repay the principal money, and no such agreement was implied by the provisions as to taking back the document and the land, and therefore there was no right to a money decree. *Held*, that under s. 67 of the Transfer of Property Act (IV of 1882) an usufructuary mortgagee cannot as such (*i.e.*, unless there is anything in the contract which would imply the right) sue either for foreclosure or for sale. *Umda* v. *Umrao Begam*, *Chathu* v. *Kunjan*, and *Ramayya* v. *Guruva* referred to; *Venkatasami* v. *Subramanya* not followed.

LUCHMESHAR SINGH *v.* DOOKH MOCHAN JHA ... ... XXIV 677

Mortgage-bond—

Money due on. See See LIMITATION ACT, ART. 132.

Mortgage Decree—

See CIVIL PROCEDURE CODE, S. 230: LIMITATION.

Mortgage Sale—

See EVIDENCE ACT, S. 92.

Mortgagee—

Payment made by. See VOLUNTARY PAYMENT.

Motion

See PRACTICE.

Mukhtear

Communication to. See PRIVILEGED COMMUNICATION.

Municipal Commissioners—

Election of. See JURISDICTION OF CIVIL COURT.

Munsif -

Jurisdiction of See EXECUTION OF DECREE. SALE IN EXECUTION OF DECREE: VALUATION OF SUIT.

Negligence

See CARRIERS ACT, S. 6.

Negligent Act

See PENAL CODE, S. 269.

New Trial

See SMALL CAUSE COURT, PRESIDENCY TOWNS.

Non-cognizable Offence—

See DAMAGES, SUIT FOR.

Non-occupancy Raiyat—

See LANDLORD AND TENANT.

Right of. See BENGAL TENANCY ACT, S. 20.

Notice -

See CRIMINAL PROCEDURE CODE, S. 148: RIGHT OF OCCUPANCY: SALE FOR ARREARS OF RENT.

Notice of Succession to Tenure—

Omission to give. See BENGAL TENANCY ACT, S. 16.

Notice of Suit—

See CIVIL PROCEDURE CODE, S. 424: RAILWAYS ACT, S. 77.

Dismissal of suit for want of. See 'RES JUDICATA.'

Notice to quit—

See LANDLORD AND TENANT.

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Notification—

Government, of 1862. See JURY.

Nuisance—

Cremation—Burning-ghat or cremation ground—Criminal Procedure Code (Act X of 1882), ss. 133, 140, 437—*Jurisdiction of District Magistrate to order further inquiry, in a proceeding under s.* 133 *of the Code—"Legalized Nuisance"—Private cremation ground, Duties of owner of—" Public place "—" Trade or occupation "—Order of removal of burning-ghat—Form of notice.* A District Magistrate has, strictly speaking, no power under s. 437 of the Criminal Procedure Code (Act X of 1882) to order a ' further inquiry ' into a proceeding under s. 133 of the Code which has been practically dropped by a Subordinate Magistrate, the proper course being to refer the matter to the High Court. Although a burning-ghat or cremation ground may not in itself be a " nuisance " within the meaning of cl. 2, s. 133 of the Criminal Procedure Code (Act X of 1882), still a Magistrate will have jurisdiction to take action under that section if it is shown that such a ghat or ground is in such an offensive state, or that cremation is carried upon it in such an offensive manner, as to be a source of injury, danger, or annoyance to persons living in the vicinity. *Queen-Empress* v. *Samnadha Pillai* and *Bamford* v. *Turnley* referred to and discussed. *Brindabun Chunder Roy* v. *Chairman of Municipal Commissioners of Serampore* distinguished. A private proprietor may be guilty of acts done on his private property, which may give rise to a public nuisance; the owner of a cremation ground may be held to create a " nuisance " if he allows the cremation of bodies upon that ground to be so performed as to annoy or endanger the lives and properties of persons living in the neighbourhood. The proprietor of a cremation ground cannot be said to be carrying on any " trade or occupation " within the meaning of cl. 3, s. 133 of the Criminal Procedure Code. A Magistrate has no power under s. 133 of the Criminal Procedure Code to order the removal of a burning-ghat from its position, but he can direct a proprietor to " remove the nuisance," *i.e.*, to take such steps as would result in the cremation of corpses ceasing to be a nuisance to the public.

INDRA NATH BANERJEE *v.* QUEEN-EMPRESS ... ... XXV 425

Criminal Procedure Code (Act X of 1882), *ss.* 133 *and* 137—*Reference by Sub-Divisional Magistrate to a second class Magistrate - Bonâ fide question of title—Jurisdiction of Magistrate—Public nuisance—Obstruction in public way.* A Sub-Divisional Magistrate having made a conditional order under s. 133 of the Criminal Procedure Code (Act X of 1882) against a person to remove an obstruction on a public thoroughfare, or appear and show cause before a second class Magistrate, the said person appeared as directed, and the order was made absolute under s. 137. In revision the High Court held that, having regard to the penultimate paragraph of s. 133, the order was not illegal on the ground that it was made absolute by a Magistrate with second class powers other than the Magistrate who made the conditional order *In re Narasimha* approved of. When a question of title is *bonâ fide* raised the Magistrate ought not to make an order under ss. 133 and 137 of the Criminal Procedure Code, but, should allow the party an opportunity for the determination of the question by a Civil Court. The claim of title must however, be *bonâ fide* and not a mere pretence to oust jurisdiction, and it is for the Magistrate to say whether the claim is a *bonâ fide* one or a pretence. *Luckeenarain Banerjee* v. *Ram Coomar Mookerjee* and *Queen Empress* v. *Bissessur Sahu* followed. Although no length of enjoyment can legalize a public nuisance—see *Municipal Commissioners of Calcutta* v. *Mahomed Ali*—yet the long possession or enjoyment of what is said to be a nuisance may give to the objection of the person so possessing or enjoying it the character of a *bonâ fide* dispute as to title such as might have the effect of ousting the jurisdiction of the Magistrate under ss. 133 and 137 of the Code, and making the question a proper one for the Civil Court.

PREONATH DEY *v.* GOBORDHONE MALO ... ... XXV 278

Criminal Procedure Code (Act X of 1882), *ss.* 133, 137, 437 *Further inquiry—Ultra vires—Obstruction to public thoroughfare.* In a complaint for alleged obstruction of a public thoroughfare the Magistrate, after making preliminary inquiries, was of opinion that the alleged way was not a public thoroughfare, and refused to take action under s. 133 of the Code of Criminal Procedure. The Sessions Judge, being of opinion that the Magistrate should have gone on with the case, directed a further inquiry under s. 133. Such inquiry was held and the Magistrate, without taking evidence in support of the complaint, made his conditional order under s. 133 absolute under s. 137. *Held*, that the order of the Sessions Judge directing a further inquiry was *ultra vires*, there being no section

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Nuisance—*(continued.)*

of the Code under which an order for further inquiry could be made in the case; s. 437 having no application. *Held*, also, that the Magistrate, before whom the petitioner showed cause, should not have made his conditional order under s. 133 absolute without taking evidence upon the matter of the complaint; the words "evidence in the matter" meaning "in the matter of the complaint," and not simply evidence which the opposite party might offer.

SRINATH ROY *v.* AINADDI HALDER ... ... XXIV 395

Criminal Procedure Code (Act X of 1882), s. 144—Order regulating boat traffic at a landing place—High Court's power of revision when order cannot be made under that section. An order regulating the boat traffic at a certain landing place of a river in the manner directed by the order passed in this case held to be not an order that is authorized by s. 144 of the Criminal Procedure Code. If the order be one that cannot be made under s. 144 of the Criminal Procedure Code, the mere fact of the order purporting to have been made under that section does not prevent the High Court from interfering with it in revision. *Abhayeswari Debi* v. *Sidheswari Debi* and *Ananda Chundra Bhuttacharjee* v. *Stephen* followed.

QUEEN-EMPRESS *v.* PRATAP CHUNDER GHOSE... ... ... XXV 852

Public nuisance. See PENAL CODE, S. 269.

Numerals—

Combination of. See TRADE-MARK.

Obstruction—

In Public way. See NUISANCE: PENAL CODE, S. 283.
To Public thoroughfare. See NUISANCE.

Occupancy-Raiyat—

Suit by, for possession. See BENGAL TENANCY ACT, SCH. III.

Occupancy Raiyats—

See BENGAL TENANCY ACT, S. 50.

Offence—

Locality of commission of. See JURISDICTION OF CRIMINAL COURT.
Uncertainty of place where committed. See JURISDICTION OF CRIMINAL COURT.

Office—

To which are attached religious duties, Sale of. See 'RES JUDICATA.'

Officer—

Not officer of regular Forces, Pay of. See ATTACHMENT.

Official Trustee—

Appointment of. See PRACTICE.

Official Trustee's Act—

XVII of 1864—
s. 10. See PRACTICE.

Omission to appeal from Order—

Effect of. See APPEAL.

Onus of Proof—

See EVIDENCE: LIMITATION: WILL.

Deeds of gift between joint brothers of part of the family estate—Subsequent partition between them of the residue. Two brothers, the only members of a joint Hindu family, executed and registered mutual deeds of gift to one another of their interests in specified portions of their family estate. In after years the younger brother sued the elder for partition of the estate excepting so much of it as had already been the subject of the above gifts. The elder defended on the ground that the deeds of gift had not been intended to operate, not representing any real transaction. To negative their effect the burden of proving that the transaction was not real, but only a pretence, was laid upon the defendant, who failed to adduce that proof.

SHAM CHAND PAL *v.* PROTAP CHANDRA PAL ... ... XXV 78

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Opium Act—

I of 1878—

s. 9. See DAMAGES, SUIT FOR.

Order—

Absolute for sale. See CIVIL PROCEDURE CODE, S. 244.
Allowing amendment of decree. See LIMITATION ACT, ART. 179, CL. 3.
Appointing commission to effect partition. See APPEAL.
Dismissing appeal for default. See REVIEW.
For inspection of property, Form of. See PRACTICE.
Granting certificate, Conditional. See APPEAL.
Granting review of judgment. See APPEAL.
Of Her Majesty in Council. See EXECUTION OF DECREE.
Refusing application to commit for contempt of Court. See LETTERS PATENT, HIGH COURT, CL. 15.
Refusing to confirm sale. See SECOND APPEAL.
Refusing to set aside sale. See SECOND APPEAL.
Regulating boat traffic at landing place. See NUISANCE.
Setting aside order granting review. See SECOND APPEAL.
To make good deficiency on resale. See APPEAL.

Oudh Estates Act—

I of 1869—

Talukdari estate under. See WILL.

Oudh Land Revenue Act—

XVII of 1876—

ss. 52, 53. *Claim to resume grant.* A proprietor in Oudh claimed to resume a perpetual lease as having been granted by his ancestor at a favourable rent, without the sanction, but otherwise under the circumstances, contemplated by s. 52 of the "Oudh Land Revenue Act," XVII of 1876, so that the grant was resumable. *Held*, that the claim failed. The undefined charges, expenses of management, and other payments incidental to the lease, might have been such as to make the rent paid a reasonable one as between lessor and lessee; and that the favourable nature of the rate of rent had not been established.

PERTAB BAHADUR SINGH *v.* BADLU ... ... XXV 479

Paper Book—

Failure to deposit costs for. See REVIEW.

Pardanashin Lady—

Execution of document by a pardanashin lady—Refusal of her application, as defendant, for the issue of a commission to take her evidence—Civil Procedure Code (Act XIV of 1882), ss. 383, 390—Irregularity not affecting merits of case—Civil Procedure Code (Act XIV of 1882), s. 578. The Court of First Instance rejected an application made under ch. XXV of the Civil Procedure Code for the issue of a commission to take the evidence of a Mahomedan *pardanashin* lady, the defendant in the suit, which was brought against her on a mortgage bond, the execution of which she had denied in her written statement. The Courts below concurred in finding that there was sufficient evidence of the execution of the document by the *pardanashin* with full knowledge of its contents. From their judgments it appeared that if the defendant had been examined on commission and had given her testimony in support of her written statement, it would not have been believed, and in their Lordships' opinion it could not reasonably have prevailed. *Held*, that the error alleged by the appellant to have occurred in the refusal of the Court to issue the commission (whether or not it would have been better to have issued it) was, at all events, no valid ground of appeal. The evidence taken on the commission could not have affected the merits of the case within s. 578 of the Civil Procedure Code.

AKIKUNNISSA BIBI *v.* RUP LAL DAS ... ... XXV 807

Pardon—

Withdrawal of. See PRACTICE.

Parties—

See CIVIL PROCEDURE CODE, S. 244: JURISDICTION OF CIVIL COURT: LANDLORD AND TENANT: POSSESSION, ORDER OF CRIMINAL COURT AS TO; RIGHT OF SUIT: SALE FOR ARREARS OF REVENUE.

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Parties—*(continued.)*

Adding parties as plaintiffs—Civil Procedure Code (1882), *s.* 32—*Suit by benamidar.* A mortgage bond was executed ostensibly in favour of R but J was the real mortgagee. A suit was brought by R, the *benamidar*, to enforce the bond; J, the real mortgagee, made over the debt on a date previous to the suit, but executed the formal deed of assignment on a date subsequent thereto. The assignees were then added as plaintiffs to the suit. *Held*, distinguishing the case of *Chunder Coomar Roy* v. *Gocool Chunder Bhuttacharjee*, that a *benamidar* may sue, and that the assignees were rightly added as plaintiffs under s. 32 of the Civil Procedure Code. *Held*, also, that s. 32 is wide enough to meet every case of defect of parties; and, further, that the power to add parties must be exercised with reference to the interests which those parties have at the time when the addition is being considered.
BHOLA PERSHAD *v.* RAM LAL ... ... XXIV 34

Adding parties to suit—Civil Procedure Code (Act XIV of 1882), *s.* 32—*Court adding a defendant—Limitation.* No question of limitation arises where a Court, of its own motion, under s. 32 of the Civil Procedure Code adds a party defendant to a suit. *Oriental Bank Corporation* v. *Charriol* followed.
GRISH CHUNDER SASMAL *v.* DWARKA NATH DINDA ... ... XXIV 640

Compromise by, without knowledge of attorney. See COSTS.

Joinder of. See EJECTMENT, SUIT FOR: LIMITATION ACT, S. 22.

Non-joinder of. See WRONGFUL DISTRAINT.

Notice to. See CRIMINAL PROCEDURE CODE, S. 148.

Parties to suit—Persons having the same interest in one cause—Civil Procedure Code (Act XIV of 1882), *ss.* 26 *and* 30. In a suit for the removal of masonry structures raised by one member of community of Hindu priests upon a certain platform, on which every member of the community had individual right to perform religious rites, praying also for a declaration and injunction in connection with such removal, the plaintiffs were seven persons claiming relief as the *panch* or committee representing the whole community, and also in their individual capacity. It was found by the Court that the plaintiffs did not constitute the *panch*, and that they did not in that character represent the community: *Held*, that s. 26 of the Civil Procedure Code (1882) was only an enabling section; it allowed the plaintiffs to bring a joint action; and should not be read as though all persons of the community *must* be joined as plaintiffs. *Held*, also, that s. 30 of the Code is an enabling section, and did not debar the plaintiffs from suing *in their own right* in this case.
BAIJU LAL PARBATIA *v.* BULAK LAL PATHUK... ... ... XXIV 385

Substitution of, Application for. See LIMITATION ACT, ART. 179.

Partition—

See TRANSFER OF PROPERTY ACT, S. 118.

Deeds of gift executed after. See ONUS OF PROOF.

Estates Partition Act (Bengal Act VIII of 1876)—*Partition of revenue-paying estate —Jurisdiction of Civil Court—Code of Civil Procedure (Act XIV of* 1882), *ss.* 265, 396. Section 265 of the Code of Civil Procedure does not apply to a suit for partition of a revenue-paying estate when no separate allotment of revenue is asked for. A Civil Court, therefore, has jurisdiction to decree partition in such a case; and a suit for possession, after partition, of a share in part of an undivided estate, in which part alone the plaintiff has a share, is maintainable in a Civil Court if no division of revenue is sought. *Debi Singh* v. *Sheo Lall Singh* approved and followed; *Meherban Rawoot* v. *Behari Lal Barik* overruled.
JOGODISHURY DEBEA *v.* KAILASH CHUNDRA LAHIRY ... ... XXIV 725

Right to partition—Partition between zamindar and putnidars—Partition between parties, one of whom owns interests subordinate to the other. The plaintiff was proprietor of an entire estate paying an annual revenue to Government of Rs. 2,444. In 1864 his father gave a *putni* lease of an undivided six annas share of the estate to the defendants' predecessors in title. The plaintiffs alleged that the land being held *ijmali*, although he and the defendants collected separately from the tenants their respective shares of the rent, difficulty and inconvenience had arisen in the management of the property, and he therefore sued to have his ten annas share of the land divided by metes and bounds from the six annas share of the *putnidars*, the land of the entire estate remaining liable as before for the entire amount of the Government revenue payable in respect of it. *Held* by the Full Bench that the plaintiff was entitled to a decree for partition.
HEMADRI NATH KHAN *v.* RAMANI KANTA ROY ... ... XXIV 575

Suit for. See ASSAM LAND AND REVENUE REGULATION,

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Party—

Added after suit brought. See LIMITATION ACT, S. 22.

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See LIMITATION ACT, S. 4.

Pay of Military Officer—

In Indian Staff Corps. See ATTACHMENT.

Payment—

By judgment-debtor under void agreement: See EXECUTION OF DECREE.
By person interested to prevent sale. See BENGAL TENANCY ACT, S. 171.
Of Court-fee, Extension of time for. See LIMITATION ACT, S. 4.
To save Putni Taluk from sale. See VOLUNTARY PAYMENT.

Penal Code—

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s. 79. See WRONGFUL RESTRAINT.
ss. 97, 99. See RIOTING.
ss. 109, 114. See FORGERY.
s. 143. See WARRANT OF ARREST.
ss. 143, 147. See JURY, VERDICT OF.
s. 147. See CRIMINAL PROCEDURE CODE, S. 423 : MAGISTRATE, JURISDICTION OF : RIOTING.
s. 149. See RIOTING.

s. 183. *Resistance to attachment—Lawful authority—Village Chaukidari Act (Bengal Act VI of 1870), ss. 26, 27 and 34.* Where a village chaukidar, without the preparation and publication of a list of defaulters and without any written authority as required by s. 26 and s. 27 of the Village Chaukidari Act (Bengal Act VI of 1870) attached some property for levying the amount of arrears: *Held*, that resistance to such attachment was not an offence under s. 183 of the Penal Code.

DURGA CHARAN MALI *v.* NOBIN CHANDRA SIL ... ... XXV 274

s. 186. See WARRANT OF ARREST.
ss. 240, 241. See JURY.
s. 268. See PENAL CODE, S. 269.

s. 269. *Negligent Act—Refusal to allow person suffering from infectious disease to be removed to a hospital—Public nuisance—Penal Code, ss. 268, 270.* Where a mother refused to allow her daughter suffering from small-pox to be removed to a hospital in accordance with an order made by the District Magistrate, unless she accompanied her, and was convicted of an offence under s. 269 of the Penal Code by the District Magistrate: *Held*, that no unlawful or negligent act had been committed within the meaning of s. 269 of the Penal Code.

CAHOON *v.* MATHEWS ... ... XXIV 494

s. 270. See PENAL CODE, S. 269.

s. 283. *Obstruction in a public way.* The accused was charged generally with obstructing a public way, no danger, obstruction, or injury being alleged to have been caused to any person, nor, was there any clear evidence that the way was a public way. *Held*, that the conviction under s. 283 of the Penal Code could not be sustained.

QUEEN-EMPRESS *v.* BENI MADHAV CHAKRAVARTI ... ... XXV 275

s. 325. See RIOTING.
s. 341. See WRONGFUL RESTRAINT.
s. 379. See CRIMINAL PROCEDURE CODE, S. 423.
ss. 380, 395. See JURY, VERDICT OF.
s. 408. See CHARGE.
s. 409. See CRIMINAL PROCEDURE CODE, S. 35.
s. 448. See RECOGNIZANCE TO KEEP PEACE.
ss. 468, 471; 467. See FORGERY.
s. 486. See JURISDICTION OF CRIMINAL COURT.

Perpetuities—

Rule against. See WILL.

Personalty—

Law relating to. See ENGLISH LAW.

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Persons—

Having same interest in one cause. See PARTIES.

Petition—

Filed in former proceeding. See EVIDENCE ACT, SS. 11 AND 21.
Filed for dissolution of marriage, Withdrawal of. See PRACTICE.
Form of. See BENGAL TENANCY ACT, S. 158.

Plaint—

Amendment of. See CIVIL PROCEDURE CODE, S. 424: CONTRACT.

Amendment of plaint—Civil Procedure Code (Act XIV of 1882), ss. 42, 45 and 53. On the question of amending a plaint, s. 53 of the Civil Procedure Code should be read with ss. 42 and 45; that it is the intention of the Legislature that all matters in dispute should be disposed of in the same suit. The proviso to s. 53 is not intended to interfere with this.

SARAL CHAND MITTER *v.* MOHUN BIBI ... . XXV 371

Plaintiffs—

Adding. See PARTIES.
Joinder of, in respect of separate causes of action. See MISJOINDER OF CAUSES OF ACTION.

Pleadings—

See RAILWAYS ACT, S. 77.

Police—

Investigation by. See WARRANT OF ARREST.

Police Officer—

Liability for illegal search. See DAMAGES, SUIT FOR.

Possession—

See CRIMINAL PROCEDURE CODE, S. 145: LIMITATION.
And mesne profits, Decree for. See LIMITATION.
And mesne profits, Suit for. See COURT FEES ACT, S. 11.
Disturbance of, by landlord. See LANDLORD AND TENANT.

Order of Criminal Court as to. Criminal Procedure Code (Act X of 1882), s. 145—Authority of District Magistrate—Sub-Divisional Magistrate. In a case where a District Magistrate made an order stating that in his opinion it was the duty of the Sub-Divisional Magistrate to institute proceedings under s. 145 of the Criminal Procedure Code: *Held*, that the District Magistrate had no authority in law to direct the Sub-Divisional Magistrate to institute such proceedings. *Queen-Empress* v. *Gobind Chandra Das* followed.

KAILASH CHUNDRA PAL *v.* KUNJA BEHARI PODDAR ... ... XXIV 391

Order of Criminal Court as to. Criminal Procedure Code (Act X of 1882), s. 145—Initial proceedings—Parties concerned—Adding parties during the course of the proceedings. Before initiating proceedings under s. 145 of the Criminal Procedure Code, it is the duty of the Magistrate, not only to be satisfied that a dispute likely to cause a breach of the peace exists, but also to ascertain, as far as possible, who are concerned in the dispute. The Magistrate has no power to add parties during the course of the proceedings unless in the initial proceeding he is satisfied that they are concerned in the dispute. If in the course of the proceedings it appears to the Magistrate that it is absolutely necessary that other parties should be required to attend, the only course open to him is to initiate a new proceeding. *Ram Chunder Das* v. *Monohur Roy* discussed.

PROTAB NARAIN SINGH *v.* RAJENDRA NARAIN SINGH ... XXIV. 55

Suit by occupancy-raiyat for. See BENGAL TENANCY ACT, SCH. III.
Suit for. See BENAMI TRANSACTION: LIMITATION ACT, ARTS. 14, 144: 'RES JUDICATA.'
Suit for, and for declaration that alienation is invalid. See BENGAL TENANCY ACT, S. 50.
Suit for, on allegation of being heir by adoption. See LIMITATION ACT, ART. 119.

Power in Deed to invest—

Construction of. See ENGLISH LAW.

Power to adopt—

Validity of. See HINDU LAW, WILL.

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Practice—

See CHARGE : COSTS : CRIMINAL PROCEDURE CODE, SS. 107 AND 118 : DECREE : DEPOSIT OF TITLE-DEEDS : INSPECTION OF DOCUMENTS : INTEREST : PRIVY COUNCIL, PRACTICE OF : RAILWAYS ACT, S. 77 : REVISION : SMALL CAUSE COURT, PRESIDENCY TOWNS : TRANSFER OF CIVIL CASE : WILL.

Consent decree, Setting aside—Motion. A consent decree cannot be set aside on motion on the ground that it was obtained by fraud and misrepresentation. A separate suit must be brought for that purpose. Charges of fraud cannot properly be tried upon affidavits. *Gilbert* v. *Endean*, *Huddersfield Banking Company* v. *Lister & Son*, and *Ainsworth* v. *Wilding* applied.
FOOLCOOMARY DASI *v.* WOODOY CHUNDER BISWAS ... ... XXV 649

Exceptions to report—Notice—Rule 565 of Belchambers' Rules and Orders of the High Court, Original side. In making an application to discharge or vary a report, it is necessary that notice should be given within the time required by Rule 565 of the rules and orders of the High Court, Original Side, and that such notice should be accompanied with the grounds of exceptions relied on by the party objecting to the report.
LUTCHMEE NARAIN *v.* BYJANAUTH LAHIA ... ... XXIV 437

Inspection of property—Civil Procedure Code (Act XIV of 1882), s. 499—Judicature Acts, Order 50, Rule 3—Form of order for inspection. The plaintiff brought an action against the defendant for damages alleged to have been caused to his house by the erection by the defendant of an adjoining house. On an application by the defendant for an order allowing him or his 'agents to enter into the house of the plaintiff for the purpose of inspecting, examining and surveying the alleged injuries and for the purpose of examining the materials employed therein and the formations thereof, and to dig excavations for the purpose of exposing the foundations,' it was objected by the plaintiff that the Court had no jurisdiction to make the order, as the house of which inspection was sought was not the "subject of the suit" within s. 499 of the Civil Procedure Code, and that if the order could be made for inspection of the house it could not be made for inspection of the house including the zenana apartments, and further that no order could be made for the excavation of the foundations. *Held*, that the house and premises of the plaintiff formed the "subject of the suit" within the meaning of s. 499, and under that section the Court had power to make the order applied for. *Held*, also, that this was a case in which the order should be made.
DHORONEY DHUR GHOSE *v.* RADHA GOBIND KUR ... ... XXIV 117

Official Trustee, Appointment of—Official Trustee's Act (XVII of 1864), s. 10—Consent of Beneficiaries—Evidence Act (I of 1872), s. 85—Affidavit, Sufficiency of. On an application under s. 10 of the Official Trustees' Act (XVII of 1864), where the petition was not signed by one of the beneficiaries, the Court held, upon other evidence, that such beneficiary was desirous of having the Official Trustee appointed as trustee of the will.
IN THE GOODS OF COLLETT ... ... XXV 856

Receiver—Power to sue in his own name—Code of Civil Procedure (Act XIV of 1882), s. 503—Trust-deed to liquidate debts—Non-communication of trust-deed to creditors—Limitation—Limitation Act (XV of 1877), s. 10. The Court has authority, under s. 503 of the Civil Procedure Code, to confer on a receiver the power to sue in his own name; and if the order appointing the receiver gives him liberty, he may do so. DS executed a trust-deed, whereby he made over his property to trustees to manage his affairs and liquidate his debts in manner therein directed. The deed contained this provision : "In order to prepare a list of my debts, the trustees shall ascertain the same by looking into my books of accounts ; and they shall not admit any debt without *rokur*, *hathchitta*, or *hundi* bearing the signature of myself or my *monib gomastas*, or without decree." *Held*, in the absence of evidence that this deed was communicated to the creditors, that it did not create a trust in favour of the creditors, but enured only for the benefit of the executant ; that therefore the plaintiff, a creditor, was not entitled to rank as a beneficiary under it ; and that it did not create a trust in his favour so as to take out of the operation of the Limitation Act a claim that otherwise fell within it.
FINK *v.* MOHARAJ BAHADUR SINGH ... ... XXV 642

Sanction to prosecute—Application for sanction—Criminal Procedure Code (Act X of 1882), ss. 337, 339—Approver—Withdrawal of conditional pardon. An application to the High Court for sanction to prosecute an approver for giving false evidence should be by motion on behalf of the Crown in open Court. The withdrawal of the conditional pardon should be made under s. 339 of the Criminal Procedure Code by the authority that granted it and not by the High Court.
QUEEN-EMPRESS *v.* MANICK CHANDRA SARKAR ... ... XXIV 492

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Practice—(*continued.*)

Withdrawal of petition for dissolution of marriage—Costs of petitioner, on what scale allowed—Divorce Act (IV of 1869), ss. 7, 35 and 45. The petitioner on the 2nd June 1896 presented her petition, in which she prayed for the dissolution of her marriage with the respondent on the grounds of adultery and cruelty. A commission was issued at her instance to examine witnesses in England on the charges of adultery and cruelty, and the result of their evidence was that the petitioner was satisfied that the charges brought by her against her husband were wholly unfounded, and she on the 2nd September 1897 applied for leave to withdraw her suit, and for payment of her costs by the respondent. She contended that her costs should be paid by him as between attorney and client. The respondent submitted he ought to pay costs only as between party and party. *Held*, that the petitioner's costs including costs of this application, be taxed as between party and party, it being open for the attorney for the wife to sue the husband for the rest of the costs.
BUTT v. BUTT ... ... XXV 222

Presidency Magistrate—

Jurisdiction of. See ACT XIII OF 1859: COMPLAINT, DISMISSAL OF: COMMISSION IN CRIMINAL CASE: MAINTENANCE, ORDER OF CRIMINAL COURT AS TO.

Presidency Small Cause Courts Act—

XV of 1882—

s. 22. See COSTS.

s. 69. See SMALL CAUSE COURT, PRESIDENCY TOWNS.

I of 1895—

s. 11. See COSTS.

ss. 37, 38. See SMALL CAUSE COURT, PRESIDENCY TOWNS.

Presumption—

See BENGAL TENANCY ACT, SS. 50; 56: LIMITATION.

Prevention of Cruelty to Animals Act—

XI of 1890—

ss. 2 and 3. *Crabs—Animals—Cruelty to animals.* The provisions of Act XI of 1890 apply to cruelty exercised towards any animal which is either "domestic" or which being *feræ naturæ* has been "captured" and is in captivity. Crabs are "animals" within the definition of s. 2 of Act XI of 1890. If a person exposes them for sale at a public place with their legs broken and with their shells crushed in so as necessarily to cause them pain he incurs the penalty prescribed by s. 3 of the Act.
TULSI BEWAH v. SWEENEY ... ... XXIV 881

Principal—

Disclosure of. See CONTRACT.

Principal and Agent—

See ARBITRATION.

Printed Case—

Costs of filing. See PRIVY COUNCIL, PRACTICE OF.

Private Defence of Property—

Right of. See RIOTING.

Privileged Communication—

Communication to mukhtear when acting as pleader—Evidence Act (I of 1872), s. 126. The restrictions imposed by s. 126 of the Evidence Act in respect of what are known as privileged communications extend also to communications made to *mukhtears* when acting as pleaders for their clients.
ABBAS PEADA v. QUEEN-EMPRESS .. . . XXV 736

Privy Council—

Order of. See EXECUTION OF DECREE.

Practice of. *Concurrent judgments on fact—Effect of reception in evidence on appeal, of documents rejected by first Court.* The merits of a claim depended upon the authenticity of an *anumati patro* (deed of permission to adopt) alleged to have been given to a widow by her husband. The first Court found that the instrument was not genuine. The High Court, on appeal, upheld this finding, but had

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Privy Council—*(continued.)*

considered relevant, and had admitted in evidence, documents rejected by the first Court when tendered by the appellant. This reception of evidence afforded no reason for making the case an exception to the application of the rule, in the discretion of the Committee, against the disturbance of concurrent decisions upon a fact in issue below.

HURRI BHUSAN MUKERJI *v.* UPENDRA LAL MUKERJI ... ... XXIV 1

Practice of. Concurrent judgments on fact—Hindu Law—Alienation by one of two co-widows—Want of legal necessity. Two widows of the same husband, each having inherited her undivided share in the inheritance, disputed as to their rights therein. They then settled their dispute by a compromise in which it was agreed that each had obtained "absolute proprietary" right in her share as a co-widow, and that division had been made between them. Having no power by this to affect the rights of the successor to the estate on their deaths each was entitled to her share for her widow's estate only. Upon a mortgage made by the elder widow before her death the mortgagee now claimed, not only the interest of both the widows and thus to deprive the younger who had survived the other of her interest during her life, but also claimed a charge on the estate of her inheritance in the land mortgaged. Against the competency of the older widow to charge the estate of both and to bind the reversioner both Courts below had decided. They had found that there had been no justifying necessity established by the evidence for the mortgage. Those concurrent findings having been accepted by the Judicial Committee as correct in regard to the absence of necessity for the mortgage, they saw no occasion to say anything about any other questions as to the competency of the elder widow to mortgage the whole estate in the way in which she did.

DHARAM CHAND LAL *v.* BHAWANI MISRAIN ... ... XXV 189

*Practice of. Costs of respondents—Printed cases—*Ex parte *hearing.* The respondents in four appeals which were consolidated and heard as one, filed their printed case and did not appear at the hearing which was *ex parte*. *Held*, that the respondents, notwithstanding their non-appearance, were, on the dismissal of the appeal, entitled to the costs thereof up to and including the filing of their printed case, and also to the costs of applying for those costs.

SUMBHU NATH SANTRA MAHAPATRA *v.* SURJAMONI DEI ... ... XXV 187

Probate—

Application for. See WILL.

Duty. See COURT FEES ACT, SCH. I, ART. 11.

Grant of probate—Subsequent inconsistent will of which probate is also granted—Costs of executor. The executor of a will had obtained probate thereof, when the executor of a subsequent (and inconsistent) will applied for and obtained probate of the second will. *Held*, that having regard to the circumstances of the case, and to the fact that the litigation was produced by the conduct of the testatrix herself, the executors of both wills were entitled to their costs to be paid out of the estate; but that in so far as the costs would not be covered by the estate, each party must bear his own costs.

IN THE GOODS OF TARAMONI DASI ... ... XXV 553

Jurisdiction in probate cases—Transfer of a probate case by the District Judge in whose Court it was instituted to that of a Subordinate Judge—The Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), *s.* 23, *sub-sec.* 2, *cl.* (*d*)*—Probate and Administration Act (V of* 1881), *s.* 52. An application was made for probate of the will of a deceased testator in the Court of the District Judge, who transferred the case to that of the Subordinate Judge. The opposite party *(inter alia)* objected that the Subordinate Judge had no jurisdiction to try the case: *Held*, that the case came within the scope of s. 23, sub-sec. 2, clause (*d*) of the Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), and therefore, the Subordinate Judge had jurisdiction to try it.

KUNJO BEHARI GOSSAMI *v.* HEM CHUNDER LAHIRI ... ... XXV 340

Order refusing. See APPEAL.

Revocation of Probate—Probate and Administration Act (V of 1881), *s.* 50, *Expl.* 4—"*Just Cause*"—*Mismanagement by executor.* Mismanagement by the executor of an estate is not, under s. 50, Expl. (4) of the Probate and Administration Act, a just cause for revoking the probate. *Held*, therefore, that the order of revocation made by the District Judge for that cause was made without jurisdiction and must be set aside. The words "just cause" as explained in s. 50 of the Probate and Administration Act are not illustrative merely, but exhaustive.

ANNODA PROSAD CHATTERJEE *v.* KALIKRISHNA CHATTERJEE ... XXIV 95

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Probate and Administration Act—

V of 1881—

See HINDU LAW, INHERITANCE.

ss. 2, 4. See HINDU LAW, WILL.

s. 3. See APPEAL.

ss. 50; 52. See PROBATE.

s. 86. See APPEAL.

s. 90. See HINDU LAW, WILL.

s. 98. *Act VI of* 1889, *s.* 15, *Amending Act V of* 1881—*Construction of Act—Meaning of the words "an account."* The provisions of s. 98 of the Probate and Administration Act that an executor shall, within one year from the grant of probate or letters of administration "or within such further time as the Court may from time to time appoint, exhibit an account of the estate," mean that one account is to be exhibited and not a series of accounts from time to time; the words "from time to time appoint" relating to an extension of the period within which an account is to be exhibited.

MOHESH CHANDRA BHUTTACHARJEE *v.* BISWA NATH BHUTTACHARJEE. XXV 250

s. 104. See ADMINISTRATOR-GENERAL'S ACT, S. 35.

Procedure

See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO: SECOND APPEAL: SMALL CAUSE COURT, PRESIDENCY TOWNS.

Proceedings-

In former case. See CONTRIBUTION, SUIT FOR.

In former suit. See 'RES JUDICATA.'

Procession-

Suit for declaration of right to carry religious emblem in. See JURISDICTION OF CIVIL COURT.

Proclamation of Sale-

Misdescription of property in. See APPEAL.

Projection—

Caused by restoring old building. See BENGAL MUNICIPAL ACT, S. 201.

Property—

Found by Police in possession of accused. See CRIMINAL PROCEDURE CODE, S. 517.

Inspection of, form of order for. See PRACTICE.

Misdescription of, in proclamation of sale. See APPEAL.

Outside local jurisdiction of High Court. See EXECUTION OF DECREE.

Passing of. See CONTRACT.

Proprietor—

See LAND REGISTRATION ACT, SS. 38 AND 78.

Prostitute-

Succession to property of. See HINDU LAW, INHERITANCE.

Provincial Small Cause Court Act -

IX of 1887--

s. 15. See VALUATION OF SUIT.

ss. 15, 23. See SECOND APPEAL.

sch. II, art. 35, cl. (*j*). See SECOND APPEAL.

Public Demands Recovery Act—

Bengal Act VII of 1880—

s. 2. See LIMITATION: RIGHT OF SUIT.

s. 2. *Revenue Court—Sale under certificate—Jurisdiction—Limitation—Appeal to Commissioner for setting aside sale—Suit to set aside sale—Order of Revenue Court setting aside sale—Powers of the Civil Court.* A sale was held on the 9th September 1893, in execution of a certificate under the Public Demands Recovery Act (Bengal Act VII of 1880). On the 2nd January 1894, an appeal was preferred to the Commissioner under s. 2 of Act VII of 1868 for setting aside the sale after the expiry of the sixty days prescribed for appeal. The Commissioner ordered an inquiry into the question whether the appellants before him were prevented from taking steps in consequence of fraud. The purchaser complained against this

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Public Demands Recovery Act—*(continued)*

Bengal Act VII of 1880—*(continued)*

order before the Board of Revenue, who acting under this power of Revision, set aside the certificate, and the Commissioner subsequently set aside the sale without hearing the purchaser In a suit brought in the Civil Court for the same object during the pendency of the appeal before the Commissioner and decided by the lower Court after the orders of the Board and the Commissioner setting aside the certificate and sale were passed *Held*, by the High Court on appeal (1) The plaintiff was entitled to proceed simultaneously in the Civil Court and in the Revenue Court If the sale be validly set aside by the Revenue Court, a decree must follow in the suit (2) Section 2 of the Public Demands Recovery Act (Bengal Act VII of 1868) applied to a sale under the Certificate Act (Bengal Act VII of 1880), and the appeal to the Commissioner was rightly made under that section *Sadhusaran Singh* v *Panchdeo Lall* followed. (3) As regards the contention that the Commissioner had no jurisdiction to entertain the appeal as it was barred by limitation, the question of limitation cannot be held to be one of jurisdiction, and the grounds of the Commissioner's finding on that point cannot be discussed in the High Court *Mahomed Hossain* v *Purundur Mahto* and *Mungal Pershad Dichit* v. *Grija Kant Lahiri* referred to (4) The Civil Court has no authority to reverse the order of a Revenue Court which sets aside a sale (5) The reason for overruling the objection on the ground of limitation applied to the objection that the Commissioner had not heard the purchaser and that objection also could not be entertained

GUNESSAR SINGH v GONESH DAS XXV 789

ss. 8, 9 See CIVIL PROCEDURE CODE s 424

s 20 See CIVIL PROCEDURE CODE s 424 LIMITATION

Public Nuisance

See NUISANCE

Public Officer—

See ATTACHMENT

Suit against See CIVIL PROCEDURE CODE s 424

Public Place—

See NUISANCE.

Public Thoroughfare—

Obstruction to See NUISANCE

Public Way

Obstruction in See NUISANCE PENAL CODE s 283

Purchase

By one of several co proprietors See BENGAL TENANCY ACT s 22

Purchaser

Allegation of improper conduct against See TAXATION OF COSTS

At revenue sale See SALE FOR ARREARS OF REVENUE

At sale in execution of decree See CIVIL PROCEDURE CODE s 244

Benamidar for judgment debtor See SECOND APPEAL

Of Putni Taluk See LIMITATION ACT ART 121

Right of, to annul incumbrances See SALE FOR ARREARS OF REVENUE

Rights of See BENGAL TENANCY ACT s 67 HINDU LAW JOINT FAMILY

Purchasers—

Right of See SALE IN EXECUTION OF DECREE

Purdanashin Lady—

See COMMISSION IN CRIMINAL CASE

Putnidar —

See LAND REGISTRATION ACT ss 38 AND 78

Putnidars and Zamindar—

See PARTITION

Question

Directly and substantially in issue See RES JUDICATA

In execution of decree See CIVIL PROCEDURE CODE s 244.

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Railway—

Through Independent State, Jurisdiction on. See JURISDICTION OF CRIMINAL COURT.

Railways Act—

IX of 1890—

s. 77. *Notice of suit—Agent of Manager—Traffic Superintendent—Civil Procedure Code (Act XIV of 1882), ss. 147, 149—Practice—Pleading.* The Traffic Superintendent is not the Manager's agent, and notice to him is not notice to the Railway Administration within s. 77 of the Indian Railways Act (IX of 1890). Under s. 77 of the Indian Railways Act it is not necessary for the defendant to plead want of notice of action in order to avail himself of it, but he may raise the objection at the hearing.
SECRETARY OF STATE FOR INDIA *v.* DIP CHAND PODDAR... .. XXIV 306

Raiyat—

Holding at fixed rent. See BENGAL TENANCY ACT, S. 50.
Non-occupancy, Right of. See BENGAL TENANCY ACT, S. 20.

"Raiyati Holding"—

Definition of. See BENGAL TENANCY ACT, S 5.

Rateable Payment—

Meaning of. See ADMINISTRATOR-GENERAL'S ACT, S. 35.

Ratification of Agent's Act—

See ARBITRATION.

Receipt given by Agent—

See BENGAL TENANCY ACT, S. 56.

Receipts for Rent—

Proof of. See EVIDENCE.

Receiver—

Power to sue in his own name. See PRACTICE.

Recognizance to keep the Peace—

See CRIMINAL PROCEDURE CODE, SS. 107 AND 145.

Criminal Procedure Code (Act X of 1882), s. 106—Security to keep the peace on conviction—Breach of the peace—Penal Code (Act XLV of 1860), s. 448—House-trespass. An order under s. 106 of the Criminal Procedure Code (Act X of 1882) binding down the accused to keep the peace, upon conviction for "house trespass" under s. 448 of the Indian Penal Code, cannot stand where the intention of the accused in committing the trespass was to have illicit intercourse with the complainant's wife. *The Queen* v. *Gendoo Khan*, and *The Queen* v. *Jhapoo* distinguished. It is necessary before an order under s. 106 of the Criminal Procedure Code can be made that the accused should have an opportunity of answering to an accusation for an offence of the kind upon a conviction for which such an order can be made.
SUBAL CHUNDER DEY *v.* RAM KANAI SANYASI ... ... XXV 628

Criminal Procedure Code (Act X of 1882), s. 107—Jurisdiction of Magistrate. In a case where an accused was bound over to keep the peace by the Deputy Magistrate of the district in which the accused was *temporarily* residing at the time when the Magistrate received information and instituted proceedings against him: *Held*, that although the accused permanently or habitually resided in another jurisdiction, he was sufficiently within the jurisdiction of the Magistrate within the meaning of s. 107 of the Criminal Procedure Code.
SHAMA CHARAN CHAKRAVARTI *v.* KATU MUNDAL ... ... XXIV 344

Surety bond—Liability to forfeiture—Evidence necessary—Criminal Procedure Code (Act X of 1882), s. 514. The mere fact of the person for whom another stands surety being convicted of a breach of the peace ought not to be sufficient to make the surety bond executed by the latter liable to forfeiture without any evidence taken in the presence of the surety to show that the forfeiture has been incurred. The language of s. 514 of the Criminal Procedure Code (Act X of 1882) does not indicate that the final order making a person bound by a bond can be made without taking any evidence in his presence or giving him any opportunity of cross-examining the witnesses on whose evidence the forfeiture is held to be

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Recognizance to keep the Peace—*(continued.)*

established. The mere production of the original record or of a certified copy of the original record of the trial in which the principal had been convicted of breaking the peace within the period covered by a bond would not be conclusive, if indeed it would be any evidence, against the surety in a proceeding under s. 514 of the Criminal Procedure Code.

QUEEN-EMPRESS *v.* HAR CHANDRA CHOWDHURY ... ... XXV 440

Record—

See EVIDENCE ACT, S. 35.

Record of Rights—

Dispute as to entry or omission in. See SECOND APPEAL.

Recorder of Rangoon—

Final decree passed by. See APPEAL.

Jurisdiction of. Reference to High Court, Calcutta—Lower Burma Courts Act (XI of 1889), s. 42—Doubt—Conflicting Decisions—Decision of Superior Court—Power of Recorder to refer. The Recorder of Rangoon, in a suit tried by him, referred to certain decisions of the High Courts at Calcutta, Bombay and Madras, which were in conflict, and not agreeing with the decision of the Calcutta High Court, referred the case to the High Court in its appellate jurisdiction. *Held*, that as the decisions of the High Court at Calcutta are binding on the Recorder, he had no jurisdiction to make the reference, and that it must be returned.

MAHOMED HADY *v.* SWEE CHEANG AND COMPANY ... ... XXV 488

Redemption—

From what date time for, runs. See MORTGAGE.

Reference by Sub-Divisional Magistrate—

To Second Class Magistrate. See NUISANCE.

Reformatory Schools Acts—

V of 1876—

ss. 2 and 7 and (VIII of 1897), s. 1, cls. 2-3 and 8. *Criminal Procedure Code (Act X of 1882), s. 3 and s. 399—Criminal Procedure Code (Act X of 1872), s. 318—General Clauses Consolidation Act (X of 1897)—Effect of the repeal of a Repealing Statute—Construction of Statute.* The accused was convicted of an offence under s. 457 of the Penal Code by the Deputy Magistrate of Barisal, who found that the accused was a boy of fourteen or fifteen years, decidedly under sixteen, and passed the following order: "I find Ahmad Ali, boy, guilty of house-breaking by night for the purpose of committing theft, and instead of being imprisoned in the jail under s. 457 of the Penal Code, I direct under s. 399 of the Criminal Procedure Code and s. 7 of Act V of 1876, that Ahmad Ali be confined in the Calcutta Reformatory for two years for training in some branch of useful industry." *Held*, that the order could not be sustained under s. 7 of Act V of 1876, as that Act had been repealed before the date of the order and the commission of the offence, nor under s. 8 of Act VIII of 1897, as the order does not comply with the provisions of the latter Act. *Held*, further that s. 318 of the Criminal Procedure Code (Act X of 1872) having been repealed by s. 2 of Act V of 1876, the corresponding s. 399 of the present Criminal Procedure Code (Act X of 1882) must also be held by virtue of s. 3 of the Code to have been repealed in the provinces, including Bengal, to which Act V of 1876 was extended. The repeal of a statute repealing another statute does not revive the repealed statute. The law in India as embodied in s. 7 of the General Clauses Act (X of 1897) is the same as the law in England. *Queen-Empress* v. *Madasami*, and *Queen-Empress* v. *Manaji* referred to and approved of.

DEPUTY LEGAL REMEMBRANCER *v.* AHMAD ALI ... ... XXV 333

Registrar—

Delegation of power by. See REGISTRATION ACT, S. 74.

Registration—

Of name in landlord's serishta. See RIGHT OF OCCUPANCY.

Registration Act—

III of 1877—

ss. 17 and 18. See LEASE.

ss. 35, 73, 76, 77. *Denial of execution—Suit to enforce registration—Right of suit* Where the executant of a document did not appear before the Sub-Registrar

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Registration Act *(continued.)*

III of 1877 - *(continued.)*

although a summons was issued to such executant, and the Sub-Registrar thereupon refused to register the document, *held* in a suit under s. 77 of the Registration Act to enforce registration of the document—(1) That the case was one of "denial" of execution within the meaning of ss. 35 and 73 of the Registration Act (III of 1877). *Luckhi Narain Khettry* v. *Satcowrie Pyne* and *Radhakissen Rowra Dakna* v. *Chooneelall Dutt* referred to. (2) That an application to the Registrar made under s. 73 of the Act in this case was properly made under that section. (3) That the order of the Special Sub-Registrar to whom the case was referred, refusing registration of the document, was equivalent to an order by the Registrar. (4) That the case came under clause (*a*) of s. 76 of the Act, and the present suit did lie under the provisions of s. 77.

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s. 74 and s. 82 *Sub-Registrar holding inquiry under order of the Registrar—Liability of witness giving evidence in such inquiry to prosecution.* An inquiry under s 74 of the Registration Act should be made by the Registrar himself. He cannot delegate his power to any one else. A Sub-Registrar holding such an inquiry under an order of the Registrar cannot be said to be acting in execution of the Registration Act in any proceeding or inquiry under that Act. An order for the prosecution of a witness under s. 82 of the Registration Act, who gives evidence before the Sub-Registrar in such an inquiry, is wrong in law.

MATA DAYAL *v.* QUEEN-EMPRESS ... ... XXIV 75[illegible]

s. 77. *Suit for registration of a conveyance—Power of Court to inquire into the genuineness as well as the validity of a document—Effect of execution of conveyance by a certificated guardian in contravention of the terms of permission granted by the District Judge—Guardians and Wards Act (VIII of 1890), s. 30.* In a suit under s. 77 of the Registration Act a Court cannot go into any matter affecting the validity of a document apart from its genuineness. The question of its validity must be determined in a suit properly framed for that purpose. *Balambal Ammal* v. *Arunachala Chetti* approved. Where, therefore, a document was executed by the certificated guardian of a minor in contravention of the terms of permission accorded by the District Judge: *Held*, the Court could under s 77 direct its registration, if only the document was proved to be genuine, although the document was voidable at the instance of the minor under s. 30 of Act VIII of 1890.

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Regulation

VIII of 1819, ss. 3, 6. See LANDLORD AND TENANT.

I of 1886. See ASSAM LAND AND REVENUE REGULATION.

Relationship—

Statements as to existence of. See EVIDENCE ACT, s. 32.

Relief—

Omission of prayer in express terms for. See SALE FOR ARREARS OF RENT.

Religious Emblems.

Suit for declaration of right to carry, in processions. See JURISDICTION OF CIVIL COURT.

Remand—

Order of. See SECOND APPEAL.

Power of Sessions Judge to. See SECURITY FOR GOOD BEHAVIOUR.

To Appellate Court. See SECOND APPEAL.

Rent—

Agreement to pay separately, Effect of. See BENGAL TENANCY ACT, s. 188.

Apportionment of. See LANDLORD AND TENANT.

Arrears of. See VOLUNTARY PAYMENT.

Arrears of, Decree for. See EXECUTION OF DECREE.

Arrears of, Suit for. See DECREE.

Deposit and acceptance of. See LANDLORD AND TENANT.

Deposit of, through transferee of holding. See LANDLORD AND TENANT.

Enhancement of. See EVIDENCE.

Enhancement of, Suit for. See LANDLORD AND TENANT.

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Rent—(*continued.*)

Payment of, to some of several joint landlords. See LANDLORD AND TENANT.
Rate of, Ascertainment of. See DECREE.
Receipt of, Effect of. See LANDLORD AND TENANT.
Settlement of. See SECOND APPEAL.
Suit for. See APPEAL: BENGAL TENANCY ACT, SS. 27 AND 29: LAND REGISTRATION ACT, SS. 38 AND 78: LANDLORD AND TENANT: 'RES JUDICATA.'
Suit for enhancement of. See BENGAL TENANCY ACT, S. 188.
Suspension of. See LANDLORD AND TENANT.

Report—

Exceptions to. See PRACTICE.

Representation—

As to age known to be false. See MINOR.

Representative—

Of judgment-debtor. See CIVIL PROCEDURE CODE, S. 244.

Re-Sale—

Order on defaulting purchaser to make good deficiency on. See APPEAL.
Power of. See CONTRACT.

Residence—

See LUNATIC.

Res judicata—

See EXECUTION OF DECREE: FOREST ACT: RIGHT OF SUIT: SALE FOR ARREARS OF REVENUE.

Civil Procedure Code (Act XIV of 1882), s. 13—Issue decided in a previous suit not subject to second appeal—Same issue raised in a subsequent suit subject to appeal—Landlord and tenant—Suit for rent—Instalment—Bengal Tenancy Act (VIII of 1885), *ss.* 53 *and* 153—*Second appeal.* The question relating to instalments, though it affects the question of interest on the rent is not a question of "the amount of rent annually payable" within the meaning of s. 153 of the Bengal Tenancy Act. Therefore no second appeal would lie in a case where the value of the suit is less than Rs. 100, even if there is a question as to the instalment of rent. *Koylash Chandra* v. *Tarak Nath* referred to. In a previous suit for rent valued at less than Rs. 100 by the plaintiff against the defendants, one of the questions raised was, in how many instalments the rent was payable, and it was held that it was not payable in instalments. In a subsequent suit for rent valued at more than Rs. 100 between the same parties, the question of instalments was again raised, as the plaintiffs claimed the rent to be payable in four instalments. The defendants *inter alia* pleaded that the question as to instalments was barred as *res judicata.* The Munsif held that it was so barred. On appeal the Subordinate Judge reversed the decision of the Munsif. On a second appeal to the High Court: *Held*, that the judgment in the previous suit operated as *res judicata*, notwithstanding that no second appeal was allowed by law in that suit. *Vithilinga Padayachi* v. *Vithilinga Mudali* and *Bhola Bhai* v. *Adesang* dissented from *Misir Raghobardial* v. *Sheo Baksh Singh*, *Edun* v. *Bechun* distinguished. *David* v. *Grish Chunder Guha* referred to.

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Civil Procedure Code (Act XIV of 1882), *s.* 13—*Landlord and tenant—Suit for rent—Issue whether land was mal or lakhiraj—Question raised in a rent suit, whether directly and substantially in issue in that suit—Subsequent suit for khas possession.* In a previous suit brought by the predecessor in title of the plaintiff against the defendants rent, one of the questions raised was whether the land, in respect of which rent was claimed, was *mal* or *lakhiraj*, and that question was decided in favour of the defendants. In a subsequent suit by the plaintiff against the same defendants for *khas* possession of certain land the defence was that the land in dispute was their *lakhiraj* land, and that the judgment in the previous suit operated as *res judicata*. *Held*, that though the previous suit was one for rent, yet the issue upon the question whether the land was *mal* or *lakhiraj* was raised directly in that suit and therefore the subsequent suit was barred as *res judicata*. *Radhamadhub Holdar* v. *Monohur Mukerji* followed. *Srihari Banerjee* v. *Khitish Chandra Rai Bahadoor* distinguished.

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Res judicata—*(continued.)*

Civil Procedure Code (Act XIV of 1882), s. 13—Landlord and tenant—Suit for rent—Question of title incidentally raised in a previous suit—Subsequent suit for declaration of title to land purchased. A suit was brought by A against B and others for rent; and the matter directly and substantially in issue was as to what the share was for which A was entitled to rent. The plaintiff obtained a decree for the whole rent. In a subsequent suit by B and others against A for declaration of title to land purchased by them in execution of their mortgage decree, the defence was that the former decree for rent operated as *res judicata*. *Held*, that as the issue in the rent suit was for what share the plaintiff was entitled to rent and not to what share of the property was the plaintiff entitled as owner, the question of title could be said to have been in issue in that suit only incidentally and not directly, and it could not have been entertained in the form in which it was now raised; therefore the subsequent suit was not barred as *res judicata*. *Run Bahadur Singh* v. *Lucho Koer* followed. *Radhamadhub Holdar* v. *Monohur Mukerji* distinguished. *Nanack Chand* v. *Teluckdye Koer*, *Dirgopal Lal* v. *Bolakee* referred to.

SRIHARI BANERJEE *v.* KHITISH CHANDRA RAI BAHADOOR ... XXIV 569

Civil Procedure Code (Act XIV of 1882), s. 13—Proceedings in a prior suit—Fact in issue not heard and "finally decided therein." To support the defence of *res judicata* it is not enough that the parties to the suits are the same and that the same matter is in issue. The matter must have been heard and finally decided: s. 13 of the Civil Procedure Code. In 1885 relations of a deceased proprietor, alleging their right to the inheritance, sued for a declaration that they were his next of kin. The defendant set up a title as direct descendant, claiming to be the son of that proprietor's daughter. The first Court decided that this was his true parentage and dismissed the suit. The High Court maintained the dismissal, not upon the merits, but on the grounds that the suit was defective for want of parties, and that a declaratory decree could not be made. In 1888 the same plaintiffs, having purchased the interest of the parties not joined in the previous suit, brought the present suit, with the same object, against the same defendant, whom the Subordinate Judge (not the same officer that disposed of the former suit), now found not to have been the son of the said daughter. A Bench of the High Court (composed of Judges other than those that heard the former appeal) having examined the record of the former suit reversed the Subordinate Judge's decision. They declined, however, to decide whether or not the latter suit was barred on the ground of *res judicata*. But intimating that they would have affirmed the judgment of the lower Court in the former suit had it, on the merits, come before them, they preferred that judgment to the one before them, and gave effect to this opinion by reversing the latter. *Held*, that the question of parentage had not been heard and finally decided in the suit of 1885. The appeal in that suit had put an end to any finality in the decision of the first Court, and had not led to a decision on the merits. There was, therefore, no *res judicata*; but unless treated as such the judgment in the former suit had little or no bearing on the question as afterwards put in issue in this. That issue had been rightly decided by the Subordinate Judge, on the evidence, and his judgment was accordingly maintained.

SHEOSAGAR SINGH *v.* SITARAM SINGH ... ... XXIV 616

Civil Procedure Code (Act XIV of 1882), s. 13, expl. 2—Different subject-matter of suits—Limitation Act (XV of 1877), sch. II, art. 124—Suit for declaration of baradari rights—Subsequent suit for assertion of khadimi rights—Sale of office to which are attached conduct of religious worship, and performance of religious duties—Mahomedan Law—Custom. Section 13, expl. 2 of the Code of Civil Procedure applies only to cases in which the plaintiff, having on a former occasion sued for certain relief on the strength of one title, afterwards claims the same relief on the ground of another title of which he might have availed himself in the former suit. It does not apply to cases where the subject-matters of the two suits are different. The plaintiffs, in the year 1881, instituted a suit for a declaration of private *baradari* rights in connection with the daily receipts and offerings at a certain Mahomedan place of worship, alleging that the defendants had dispossessed them on the 27th September 1881; but they did not assert any claim as *khadims*. The suit was decreed; but the decree was reversed on appeal. On the 7th March 1892, the plaintiffs instituted a suit for a declaration that they were the *khadims* of a certain *durga* and, as such, entitled to perform the duties attached to that office for 21 days in each month, and during that period to receive the offerings made by worshippers at the *durga*. They also claimed an injunction restraining the defendants from interfering with them in the exercise of that office. The plaintiffs claimed their *khadimi* rights partly by inheritance and

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Res judicata—*(continued.)*

partly by purchase, a custom of transferability by sale having been long recognized. *Held*, that the relief claimed in the second suit was not *res judicata*, the subject-matters of the two suits being distinct. *Denobundhoo Choudhry* v. *Kristomonee Dossee, Woomatara Debia* v. *Unnopoorna Dassee, Kameswar Pershad* v. *Rajkumari Ruttan Koer, Doorga Persad Singh* v. *Doorga Konwari, Vijaya Raghanadha Bodha* v. *Katama Natchiar, Soorjoomonee Dayee* v. *Suddanund Mohapatter* and *Krishna Behari Roy* v. *Bunwari Lal Roy* distinguished. *Held*, also, that the second suit, being a claim to an hereditary office, fell under art. 124 of the Limitation Act, and was not barred by limitation. *Semble*, that a Mahomedan office to which are attached substantially the conduct of religious worship and the performance of religious duties, is not legally saleable, any custom to the contrary notwithstanding; and that, therefore, in so far as the title of the plaintiffs depended upon purchase, the suit failed. *Juggurnath Roy Chowdhry* v. *Kishen Pershad Surmah, Kuppa Gurukal* v. *Dorasami Gurukal, Mancharam* v. *Pranshankar* and *Vurma Valia* v. *Ravi Vurmah Kunhi Kutty* referred to.

SARKUM ABU TORAB ABDUL WAHEB v. RAHAMAN BUKSH .. XXIV 83

Civil Procedure Code (Act XIV of 1882), s. 13, expl. 2—Dismissal of suit for want of notice, and also upon the merits—Matter directly and substantially in issue finally heard and decided—Bengal Municipal Act (Bengal Act III of 1884), s. 363. In a suit brought by one A against C for damages for not removing certain offensive matter from his land, the questions raised were, whether there was notice, and whether the defendant was bound to remove the filth from the plaintiff's property. The Court having found that there was no notice, which in its opinion was a ground sufficient for dismissal of the suit under s. 363 of the Bengal Municipal Act, and also upon the merits, having come to the conclusion that the defendant was not bound to remove the offensive matter from the plaintiff's land, dismissed the suit. In a subsequent suit between the same parties, the plaintiff claiming the same relief as in the previous suit, the defence was that the suit was barred as *res judicata*. *Held*, that inasmuch as the matter directly and substantially in issue in the subsequent suit was directly and substantially in issue in the previous suit, and as it was finally heard and decided between the same parties, notwithstanding the fact that the previous suit failed by reason of the decision of the Court upon some other matter as well, the subsequent suit was barred as *res judicata*. *Shib Charan Lal* v. *Raghu Nath* distinguished.

PEARY MOHUN MOOKERJEE v. AMBICA CHURN BANDOPADHYA ... XXIV 900

Civil Procedure Code (Act XIV of 1882), s. 13, expl. 2—Suit for rent—Whether the question that the plaintiff was a mere benamidar could be raised in a subsequent suit for rent, it not having been raised in a suit previously brought by the same plaintiff against the same defendant. In a previous suit brought by the plaintiff for rent the defendant denied the relationship of landlord and tenant, but he did not plead that the plaintiff was a mere *benamidar*. The plaintiff obtained a decree. In a subsequent suit by the same plaintiff against the same defendant for rent for subsequent years, the defendant, *inter alia*, contended that the plaintiff was a mere *benamidar*. The plaintiff objected that the previous decree was a bar to defendant's contention. *Held*, that even if the matter in issue might and ought to have been made a defence in the former suit, yet as it was not finally heard and decided by the Court, within the meaning of s. 13 of the Code of Civil Procedure, the defendant was not precluded in this suit from raising the objection that the plaintiff was a mere *benamidar*.

KAILASH MONDUL v. BARODA SUNDARI DASI ... ... XXIV 711

Consent decree—Decree dismissing party from suit. In 1839 in contemplation of a marriage between M and G a deed of settlement was executed which provided that, during the life-time of M's father half of the rents and profits of two houses in Calcutta, held for a term of years, should be taken by him and half by G; that after the death of M's father the rents and profits should go to G and M, and upon the death of either of them to the survivor; and after the death of the survivor to the use absolutely of the issue of the marriage, if any. The father of M died in 1841 and G on the 23rd of November in the same year. M, on 21st December 1841, shortly after the death of her husband, married AS, and on the 8th of April 1842 gave birth to a child who was named E and afterwards married to T. M died in 1850. By AS she had two children, the plaintiff and a son GS. On the 7th November 1859 E and her husband filed a bill of complaint in the Supreme Court, Calcutta, against the trustees of the settlement of 1839 and

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Res judicata—(*concluded.*)

against AS and GS, who was then an infant in which she claimed to be entitled to the properties absolutely. On the 21st of June 1860 a decree was made dismissing the suit against GS, and declaring that the properties covered by the deed of settlement were personalty. In the present suit it was objected that the decree of the Supreme Court could not bind GS, as he was dismissed from the suit and because the decree was a decree by consent. *Held*, that the decree was binding upon GS, and persons claiming to derive their title from him. A consent decree is as binding on the parties to the proceedings in which it is made as a decree made after a contentious trial. *In re South American and Mexican Co., The Bellcairn, Nilakandhen* v. *Padmanabha,* and *Gajapathi Radhika* v. *Gajapathi Nilamani* referred to.

NICHOLAS *v.* ASPHAR ... ... XXIV 216

Respondents—

Costs of. See PRIVY COUNCIL, PRACTICE OF.

Revenue Court—

See PUBLIC DEMANDS RECOVERY ACT, S. 2.

Revenue Officer—

Decision of. See SECOND APPEAL.

Revenue-paying Estate—

See PARTITION.

Revenue Sale Law—

Act XI of 1859. See SALE FOR ARREARS OF REVENUE.

Reversionary Right—

See TRANSFER OF PROPERTY ACT, S. 6, CL. (*a*).

Reversioners

See CONTRACT: HINDU LAW, INHERITANCE.

Review—

Appeal from original decree—High Court Rules, Part II, Chap. VIII, Rule 17—Deposit of costs for paper book—Order of dismissal for default—Procedure to set aside such order—Civil Procedure Code (1882), ss. 623, 626. A decree of a Division Bench of the High Court, dismissing an appeal for default in depositing the estimated costs of preparation of the paper book under Rule 17 of the High Court Rules, Part II, Chap. VIII, can only be set aside by an order under s. 626 of the Civil Procedure Code (Act XIV of 1882). *Ramhari Sahu* v. *Madan Mohan Mitter*, so far as it decides the contrary, is wrongly decided.

FATIMUNNISSA *v.* DEOKI PERSHAD ... ... XXIV 360

Of judgment. See BENGAL TENANCY ACT, S. 103. LIMITATION ACT, ART. 179, CL. 3.

Order granting. See APPEAL.

Order setting aside Order granting. See SECOND APPEAL.

Revision—

Power of High Court on. See NUISANCE.

Power of interference by the High Court—Test as to whether case is of exceptional nature or not—Practice in Criminal Cases. The High Court will not interfere in a case during its pendency in a subordinate Court, unless it is of an exceptional nature; and one test of its being of such a nature is that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that the case is a fit one for its interference at an intermediate stage. *Chandi Pershad* v. *Abdur Rahman* discussed.

CHOA LALL DASS *v.* ANANT PERSHAD MISSER ... ... XXV 233

Revivor—

See LIMITATION ACT, ART. 180.

Right of Exclusive User

See TRADE MARK.

Right of Occupancy—

Effect of purchase of, by one co-owner. See BENGAL TENANCY ACT, S. 22, CL. 2.
Nature of. See BENGAL TENANCY ACT, S. 20.

Transfer of right—Suit for registration of name in landlord's serishta—Right of suit—Notice—Bengal Tenancy Act (VIII of 1885), s. 73. Under the Bengal Tenancy Act (VIII of 1885) the transferee of a holding of a *raiyat*, with right of occupancy transferable by custom, cannot maintain a suit for registration of his own name in the landlord's *serishta* by expunging that of his vendor. A declaration that the transferee, and not the old tenant, is responsible for the rent of the holding cannot be obtained without service of notice as prescribed by s. 73 of the Act.

AMBIKA PERSHAD v. CHOWDHRY KESHRI SAHAI ... ... XXIV 642

Transferability of right—Bengal Tenancy Act (VIII of 1885), ss. 65, 73. In the absence of custom or local usage to the contrary, a *raiyati* holding in which the *raiyat* has only a right of occupancy is not saleable at the instance of the occupancy *raiyat* or any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent.

BHIRAM ALI SHAIK SHIKDAR v. GOPI KANTH SHAHA ... ... XXIV 355

Right of Suit—

See BENAMI TRANSACTION. BENGAL TENANCY ACT, S. 16: CIVIL PROCEDURE CODE, S. 539: JURISDICTION OF CIVIL COURT. LETTERS OF ADMINISTRATION: LIMITATION ACT, ARTS. 14; 132: REGISTRATION ACT, S. 35. RIGHT OF OCCUPANCY.

Benamidar—Suit for ejectment—Parties. A mere *benamidar* cannot maintain a suit for ejectment, he having neither title to, nor possession of, the property. *Hari Gobinda Adhikari* v. *Akhoy Kumar Mozumdar* followed in principle. *Nand Kishore Lal* v. *Ahmad Ata* dissented from.

ISSUR CHANDRA DUTT v. GOPAL CHANDRA DAS ... ... XXV 98

Benamidar—Suit for foreclosure of mortgage—Beneficial owner—Parties—Transfer of Property Act (IV of 1882), s. 85. A suit for foreclosure of a mortgage may be brought by the person named in the mortgage deed as the mortgagee, although he was, in fact, only the *benamidar* of the beneficial owner; and such a suit should not be dismissed because the beneficial owner is not added as a party.

SACHITANANDA MOHAPATRA v. BALORAM GORAIN ... ... XXIV 644

Fraud—Suit to set aside ex parte *decree and sale in execution thereof, on the ground of fraud*—Res judicata—*Effect of not appealing against an appealable order—Civil Procedure Code (Act XIV of 1882), ss.* 13, 108, 244, 311. The plaintiff having applied unsuccessfully under ss. 108 and 311 of the Civil Procedure Code to set aside an *ex parte* decree against him and the sale of his property in the execution thereof on the ground of fraud, and without preferring an appeal against the order rejecting his said application under s. 108 of the Code, instituted this suit praying for the same relief. The Subordinate Judge dismissed the suit as not maintainable. *Held*, that such a suit was maintainable, and that ss. 13 and 244 of the Civil Procedure Code were no bar thereto. The facts that his application under s. 108 was unsuccessful, and that he did not appeal against the order rejecting that application, did not disentitle him from prosecuting his remedy by suit on the ground of fraud. *Held*, also, that when there is an appeal against a decision, the effect of not appealing is that the decision holds good for what it is worth; so far as concerns any other modes of relief available, the person not appealing is in no worse position than if he had appealed and failed. *Abdul Mazumdar* v. *Mohamed Gazi Chowdhry* approved. *Raj Kishen Mookerjee* v. *Modhoo Soodun Mundle* distinguished.

PRAN NATH ROY v. MOHESH CHANDRA MOITRA ... ... XXIV 546

Suit to set aside sale for arrears of Road and Public cesses—Appeal to Commissioner—Act XI of 1859, s. 33—Public Demands Recovery Act (Bengal Act VII of 1880), s. 2. A suit to set aside a sale for arrears of road and public cesses will lie, although no previous appeal to the Commissioner has been made under s. 33 of Act XI of 1859. Such a sale is not one for "arrears of revenue or other demands realizable in the same manner as arrears of revenue are realizable" within the meaning of that section.

MOHIBUL HUQ v. SHEO SAHAY SINGH ... ... XXV 85

Rioting—

See MAGISTRATE, JURISDICTION OF.

Unlawful assembly—Right of private defence of property—Causing grievous hurt in furtherance of common object—Penal Code (Act XLV of 1860), ss. 97, 99, 147, 149,

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Rioting *(continued)*

325 The accused receiving information that the complainant's party were about to take forcible possession of a plot of land which was found by the Court to be in the possession of the accused collected a large number of men, some of whom were armed, and went through the village to the land in question. While they were engaged in ploughing, the complainant's party came up, some of them being armed, and interfered with the ploughing. A fight ensued, in the course of which one of the complainant's party was grievously wounded and subsequently died, and two of the accused's party were hurt. *Held*, that if the accused were rightfully in possession of the land and found it necessary to protect themselves from aggression on the part of another body of men, they were justified in taking such precautions as they thought were required and using such force or violence as was necessary to prevent the aggression. *Held*, also, that under such circumstances they could not rightly be held to be members of an unlawful assembly. *Queen Empress v. Narsang Pathabhai*, *Birjoo Singh v. Khub Lall* and *Shunker Singh v. Burmah Mahto* followed. *Ganouri Lal Dass v. Queen Empress* distinguished.

PANCHKAURI v. QUEEN EMPRESS . XXIV 686

Riparian Owners—

Water rights for irrigation where a stream flows through separate estates. Relative rights of upper and lower proprietors on the banks to the use of the water—Issues not raising actual rights. A riparian owner where a stream flows in a channel down from a property higher up is entitled to the flow of water without interruption and without substantial diminution caused by the upper proprietor, who may for legitimate purposes withdraw so much only of the water as will not materially lessen the downward flow on to his neighbour's land. In this suit the upper proprietor claimed the right to dam up a stream on his own estate and to impound so much of its water as he might find convenient for irrigation, leaving only the surplus, if any, for the use of the proprietors below. He has no such right in the absence of a right obtained by him in virtue of contract with the lower proprietors or acquired by him as a consequence of prescriptive use. His common law right is to take for the purpose of irrigation so much water only as can be abstracted without materially diminishing what is to be allowed to descend. What quantity of water can be abstracted and used without infringing that essential condition must in all cases be a question of the circumstances, depending mainly upon the size of the stream and the proportion which the water taken bears to its entire volume. In this suit, the upper proprietor's claim having been put too high, the real question as to the proportion of his share had been omitted. No issue had raised it, and no evidence had been given to determine it approximately. The Court of First Instance and the first Appellate Court had attempted to decree what they considered would be the just proportion but the High Court had rightly pointed out that there had been no materials before the Courts upon which a right to a more limited kind than that which had been in excess claimed could be decreed to the upper proprietor, and the suit had been rightly dismissed.

DEBI PERSHAD SINGH v. JOYNATH SINGH XXIV 865

Road and Public Cesses

Suit to set aside sale for arrears of. See RIGHT OF SUIT

Rules of High Court—

Ch V Rule 1. See FULL BENCH REFERENCE TO

Ch VI, Rules 1 and 6. See FULL BENCH REFERENCE TO

Part II Ch VIII Rule 17. See REVIEW

Rule 565 of Belchambers' Rules and Orders, Original Side. See PRACTICE

Sale for Arrears of Rent

See BENGAL TENANCY ACT, s 67. LIMITATION ACT, ART 121. JAGIR TENURE

Application to set aside sale—Bengal Tenancy Act (VIII of 1885), s 174, cls (1) and (2). Deposit of decretal amount incorrectly calculated by ministerial officers of Court—Effect of deposit without a prayer in express terms to set aside the sale—Challans. Practice. The judgment-debtor, within thirty days from the date of sale of his holding for arrears of rent, deposited in Court under s 174 of the Bengal Tenancy Act the decretal amount by a *challan* endorsed by the chief ministerial officer of the Court executing the decree. Subsequently it was discovered that the amount was short by 9 pies, which the judgment-debtor forthwith paid in, making up the deficiency, and presented a petition, praying that "the execution case may be declared as finally closed," but without applying in express terms to have the sale set aside. *Held*, that under s 174 of the Bengal Tenancy Act the Court was

Sale for Arrears of Rent—(*continued.*)
bound to set aside the sale, notwithstanding that the applicant did not in express terms ask for that relief. *Ugrah Lall* v. *Radha Pershad Singh* referred to. *Per* AMEER ALI, J.—The fact of his depositing the amount was a sufficient indication of his intention to seek the relief. *Per* MACPHERSON, J.—The *challan* which set out the purpose of the deposit may be regarded as a sufficient application.
ABDOOL LATIF MOONSHI v. JADUB CHANDRA MITTER ... ... XXV 216

Incumbrance—Bengal Tenancy Act (VIII of 1885), ss. 161, 167—Mortgage—Transfer of Property (Act IV of 1882), s. 73. A sale purporting to be under s. 161 and the following sections of the Bengal Tenancy Act (VIII of 1885) does not, *ipso facto*, cancel incumbrances. Notice *must* be given under s. 167 according to the procedure laid down in that section. Section 73 of the Transfer of Property Act only gives a right to the mortgagee over the residue of the sale proceeds, and refers to cases where the law otherwise provided that the effect of the sale is to nullify a mortgage; it is not intended in any way to enlarge the interest of the purchaser at a sale for arrears of revenue or rent. *Prem Chand Pal* v. *Purnima Dasi* referred to.
BENI PROSAD SINHA v. REWAT LALL ... ... XXIV 746

Payment to prevent. See BENGAL TENANCY ACT, S. 171.

Sale for Arrears of Revenue—
See JURISDICTION OF CIVIL COURT: RIGHT OF SUIT.

Act XI of 1859 (Bengal Revenue Sale Law), ss. 3, 8, and 33—Bengal Excise Act (Bengal Act VII of 1868), s. 2—Unauthorized sale by Collector—Jurisdiction of Civil Court—Res judicata—*Parties—Secretary of State for India.* Act XI of 1859, the Bengal Revenue Sale law, providing for the sale of estates in arrear of payment of revenue, does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of such payment. The whole clauses, in so far as they relate to sales, or to their challenge, as well the provisions of Bengal Act VII of 1868, are framed upon the express footing that they are to be applicable to the sale of estates, which are in arrear of duty. A Collector had sold an estate, purporting to act under Act XI of 1859, for a supposed arrear of revenue. There was, however, only an erroneous debit in the collectorate books against the estate, in excess of the revenue actually assessed upon it, chargeable against it, and due from it. *Held*, that the sale was without authority; that the Civil Court had jurisdiction to declare the sale void; and that the provisions of s. 33 of Act XI of 1859, relating to an appeal to the Commissioner of Revenue, did not exclude that jurisdiction. The enactment in s. 8 had no application to such a case. This was not a question about a transfer from the account of one revenue-paying estate to that of another, nor was it a claim for remission or abatement, which had not been duly allowed by the Government. Section 8 has no application, except there be (1) default in payment of the revenue, and (2) possession by the collector of money of the defaulter not indisputably placed to his credit. But here there was no default. All moneys paid by the appellant were credited, and their alleged default was based upon erroneous debit entries to which they were not parties. In this suit, in the Courts below, the Government had been made a co-defendant, but were not respondents, on this appeal; and the objection was taken, on the argument of this appeal, and by previous petition, that they should be made parties, respondents. *Held*, that it was a mistaken view that a decree annulling the sale in this suit would be *res judicata* in any future question or proceeding, as between the Government and the unsuccessful purchaser. The Secretary of State for India, therefore, was not a necessary respondent. His position was correctly explained in *Bal Mokoond Lal* v. *Jirjudhun Roy*, in the judgment of MITTER, J.
BALKISHEN DAS v. SIMPSON ... ... XXV 833

Purchaser at a revenue sale—Act XI of 1859, s. 37—"Entire estates"—Estates Partition Act (Bengal Act VIII of 1876), s. 123—"Time of settlement." A new estate created upon a partition by the Collector comes within the meaning of "entire estate" in s. 37 of Act XI of 1859. The words "time of settlement" in that section mean the time when the contract was made with Government, and in the case of a permanently settled estate mean the time of permanent settlement. A partition by the Collector merely apportions the amount of revenue; there is no *settlement* of the revenue in any sense at the time of such partition.
KOOWAR SINGH v. GOUR SUNDER PERSHAD SINGH ... ... XXIV 887

Right of auction-purchasers to annul incumbrances—Act XI of 1859, s. 37—Suit to cancel under-tenures—Parties. The right that is given by s. 37 of Act XI of 1859

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Sale for Arrears of Revenue—*(continued.)*

to the auction-purchaser of an entire estate in the permanently settled districts of Bengal, Behar and Orissa, sold for arrears of revenue, to avoid and annul an under tenure is a right that must be exercised by all the purchasers jointly where there are more purchasers than one.

JATRA MOHUN SEN *v.* AUKHIL CHANDRA CHOWDHRY ... ... XXIV 334

Sale for Arrears of Road and Public Cesses—

Suit to set aside. See RIGHT OF SUIT.

Sale for Default in Payment—

Of costs of realizing Government Revenue. See CIVIL PROCEDURE CODE, S. 124.

Sale in Execution of Decree—

See APPEAL. BENGAL CESS ACT, S. 47: HINDU LAW, JOINT FAMILY.

Application to set aside. See LIMITATION ACT, ART. 178: SECOND APPEAL.

Civil Procedure Code (Act XIV of 1882), ss. 15, 285—Sale in execution by inferior Court of property already under an attachment by a superior Court—Jurisdiction of Munsif—Preferential right of purchasers at execution sale—Concurrent decrees, Execution of. A obtained a decree against B in the Court of the Munsif of Jamui, and in execution thereof attached B's property on the 16th March 1891; the property was sold on the 20th April 1891 and purchased by C who obtained possession of it on the 3rd of August 1891, and then sold his interest to the plaintiff. At the same time the defendant R had a decree for costs against B and his heirs in the Court of the Subordinate Judge of Monghyr, and in execution thereof attached the same property on the 4th February 1891, and sold it on the 24th August 1891, i.e. about four months after the sale of the property by the Munsif. The plaintiff sued for possession on the ground that having purchased the property of B before the second sale by the Subordinate Judge, she was entitled to the property. The defendant contended that the sale by the Munsif of the property under attachment by a Court of a higher grade was absolutely void, and the Munif had no jurisdiction to sell the property under s. 285 of the Civil Procedure Code. *Held*, that the sale by the Munsif was not without jurisdiction, and that it conveyed to the plaintiff a valid title to the property. Section 285 of the Civil Procedure Code is merely a section for procedure to prevent different claims arising out of the attachment and sale of the same property by different Courts. *Bykant Nath Shaha* v. *Rajendra Narain Rai*, *Dwarka Nath Das* v. *Banku Behari Bose*, and *Patel Naranji Morarji* v. *Haridas Navalram* referred to.

RAM NARAIN SINGH *v.* MINA KOERI ... ... XXV 46

Confirmation of. See SECOND APPEAL.

Rights of purchasers—Two judicial sales of the same property, each in execution of a separate decree—Conflicting claims thereunder—Purchase pendente lite—*Limitation Act (XV of 1877), sch. II, arts. 12 and 13.* The same property having been sold in execution of two different decrees the result was that the two purchasers at the respective sales afterwards contested title to the property. The sale to the first purchaser was confirmed in November 1882. The sale to the second, who upon it obtained possession, took place in October 1881, the property having been attached under the second decree in March 1883. The first purchaser on the 28th July 1884 brought a suit, to which the second purchaser was not a party, to have that attachment declared invalid. By a decree of the 14th November to that effect the second purchaser was bound as a purchaser *pendente lite*; and his possession was of no avail to him. *Held*, that the attachment of March 1883, although it had preceded the institution of the first purchaser's suit of 1881, afforded no support to the second purchaser's claim, attachment under ch. XIX of the Civil Procedure Code merely preventing alienation, and not giving title. Moreover, after the first sale in 1882, there had been no interest left to be sold to another purchaser, so that, without there having been the decree of 1885, the second purchaser would still have had no title against the first. There was no occasion for the setting aside the second sale within the meaning of arts. 12 and 13 of sch. II of the Limitation Act (XV of 1877); nor was it set aside. That sale was held not to affect the right of the first purchaser, there being a wide difference between setting aside a sale, and deciding that a plaintiff's right was not affected by it.

MOTI LAL *v.* KABRABULDIN ... ... XXV 179

Sale under mortgage decree—Sale in execution of a money decree, Effect of, before the sale in execution of mortgage decree confirmed—Code of Civil Procedure (Act

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Sale in Execution of Decree—*(continued.)*

XIV of 1882), ss. 310A, 311, 312, 314 and 316—Effect of sale not being set aside either under ss. 310A or 311 of the Code. A certain property was sold on the 16th August 1895 in execution of a mortgage decree, dated 9th December 1892, and was purchased by A. In the meantime an eight annas share of the said property was sold in execution of a money decree and was purchased by R on the 22nd May 1893. On the 10th September 1895 the judgment-debtor applied to set aside the mortgage sale under s. 311 of the Code of Civil Procedure, and on the 14th September 1895 a similar application was made by R. On the 28th March 1896 both these applications came on for hearing before the Subordinate Judge who passed no order; and on the same date R presented a petition, asking the Court to set aside the sale held in execution of the mortgage decree upon payment by him of the mortgage money, with interest and costs, and also to declare that he might be entitled to redeem the property. On the 30th March 1895 the Subordinate Judge allowed the petition and ordered the sale to be set aside upon the aforesaid terms. *Held*, that, inasmuch as under s. 312 of the Code of Civil Procedure A was entitled to have an order confirming the sale of the 16th August 1895, unless the sale were set aside under s. 310A or s. 311 of the Code of Civil Procedure, and as the sale was not set aside under either of these sections, the Court below had no jurisdiction to set aside the sale upon payment by the applicant of the mortgage money with interest and costs. *Brij Mohun Thakur v. Uma Nath Chowdhry* referred to.

KHETTER NATH BISWAS *v.* FAIZUDDIN ALI ... ... XXIV 682

Setting aside sale—Material irregularity—Code of Civil Procedure (Act XIV of 1882), ss. 291, 311—Evidence. Where a debtor's property under attachment had been ordered to be sold at a fixed date, after the disposal of a certain claim thereto made under s. 278 of the Code of Civil Procedure, but no hour had been fixed for the sale as required by s. 291, and the property was sold at a very inadequate price by reason of the paucity of bidders. *Held*, affirming the decision of the Subordinate Judge, that there had been material irregularity causing substantial injury to the debtor; and that it is sufficient under s. 311 of the Code if the evidence, though not "direct evidence," shows that the injury was a necessary result of the irregularity complained of. *Tassaduk Rasul v. Khan Ahmed Hosain* explained.

SURNO MOYEE DEBI *v.* DAKHINA RANJAN SANYAL ... ... XXIV 291

Suit to set aside. See RIGHT OF SUIT.

Sale of Goods—

See CONTRACT.

Sale of Unascertained Goods—

See CONTRACT.

Sanction for Prosecution—

Application for. See PRACTICE.

Sanction of Court—

Mortgage made without. See GUARDIAN.

To agreement for satisfaction of decree. See EXECUTION OF DECREE.

Search—

Right of. See BENGAL EXCISE ACT, S. 4: DAMAGES, SUIT FOR.

Second Appeal—

See APPEAL.

Bengal Tenancy Act (VIII of 1885), ss. 104, 106, 108—Special Judge under the Bengal Tenancy Act—Appeal from the decision of the Special Judge. Under the terms of s. 108 of the Bengal Tenancy Act (VIII of 1885) a second appeal lies from the decision of the Special Judge on questions with regard to the prevailing standard of measurement, area of lands in the possession of tenants, and the liability of the tenants to pay rent on account of any excess lands in their possession.

MATHURA MOHUN LAHIRI *v.* UMA SUNDARI DEBI ... ... XXV 34

Civil Procedure Code (Act XIV of 1882), s. 586—Suit for compensation for use and occupation of land valued at less than Rs. 500—Provincial Small Cause Courts Act (IX of 1887), ss. 15 and 23, sch. II, art. 8. A suit for compensation for money realized by the defendants from the actual occupants of land who were stated to have been the plaintiff's tenants, is a suit of a nature cognizable by the

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Second Appeal—*(continued.)*

Small Cause Court; therefore no second appeal lies to the High Court: in such a suit valued at less than Rs. 500 notwithstanding that the plaint was returned by the Small Cause Court to be filed in the Civil Court under s. 23 of the Provincial Small Cause Courts Act on the ground that the suit involved a question of title. *Mohesh Mahto* v. *Piru* and *Muttukaruppan* v. *Sellan* referred to.

KALI KRISHNA TAGORE *v.* IZZATANNISSA KHATUN ... . XXIV 557

Civil Procedure Code (Act XIV of 1882), s. 586—Suit for money paid and damages incurred by distraint of crops—Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 35, clause (j)—Small Cause Court, Mofussil, Jurisdiction of. A suit to recover money paid to redeem crops which had been distrained by the defendants for rents due from persons other than the plaintiffs, and also for damages sustained on account of the distraint, is, so far as the claim relates to damages, a suit coming under clause (j), art. 35 of the Provincial Small Cause Court Act (IX of 1887), and is therefore not entirely a suit of the nature of a Small Cause Court suit. Section 586 of the Civil Procedure Code (1882) does not bar a second appeal in such a suit.

DEWAN ROY *v.* SUNDAR TEWARY ... ... XXIV 163

Decision of Settlement Officer—Settlement of rent under Bengal Tenancy Act (VIII of 1885), s. 104. No second appeal lies to the High Court from a decision of a Revenue Officer settling rents under s. 104 of the Bengal Tenancy Act.

ACHHA MIAN CHOWDHRY *v.* DURGA CHURN LAW ... ... XXV 146

Ground of appeal—Civil Procedure Code (Act XIV of 1882), ss. 584, 585—Findings of fact—Inference of law which the facts found are insufficient to justify. Where the lower Appellate Court arrives at a conclusion, which is an inference based upon an erroneous view of law, the judgment is open to question in second appeal *Lachmeswar Singh* v. *Manowar Hossein*, and *Ram Gopal* v. *Shamskhaton* referred to.

ISHAN CHUNDER DAS SARKAR *v.* BISHU SIRDAR ... ... XXIV 825

Order made on application to set aside sale in execution where the auction-purchaser is a benamidar for judgment-debtor—Civil Procedure Code (Act XIV of 1882), ss. 244, 311—Bengal Tenancy Act, s. 173. Where the auction-purchaser is a *benamidar* for the judgment-debtor, in an application to set aside a sale under ss. 173 of the Bengal Tenancy Act and 311 of the Code of Civil Procedure, a second appeal lies to the High Court from the order made on the application, as the application is one under s. 244 of the Code.

CHAND MONEE DASYA *v.* SANTO MONEE DASYA ... ... XXIV 707

Order refusing to confirm a sale—Subsisting decree—Code of Civil Procedure (Act XIV of 1882), ss. 588, 316, 244. A second appeal lies to the High Court against an order passed by a Judge refusing to confirm a sale, on the ground that there was no subsisting decree at the date when the confirmation of the sale was applied for, the order being not one provided for by s. 588 of the Code of Civil Procedure, and the question raised in the case being a question relating to the execution or satisfaction of the decree within the meaning of s. 244 of the Code. *Prosunno Kumar Sanyal* v. *Kalidas Sanyal* referred to.

DOYAMOYI DASI *v.* SARAT CHUNDER MOJUMDAR ... ... XXV 175

Order refusing to set aside a sale—Appeal from an order remanding a case—Code of Civil Procedure (Act XIV of 1882), s. 588, cls. 16 and 28 and s. 562. Though orders under s. 562 of the Code of Civil Procedure are appealable under cl. 28 of s. 588, yet the provisions of the latter section are subject to its last paragraph, which says that "orders passed under this section shall be final; and, therefore, no second appeal lies from an order passed under s. 588, cl. 16, notwithstanding that it is an order passed by the lower Appellate Court remanding the case under s. 562, inasmuch as the order was made in a case which was itself an appeal from an order allowed by s. 588 of the Code.

MATHURA NATH GHOSE *v.* NOBIN CHANDRA KUNDU BISWAS ... XXIV 774

Order setting aside order granting review—Civil Procedure Code (Act XIV of 1882), ss. 591, 628, 629. No second appeal to the High Court lies from an order setting aside an order granting a review of judgment.

KANTI CHUNDER MOOKERJEE *v.* SALIGRAM ... ... XXIV 319

IMAM BUX *v.* MAHADEO GOPE ... ...XXIV 319 *note*

Remand to the Appellate Court—Additional evidence in Appellate Court—Finding of fact upon evidence taken after remand—Procedure in the second Court of Appeal—Civil Procedure Code (Act XIV of 1882), ss 568, 584, 585, 587. In a second appeal, the High Court set aside the decrees of the lower Courts on the ground